



**FORCED MIGRATION AND THE ADVANCEMENT
OF INTERNATIONAL PROTECTION/**

**MIGRACION FORZADA Y EL AVANCE DE LA
PROTECCION INTERNACIONAL**

**7th World Conference, November 6-9, 2006
International Association of Refugee Law Judges/**

**7a Conferencia Mundial, 6 al 9 de Noviembre del 2006
La Asociación Internacional de Jueces en Derecho de Refugiados**

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International Association of Refugee Law Judges

International Association of Refugee Law Judges
7th World Conference, November 6-9, 2006
Mexico City, Mexico

Forced Migration and the Advancement of International Protection:
The Interplay Between Migration, International Human Rights Law and
Refugee Status Determination

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Asociación Internacional de Jueces en Derecho de Refugiados
7a Conferencia Mundial, 6-9 de noviembre de 2006
Ciudad de México, México

“Migración Forzada y el Avance de la Protección Internacional:
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FOREWORD

The International Association of Refugee Law Judges (IARLJ) held its Seventh World Conference in Mexico City on November 6th to 9th, 2006. The theme was “Forced Migration and the Advancement of International Protection: The Interplay Between Migration; International Human Rights Law and Refugee Status Determination. This was the first IARLJ World Conference that was delivered in two official languages and this is the first IARLJ World Conference proceedings to be published in two languages, English and Spanish.

Five major topics of principal concern to asylum and refugee jurisprudence and policy were addressed at the World Conference by some of the leading judges, practitioners, and academics in the field. The first day of the World Conference featured a keynote address from Erika Feller, Assistant High Commissioner for Protection, UNHCR, on “Bridging the Gap Between International Instruments and Public Policy.” This was followed by two panels that addressed the topics of “Protecting the Rights of Migrants and Asylum-Seekers” and “Human Trafficking.” The venue on the second day of the World Conference was the beautiful new Federal Judicial Institute of Mexico. Professor Alfonso Sierra Lam, Universidad Iberoamericana, delivered the second keynote address on the critically important topic of “International Law and Refugee Protection.” This was followed by three panels that dealt with the following pivotal concerns: “Asylum Law as it Impacts Immigration Issues (Extradition, Deportation, and Detention);” “International Law Instruments;” and, “Regional Instruments – Regional Remedies: The Importance of Regional Instruments in Refugee Status Determination.” The third day of the World Conference was devoted to the work of the IARLJ Inter-Conference Working Party Process and the IARLJ Regional Chapters. World Conference participants had an opportunity to consider and discuss the research papers and reports from seven IARLJ Working Parties and its four Regional Chapters: Africa, Americas, Australasia and Europe. The range of issues considered in the field of asylum and refugee law and their depth of coverage was a true testament to the contributions of all those who helped to make the Seventh IARLJ World Conference the most successful IARLJ World Conference yet.

The Seventh IARLJ World Conference was also the first occasion in which we had the participation of both the United Nations High Commissioner for Refugees, Antonio Guterres, and the United Nations High Commissioner for Human Rights, Louise Arbour. We are very pleased that they agreed to make a contribution to our Mexico City IARLJ World Conference and to allow us to publish their video presentations as part of our World Conference proceedings.

Planning, organizing, and holding an IARLJ World Conference requires the commitment and support of a number of key dedicated partners. We gratefully acknowledge the contributions of the following organizations and individuals to the success of our Seventh IARLJ World Conference:

- The Mexican Commission for Refugees (COMAR) for their outstanding support for the Seventh IARLJ World Conference from the very outset.
- The National Commission for the Prevention of Discrimination in Mexico (CONAPRED) for its assistance and support.
- The Government of Mexico for its financial support for the Seventh IARLJ World Conference.
- The Federal Judicial Institute of Mexico for hosting the second day of our Seventh World Conference in their beautiful modern facilities.
- The Universidad Iberoamericana for hosting our Pre-World Conference Workshops and for their contribution to the Seventh IARLJ World Conference.
- The Institute for the Promotion of Tourism, Tourism Secretariat, Federal District of Mexico, for providing us the 7th IARLJ World Conference logo and posting the information on our Mexico City IARLJ World Conference on their web page.
- The United States Embassy in Mexico City for providing simultaneous translation in the two official languages throughout the Pre-World Conference Workshops and the IARLJ World Conference.
- The Canadian Embassy in Mexico City for its generous support and assistance.
- The Immigration and Refugee Board of Canada for its overwhelming support and assistance throughout the planning and organization of the Seventh IARLJ World Conference.
- The Australian Ambassador to Mexico, Neil Mules, for hosting the Welcome Reception at his official residence for all Mexico City IARLJ World Conference participants.
- The UNHCR for its financial assistance and continuous support.

We are most grateful, of course, to all those who worked so hard in preparing and delivering their papers and presentations and for consenting to their publication. All papers contained within this volume are published in the language that they were originally delivered at the Mexico City IARLJ World Conference.

Our hope is that the publication of our Seventh IARLJ World Conference Proceedings will prove to be a valuable contribution to not only the members of our Association but for all those who are working in the asylum and refugee law and policy field. In particular, we hope that the present volume will be of immediate and practical benefit to all those who are adjudicating claims for Convention refugee status and/or subsidiary protection, at either first instance or on appeal.

Dr. James C. Simeon, Editor
Seventh IARLJ World Conference Proceedings Publication
International Association of Refugee Law Judges (IARLJ)

PRÓLOGO

La Asociación Internacional de Jueces en Derecho de Refugiados celebró su Séptima Conferencia Mundial del 6 al 9 de noviembre del 2006 en la Ciudad de México. El tema fue "Migración Forzada y el Avance de la Protección Internacional: La Intersección entre la Migración, el Derecho Internacional de los Derechos Humanos y la Determinación del Estatuto de Refugiado". Está fue la primera Conferencia Mundial de la IARLJ que se llevó a cabo en dos lenguas oficiales, e igualmente es la primera vez en que las Memorias de la Conferencia Mundial serán publicadas en los dos idiomas, el inglés y el español.

Cinco temas de mayor interés sobre asilo, jurisprudencia y políticas sobre refugiados fueron expuestos por jueces, practicantes y académicos en la materia. Durante el primer día de sesiones de la Conferencia Mundial, destacó la conferencia magistral de Erika Feller, Asistente para la Protección del ACNUR, sobre el tema "Acortando el Espacio entre los Instrumentos Internacionales y las Políticas Públicas". Le siguieron dos paneles sobre los temas "Protegiendo los Derechos de los Migrantes y de los Solicitantes de Asilo" y "Trata de Personas". La sede del segundo día de sesiones fue el hermoso Instituto de la Judicatura Federal de México. En esta ocasión, el Profesor Alfonso Sierra Lam, de la Universidad Iberoamericana, dirigió la conferencia magistral sobre el relevante tema del "Derecho Internacional y la Protección a los Refugiados". A ello le siguieron tres paneles de crucial interés: "Derecho de Refugiados y su Impacto en los Temas de Migración (extradición, deportación y detención)"; "Instrumentos Internacionales"; e "Instrumentos Regionales – Soluciones Regionales: La importancia de los Instrumentos Regionales en la Determinación del Estatuto de Refugiado". El tercer día, la Conferencia Mundial fue dedicada a los Procesos de los Grupos de Trabajo y Capítulos Regionales de la IARLJ. Los participantes de la Conferencia Mundial tuvieron la oportunidad de reflexionar y discutir los documentos de investigación y reportes de los siete Grupos de Trabajo de la IARLJ y de los cuatro Capítulos Regionales: África; Americas; Australasia; y Europa. La gama de temas considerados en materia de asilo, Derecho de Refugiados y su profunda cobertura fueron real prueba de la contribución de todos aquellos que apoyaron la realización de la más exitosa Séptima Conferencia Mundial de la IARLJ.

La Séptima Conferencia Mundial de la IARLJ también fue ocasión para obtener la contribución del Alto Comisionado de las Naciones Unidas para los Refugiados, Antonio Guterres, y de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos, Louise Arbour. Estamos realmente agradecidos por haber recibido sus mensajes como contribución a nuestra Conferencia Mundial en la Ciudad de México y de que nos

hayan permitido publicar sus presentaciones en video como parte de las Memorias de la Conferencia.

La planeación, organización y celebración de una Conferencia Mundial de la IARLJ requiere el compromiso y apoyo de un sin número de importantes contrapartes. Reconocemos gratamente la contribución de las siguientes organizaciones y personas en el éxito de la Séptima Conferencia Mundial de la IARLJ:

- A la Comisión Mexicana de Ayuda a Refugiados (COMAR) por su sobresaliente apoyo desde el inicio para la Séptima Conferencia Mundial de la IARLJ.
- Al Consejo Nacional para Prevenir la Discriminación (CONAPRED) por su gran asistencia y apoyo.
- Al Gobierno de México por su apoyo financiero en la Séptima Conferencia Mundial de la IARLJ.
- Al Instituto de la Judicatura Federal por permitirnos sus hermosas y modernas instalaciones durante el segundo día de sesiones de la Séptima Conferencia Mundial.
- A la Universidad Iberoamericana por ser la sede de los Talleres Pre-Conferencia y por su contribución durante la Séptima Conferencia Mundial de la IARLJ.
- A la Embajada de Estados Unidos de América en México por proveer la traducción simultánea en las dos lenguas oficiales durante todo el desarrollo de la Séptima Conferencia Mundial.
- A la Embajada de Canadá en México por su generoso apoyo y asistencia.
- A la Comisión de Inmigración y Refugiados de Canadá (Immigration and Refugee Board of Canada) por su contundente apoyo y asistencia durante la planeación y organización de la Séptima Conferencia Mundial.
- Al Embajador de Australia en México, Neil Mules, por ofrecer en su residencia oficial, la Recepción de Bienvenida para todos los participantes de la Conferencia Mundial de la IARLJ.
- Al ACNUR por su asistencia financiera y continuo apoyo.
- Por supuesto, estamos verdaderamente agradecidos con todos aquellos que elaboraron y enviaron sus ponencias y exposiciones para su publicación. Todas las ponencias contenidas en este volumen están publicadas en el idioma original en el que fueron presentadas durante la Conferencia Mundial de la IARLJ en la Ciudad de México.

Nuestro deseo con la publicación de la Séptima Conferencia Mundial es demostrar el valor de esta contribución no sólo para los miembros de la Asociación, sino para todos aquellos que realizan labores en materia de

asilo y refugio. En particular, esperamos que el presente volumen brinde un beneficio inmediato y práctico para los adjudicadores en la determinación de la condición de refugiado bajo la Convención y/o protección subsidiaria, tanto en primera instancia como en apelación.

Dr. James C. Simeon, Editor

Memorias de la Séptima Conferencia Mundial de la IARLJ

Asociación Internacional de Jueces en Derecho de Refugiados (IARLJ)

IARLJ

7th Biennial World Conference

Forced Migration and the Advancement of International Protection:
*The Interplay Between Migration, International Human Rights Law
and Refugee Status Determination*

6-9 November 2006
Gran Melia México Reforma
México City, México

DAY 1 – NOVEMBER 6, 2006

FORCED MIGRATION ISSUES *Gran Meliá, Revolución Room*

0900 - 0910	Conference Welcome	Dra. Norma D. Sabido Peniche (Head of COMAR)
0910 - 0920	Welcome to all IARLJ members	Justice Katelijne Declerck (Vice-president IARLJ)
0920 - 0940	Official Opening of Conference	Lic. Carlos María Abascal (Secretary of the Interior)
0940 – 0950	Introduction of UN High Commissioner for Refugees	Jean-Guy Fleury, (president Immigration and Refugee Board of Canada, president Americas Chapter)
0950 - 1000	Welcome Address (via video)	Antonio Guterres (UN High Commissioner for Refugees)
1000 - 1015	Address by IARLJ Vice-President and Introduction of Keynote Speaker	Justice Katelijne Declerck (Vice-President IARLJ)
1015 - 1045	Keynote Address – Bridging the Gap Between International Instruments and Public High Policy	Erika Feller (Assistant Commissioner for Protection, UNHCR)

1045 - 1115	Break	
1115 - 1315	Protecting the Rights of Migrants and Asylum-Seekers	<p><u>Panel Organizer</u> Eamonn Cahill (Refugee Appeals Tribunal, IRE)</p> <p><u>Panel Speaker</u> Gilberto Rincón Gallardo (President, CONAPRED, MEX)</p> <p><u>Panel</u></p> <ul style="list-style-type: none"> • Dr Elspeth Guild (EU) • Dr Jane McAdam (AUS) • Dr François Crépeau (CAN) • Dr Kees Groenendijk (EU) • Act Eugenia Diez Hidalgo (MEX)
1315 - 1430	Lunch	Gran Meliá, Juarez Room (sponsored by CONAPRED)
1430 – 1630	Human Trafficking	<p><u>Panel Organizer</u> Gaetan Cousineau (CAN)</p> <p><u>Panel Speaker</u> Oscar Lujan (District Director, US Department of Homeland Security)</p> <p><u>Panel</u></p> <ul style="list-style-type: none"> • Justice Ana Calzada (Supreme Court of Costa Rica) • Dr Helga Konrad (EU) • Fernanda Ezeta (IOM, MEX) • Prof. James Hathaway (USA) • Justice Lawal Uwais (NIG)
1830	Buses Depart for Reception	Australian Ambassador's Official Residence, Neil Mules

DAY 2– NOVEMBER 7, 2006

THE ROLE OF INTERNATIONAL LAW *Judicial Institute, Auditorium*

0830 Buses depart for Judicial Institute

0900 - 0915 Welcome Judge Jaime Manuel Marroquín Zaleta (Director General, Judicial Institute, MEX)

0915 - 0930 Introduction of Louise Arbour Justice Katelijne Declerck

0930 - 0945 The Link Between Human Rights and Refugee Law (via video) Louise Arbour (UN High Commissioner for Human Rights)

0945 - 1000 Introduction of Keynote Speaker Justice Katelijne Declerck

1000 - 1030 Keynote Address Alfonso Sierra Lam (MEX)

1030 - 1045 Break

1045 - 1215 Asylum Law as it Impacts Immigration Issues (extradition, deportation and detention) Panel Organizer
Andrew Baumberg (Federal Court of Canada)

Panel Speaker
J. Phillip Williams (USA)

- Panel
- Lord Justice Sir Stephen Sedley (EU)
 - The Honourable John Maxwell Evans (CAN)
 - Justice Catherine Branson (AUS)
 - Loretta Ortiz Ahlf (Law Dean, UIA, MEX)

1215 - 1345 Lunch and Group Photo Judicial Institute (Sponsored by the Embassy of Canada and the Immigration and Refugee Board of Canada)

- Mr Gilbert Bitti (ICC)

1345 - 1515	International Law Instruments	<u>Panel Organizer</u> Lois Figg (Immigration Appeal Division, IRB, CAN)
		<u>Panel Speaker</u> Lori Disenhouse (Legal Services, IRB, CAN)
		<u>Panel</u> <ul style="list-style-type: none"> • Judge Luc Martineau (Federal Court of Canada) • Dr Hugo Storey (EU)
1515 - 1530	Break	
1530 - 1700	Regional Instruments – Regional Remedies: the importance of regional instruments in Refugee Status Determination	<u>Panel Organizer</u> Ema Aitken (Chair, Refugee Status Appeals Authority, NZ)
		<u>Panel Speaker</u> Professor Santiago Corcuera Cabezut (MEX)
		<u>Panel</u> <ul style="list-style-type: none"> • Ahmed Arbee (SA) • Justice Mark Ockelton (EU) • Dra. Norma Dolores Sabido Peniche (MEX)
1715	Buses depart for Hotel Gran Meliá	
1830	Women Judges Forum (invitees only)	(Restaurant Fonda el Refugio)

DAY 3 – NOVEMBER 8, 2006 LEGAL ISSUES IN REFUGEE STATUS DETERMINATION *Gran Meliá, Juarez Room*

0800 - 0900	IARLJ Working Parties Rapporteurs breakfast meeting		
0900 - 1000	Working Parties Meetings	<u>Working Group</u> <u>PGS</u> <u>Expert Evidence</u> <u>Vulnerable Groups</u> <u>HR Nexus</u> <u>Asylum Procedures</u> <u>COI</u> <u>CR Status and</u> <u>Subs Protection</u>	<u>Facilitator</u> Michael Ross Sue Zelinka Lois Figg Paulah Dauns Steve Karas Hugo Storey L. Dufour/ J. McAdam
1000 - 1030	Break		
1030 - 1300	Plenary (Report of Working Parties Meetings)	<u>Facilitator</u> James Simeon	
1300 - 1400	Lunch break		
1400 - 1600	Chapter meetings: case studies	<u>Chapter</u> Americas Europe Aus-NZ Africa	<u>Facilitator</u> Figg/ Osuna E. Cahill S. Zelinka A. Arbee
1600 - 1700	Plenary- Reporting on Case Study	Facilitators	
1700 - 1730	Conference Close		
1830	Conference Dinner at the Chapultepec Castle	Lauro Lopez Sanchez Acevedo, Subsecretary, Population, Migration and Religious Affairs, Mexico	

DAY 4 – NOVEMBER 9, 2006 BUSINESS MEETINGS

Gran Meliá, Juarez room

0900 - 1030	Biennial General Assembly	All IARLJ Members
1030 - 1100	Break	
1100 - 1200	Council and Executive Meeting	Katelijne Declerk (Co-Chair) <ul style="list-style-type: none">• IARLJ Council members and Officers
1200 - 1300	Americas Chapter Management Committee Meeting	Jean-Guy Fleury (Chair) <ul style="list-style-type: none">• Committee members

IARLJ

7a Conferencia Mundial Bienal

Migración Forzada y el Avance de la Protección Internacional :
La Intersección entre la Migración, el Derecho Internacional de los Derechos Humanos y la Determinación del Estatuto de Refugiado

6 al 9 de Noviembre del 2006
Gran Meliá México Reforma
Ciudad de México

DIA 1 – LUNES 6 DE NOVIEMBRE DEL 2006

TEMAS DE MIGRACIÓN FORZADA *Gran Meliá, Salón Revolución*

0900 - 0910	Bienvenida	Dra. Norma Dolores Sabido Peniche
0910 - 0920	Palabras dirigidas a los miembros de la IARLJ	Jueza Katelijne Declerck (Vicepresidenta de la IARLJ)
0920 - 0940	Declaratoria Oficial de Apertura	Lic. Carlos María Abascal Carranza (Secretario de Gobernación)
0940 - 0950	Presentación del Alto Comisionado de Naciones Unidas para los Refugiados	Jean Guy Fleury, (Presidente de la Comisión de Inmigración y Refugiados de Canadá, Presidente del Capítulo de las Américas)
0950 - 1000	Palabras dirigidas a los participantes de la IARLJ (video)	Antonio Guterres (Alto Comisionado de las Naciones Unidas para los Refugiados)
1000 - 1015	Presentación de la Conferencia Magistral	Jueza Katelijne Declerck (Vicepresidenta de la IARLJ)
1015 - 1045	Acortando el espacio entre los Instrumentos Internacionales y las Políticas Públicas	Erika Feller (Alta Comisionada Asistente para la Protección, ACNUR)

1045 - 1115	Receso	
1115 - 1315	Protegiendo los derechos de los Migrantes y de los Solicitantes de Asilo	<p><u>Moderador</u> Eamonn Cahill (Tribunal de Apelaciones para Refugiados, IRE)</p> <p><u>Ponente</u> Gilberto Rincón Gallardo (Presidentedel CONAPRED MEX)</p> <p><u>Panel</u></p> <ul style="list-style-type: none"> • Dr. Elspeth Guild (UE) • Dr. Jane McAdam (AUS) • Dr. Francois Crépeau (CAN) • Dr. Kees Groenendijk (UE) • Act. Eugenia Diez Hidalgo (MEX)
1315 - 1430	Almuerzo	<i>Gran Meliá, Salón Juárez</i> (Ofrecido por CONAPRED)
1430 - 1630	Trata de personas	<p><u>Moderador</u> Gaetan Cousineau (CAN)</p> <p><u>Ponente</u> Oscar Lujan, (Director de Distrito, Departamento de Seguridad Interna de los EU)</p> <p><u>Panel</u></p> <ul style="list-style-type: none"> • Jueza Ana Calzada (Corte Suprema de COS) • Dra. Helga Konrad (UE) • Fernanda Ezeta (IOM, MEX) • Prof. James Hathaway (EU) • Juez Lawal Uwais (NIG)
1830	Salida de Autobuses para la Recepción	Residencia del Excmo. Embajador de Australia, Neil Mules

DIA 2 – MARTES 7 DE NOVIEMBRE DEL 2006
EL PAPEL DEL DERECHO INTERNACIONAL

Instituto de la Judicatura Federal, Auditorio

0830	Salida de Autobuses para el Instituto de la Judicatura Federal	
0900 - 0915	Bienvenida	Mag. Jaime Manuel Marroquín Zaleta (Director General, Instituto de la Judicatura Federal)
0915 - 0930	Presentación de Louise Arbour	Jueza Katelijne Declerck
0930 - 0945	El vínculo entre los Derechos Humanos y el Derecho de los Refugiados (video)	Louise Arbour (Alta Comisionada de las Naciones Unidas para los Derechos Humanos)
0945 - 1000	Presentación de la Conferencia Magistral	Jueza Katelijne Declerck
1000 - 1030	Conferencia Magistral	Alfonso Sierra Lam (MEX)
1030 - 1045	Receso	
1045 - 1215	Derecho de Refugiados y su Impacto en los Temas de Migración (extradición, deportación y detención)	<u>Moderador</u> Andrew Baumberg (Corte Federal de Canadá) <u>Ponente</u> J. Phillip Williams (EU) <u>Panel</u> <ul style="list-style-type: none">• Lord J. Sir Stephen Sedley (UE)• H. John Maxwell Evans (CAN)• J. Catherine Branson (AUS)• Loretta Ortiz Ahlf (Directora del Departamento de Derecho, UIA, MEX

1215 - 1345	Almuerzo y Foto de Grupo	Ofrecido por la Embajada de Canadá en México y por la Comisión de Inmigración y Refugiados de Canadá <ul style="list-style-type: none"> • Sr. Gilbert Bitti (CPI)
1345 - 1515	Instrumentos Internacionales	<p><u>Moderadora</u> Lois Figg (División de Apelaciones de Inmigración, IRB, CAN)</p> <p><u>Ponente</u> Lori Disenhouse (Servicios Legales, IRB, CAN)</p> <p><u>Panel</u></p> <ul style="list-style-type: none"> • Juez Luc Martineau (Corte Federal de Canadá) • Dr. Hugo Storey (UE)
1515 - 1530	Receso	
1530 - 1700	Instrumentos Regionales – Soluciones Regionales: la importancia de los instrumentos regionales en la determinación del estatuto de refugiado	<p><u>Moderadora</u> Ema Aitken (Presidenta, Autoridad de Apelaciones del Estatuto de Refugiados, NZ)</p> <p><u>Ponente</u> Prof. Santiago Corcuera Cabezut (MEX)</p> <p><u>Panel</u></p> <ul style="list-style-type: none"> • Ahmed Arbee (SA) • Juez Mark Ockelton (UE) • Dra. Norma D. Sabido Peniche (MEX)
1715	Salida de Autobuses para el Hotel Gran Meliá	
1830	Foro de Juezas (únicamente invitadas)	(Restaurante Fonda el Refugio)

DIA 3 – MIÉRCOLES 8 DE NOVIEMBRE DE 2006
TEMAS LEGALES EN RSD *Gran Meliá, Salón Juárez*

0800 - 0900	Desayuno de trabajo de los facilitadores de los Grupos de Trabajo de la IARLJ		
0900 - 1000	Reunión de Grupos de Trabajo	<u>Grupo de Trabajo</u> <u>Gpo. Social Deter.</u> <u>Dictamen Pericial</u> <u>AHI</u> <u>Nexo</u> <u>Proced. de Asilo</u> <u>COI</u> <u>Prot Subsidiaria</u>	<u>Facilitador</u> Michael Ross Sue Zelinka Roland Bruin Paula Dauns Steve Karas Hugo Storey Laurent Dufour/ Jane McAdam
1000 - 1030	Receso		
1030 - 1300	Plenaria (Reporte de los Grupos de Trabajo)		
1300 - 1400	Almuerzo		Ofrecido por la IARLJ
1400 - 1600	Reunión de los Capítulos : Caso de Estudio (Grupo Social Particular)	<u>Capítulo</u> Americas Europa Aus-NZ África	<u>Facilitador</u> Figg / Osuna E. Cahill S. Zelinka A. Arbee
1600 - 1700	Plenaria- Reporte de los Caso de Estudio	Facilitadore	James C. Simeon
1700 - 1730	Clausura de la Conferencia		
1830	Reconocimientos y cena de la Conferencia Castillo de Chapultepec	Lauro Lopez Sanchez Acevedo	

DIA 4 – JUEVES 9 DE NOVIEMBRE DE 2006

REUNIONES INTERNAS *Gran Meliá, Salón Juárez*

0900 - 1030 Asamblea Bienal General Todos los miembros de la IARLJ

1030 - 1100 Receso

1100 - 1200 Reunión del Consejo y Ejecutivo Jueza Katelijne Declerck (Vicepresidenta de la IARLJ)
Miembros del Consejo y Oficiales de la IARLJ

1200 - 1300 Reunión del Comité para la Dirección del Capitulo de las Americas Jean-Guy Fleury (Presidente)
• Miembros del Comité

REPORT OF THE PRESIDENT TO THE GENERAL MEETING OF MEMBERS

Mexico City

9 November 2006

I am delighted to present to the members of the Association this report of the major activities of the Association which have occurred since the last general meeting held in Stockholm on 23 April 2005.

Regular meetings of the Council of the Association were held on 12 August 2005, 2 November 2005, 3 December 2005, 25 January 2006, 29 March 2006, and 9 August 2006. The minutes of these meetings have been posted on the website. They describe in detail the activities of the Association and my purpose in this report is to highlight the major achievements and provide you with my vision of the way forward of the Association.

At the time I was elected President in April 2005, it was generally recognised that the organisation had reached a stage of development where, in order to remain effective in its core function of delivering training, professional development and capacity building to judges, some changes were necessary. This was particularly underscored in a meeting in Stockholm of the officers of the Association with Ms Erika Feller, now Assistant High Commissioner, UNHCR. She expressed confidence in the potential of the Association but pointed out that it had to develop a greater degree of professionalism to respond to the demands of development of its function. This suggestion, which reflected the views of many who knew the workings of the Association, led to lengthy and intense negotiations with UNHCR. They occupied me as President for a great deal of time in the balance of 2005.

The essence of the negotiations related to the appointment by the Association of an Executive Director. Through such an appointment, it was thought, the core function of the Association could be coordinated and thus professionalised in a way that had not occurred in the past.

The Sub Agreement between the Association and UNHCR

Ultimately, UNHCR agreed to a two month initial funding of the position for November and December 2005. Dr James Simeon, who had just retired as a co-ordinating member of the Immigration and Refugee Board of Canada was selected to fill the acting position. In order to justify the continuation of this arrangement, UNHCR, understandably, suggested that the Association conduct a review of its activities which would describe the past

activities of the Association, and provide a plan of action for the future. The Acting Executive Director produced the Activities Review after very wide research and consultation. The sub-agreement was extended for a further two months (January and February 2006) so that the Activities Review could be completed. A further two month extension of the sub-agreement was granted for the months April and May 2006 primarily to allow the UNHCR to consider whether it would extend the sub-agreement for the balance of 2006 and to allow the parties to negotiate the primary objectives of the agreement. In due course the UNHCR agreed to a further agreement from 1 June to 31 December 2006. The Executive Committee agreed that James Simeon should continue to fill the position of Executive Director under the extension of the sub-agreement. The performance targets specified in the sub-agreement for the period ending 31 December 2006 were as follows:

A. Development of an Africa Chapter

- Establishing a Steering Committee of African judges and quasi-judicial decision-makers who would be interested in establishing a new active IARLJ Africa Chapter.
- Facilitating the meeting of the Steering Committee.
- Facilitating the development of a plan for establishing an Africa Chapter by the Steering Committee.
- With the assistance of the Steering Committee develop a plan for a first, founding meeting of the Africa Chapter.
- Facilitate the implementation of the plan for establishing the IARLJ Africa Chapter.

B. Roll-out of the Russian language IARLJ Training Manual

- Put together the supporting materials necessary to submit an application for funding to the Council of Europe to have the IARLJ training manual translated into Russian.
- Secure professional Russian language translation services to have the IARLJ training manual translated accurately and precisely in Russian.
- Plan the roll-out of the Russian language IARLJ training manual for 2007, targeting primarily CIS countries.
- Professional development of Russian-speaking judges in 2007 may be the first step towards the establishment of a sub-regional chapter for the CIS.

The total payable under the sub-agreements is \$60,000 US.

I am particularly grateful to the work of Jean-Paul Cavaliere at UNHCR who negotiated and organised the sub-agreements. And, without the farsightedness and support of Erika Feller the whole project would never

have seen the light of day. The Association owes her a tremendous debt of gratitude.

Subsequent events have confirmed that the appointment of an Executive Director is critical to the way forward for the Association.

The Founding of the Africa Chapter

Shortly after the June – December 2006 sub-agreement was executed the Executive Director began intensive preparations for the founding of the Africa Chapter and the conduct of the professional development workshop in Pretoria. This has been the subject of a separate report to the members by me on 6 October 2006.

In short, the event was an outstanding success. It attracted about 50 participants including about 15 from Africa outside South Africa. One of the most pleasing aspects was the enthusiasm and dynamism of this group of judges. The founding meeting adopted a draft governance document for approval at this General Meeting of the Association and selected an interim management committee of about 14 judges. Mr Ahmed Arbee was appointed as the Convenor of the committee. The interim management committee then considered a plan of action for the Africa Chapter. The first stage was to try to fund African judges to attend the 7th World Conference in Mexico City. The second stage of the plan involved developing a program for the workshop in Dublin in 2007. The Chair of the European Chapter, Eamonn Cahill SC, had already secured funding for the attendance of some judges at this workshop.

The Association is greatly indebted to the South African Department of Home Affairs, and the Refugee Appeal Board of South Africa who contributed so much by way of finance, personnel, and enthusiasm to the success of the event. And, again, our ever supportive partner, UNHCR, funded the attendance of about 14 judges from African states. The financial support for this event from those contributors as well as the Canadian and US embassies in Pretoria amounted to about \$25,000 USD.

The Generosity of Australia

However, even greater success was in store for the Association. After the founding meeting and workshop James Simeon, Ahmed Arbee and myself met with Jane Lambert, the Acting High Commissioner for Australia. As a result of that meeting the Australian government agreed to contribute up to \$AUD100,000 to fund the attendance of the members of the interim management committee at the Mexico Conference. This meeting came about as

a result of a contact arranged by Sue Zelinka, a co-convenor of the Chapter. The launch of the Africa Chapter has been a great example of the benefits of international co-operation among members of the Association – a critical feature of the value and purpose of the Association.

A Tribute to the Executive Director

The success of the founding of the Africa Chapter is a great testament to the perseverance and ingenuity of our Executive Director in the face of a short time frame and considerable logistical difficulties. His work has been a wonderful contribution to the Association.

Funding

At the time he was appointed Executive Director under the June to December 2006 sub-agreement, it was made clear by the Executive Committee, that a primary function of the appointment was to pursue sustainable funding so that the office of Executive Director could be continued without reliance on funding from the UNHCR. Under my direction pursuant to paragraph 9.4(iii) of the Constitution, and pursuant to the directions given by the Council at its various meetings, funding was pursued in two ways.

First, the Executive Director approached influential members in particular countries with a request that they approach their relevant government bodies for recurrent funding for the Association. This has proved to be quite successful. So far commitments for 1,000 EUR per annum have been received from Slovenia and 5,000 EUR this year and 7,000 EUR next year, with possible ongoing funding, from Norway. We are hoping that a number of other states will also make recurring funding contributions to our Association. The second approach has been for the Executive Director to formulate ambitious training, professional development, and capacity building programs for both the Americas and Europe which build in a component for project management to fund the position of Executive Director. IPPA (International Protection Project for the Americas) is a three-year professional development and capacity building project for Caribbean and Latin American states. EALHP (European Asylum Law Harmonization Programme) is an 18-month programme for the 25 EU member states and EU candidate states intended to further a common understanding of the appropriate interpretation and application of the provisions of the Qualifications and Procedures Directives. The Executive Director has presented these projects to various funding bodies and the Association is awaiting the outcome of those applications.

The amount of work undertaken by the Executive Director in pursuing the-

se two avenues for funding has been prodigious. However, a considerable lead time is required to secure such funding. As the future of the Executive Director position was not secured until June 2006, there has not yet been sufficient time to see the fruits of these initiatives. Nonetheless, there are grounds for some optimism.

Even at this early stage it is clear that the UNHCR funding of the position has generated direct and indirect financial support to the Association of over \$US150,000.

Translation of the Training Manual

The Executive Director has also commenced planning of the project for the translation of the training manual into Russian. He has followed up with the Council of Europe, which has agreed in principle, to translating the Association's training materials into the Russian language for use in several workshops in CIS next year. Since our Association has the copyright on our Training Manual, we can use the Russian language versions of our Training Manual for future training sessions in CIS.

The 7th World Conference

At the same time as all this activity was occurring, the international and local organising committees were busy with the preparation and organisation of the 7th World Conference in Mexico City. It is very difficult to convey to someone who has not been involved in the organisation of such an event the commitment of time and energy which is required to ensure the success of such a conference.

The Association could not have been better served than by Lois Figg from the Immigration and Refugee Board of Canada who heads the international organising committee and Cynthia Cardenas from COMAR who leads the local organising committee. Their efforts and dedication have been extraordinary. Lois could not have participated without the cooperation and support of the Chair of the Immigration and Refugee Board of Canada, Monsieur Jean-Guy Fleury, who has been a mainstay of the Association in the past two years. In the latter part of the organisation of the conference M. Fleury made available the services of Christian Fournier from the staff of the IRB to assist Lois in the onerous task of final preparations for the conference. A particular reference should be made to Chief Justice Lutfy of the Federal Court in Canada. He has been a great support to the Association and has made available the considerable abilities of his Executive Assistant, Andrew Baumberg, to the international organising committee. Liesbeth van de Meeberg, our Administrative Assistant, also worked hard to design our 7th

IARLJ World Conference weblink on our website, which includes the online registration forms and all other information regarding our World Conference and Pre-Conference Workshops. We now have a template that we can use for future World and Regional Conferences. The Executive Director has also been closely involved in many of the aspects of the preparation of the Conference. The Association was fortunate that the Americas Chapter was prepared to allow the Mexico City Conference to evolve into the venue for the World Conference although it started, in concept, as a venue for a regional conference.

Working Parties

The work of the inter-conference working parties is an essential part of the Association. It is very pleasing to see that excellent work is being done by the following working parties:

- human rights nexus
- country of origin information and country guidance
- asylum procedures
- expert evidence
- membership in a particular social group
- convention refugee status and subsidiary protection
- internal flight alternative
- vulnerable categories

The Executive Director has coordinated the administration of these working parties and it is expected that some first class papers will be presented at the World Conference in Mexico City.

Highlights in the Chapters

Again, the details of Chapter activities can be seen in the minutes of meetings held throughout the period. It is, however, worth highlighting several particular Chapter events.

After an extremely successful regional conference in Costa Rica, the resources and energy of the Americas Chapter has been fully committed to the organisation of the World Conference.

The European Chapter conducted a highly successful and extremely well organised regional conference in Budapest in 3 - 5 November 2005, which attracted an attendance of about 90 people, including a very large contingent of judges from Eastern Europe.

The Australia/New Zealand Chapter invited Dr Gregor Noll who was visiting Melbourne to address a meeting of about 40 judges and decision makers on 26 July 2005. The Australian/New Zealand Chapter has benefited from the support of my Chief Justice, Chief Justice Black of the Federal Court of Australia, the Chief Federal Magistrate John Pascoe, and the Principal Member of the Refugee Review Tribunal, Mr Steve Karas. Their encouragement of members of their organisations to participate in the work of the Association, and the funding support which has made that participation possible, has been invaluable.

The Secretariat

Under the ever steady guidance of our Secretary/Treasurer, Sebastiaan de Groot, the secretariat facilities provided by his court in Haarlem, The Netherlands, has continued to provide the essential efficient administration of the affairs of the Association. It has been a delight to deal with Liesbeth van de Meeberg whose knowledge of the affairs of the Association is unparalleled, and whose willingness to help out is always available.

A Vision for the Future

It is well accepted by members of the Association that in order to serve the objects specified in the constitution, the core activity of the Association is to provide training, professional development and capacity building to judges. The scale of the work now to be done in this area is too much for the part time attention of volunteer officers. In order that the Association remains a leading player in offering this type of training and development the function must be coordinated professionally by a person who can devote full time energy to the task. The appointment of an Executive Director has energised the Association in a way which could hardly have been imagined. The experience has demonstrated that this is the way to take the Association forward. However, the strategy is new and requires some refinement. The Association must build on this foundation. There remains much to be done in developing training projects, securing sustainable funding, and building up the membership of the Association.

On a personal note, although the commitment in time and energy is far in excess of my expectations on accepting the appointment, it has been a delight and excitement to see the Association flourish in the last two years. The job is only part done, and I hope that the Association will continue to grow in order to meet its very worthwhile objectives.

Justice Tony North

Introduction of His Excellency Antonio Guterres United Nations High Commissioner for Refugees (UNHCR)

Justice Jean-Guy Fleury

I have had the pleasure to meet His Excellency Antonio Guterres several times over the past six weeks, most recently in Ottawa and in Geneva at the October UNHCR Executive Committee meeting. At each meeting I have been extremely impressed with the High Commissioner's dedication and keen interest in all aspects of refugee protection and refugee status determination.

Without doubt, the High Commissioner has a number of key challenges ahead of him at UNHCR – an expanding purview vis-à-vis Internally Displaced Persons, HCR reform, etc.

The UNHCR and the IARLJ already share a long history – most recently we cooperated with the formation of the Africas Chapter of the IARLJ. It certainly is fair to say that the UNHCR and the IARLJ are key partners and we look forward to a lengthy and productive collaboration

I am now honoured to introduce His Excellency, the United Nations High Commissioner for Refugees, Antonio Guterres.

*Jean-Guy Fleury,
Chairperson, Immigration and Refugee Board of Canada*

Welcome Address by Mr. António Guterres United Nations High Commissioner for Refugees

(video recording)

Mr. Chairman,
Distinguished Colleagues,
Ladies and Gentlemen,

It is an honour to address you on the occasion of the 7th World Conference of the Association. UNHCR has been a partner of the International Association of Refugee Law Judges since its creation in 1997, and we have since worked together on all five continents.

The IARLJ is a truly unique organization, gathering judges from around the globe with the goal of promoting a common understanding and application of refugee law principles.

In this globalised world, State borders no longer contain judicial decisions: judgements travel. Establishing best practices among judges, who are empowered to deliver protection to refugees when other officials might have initially failed to do so, is one of the tremendous qualities of the IARLJ.

This year, UNHCR and the IARLJ worked together to create a new African Chapter, and I congratulate the IARLJ and President Justice North, for this achievement. UNHCR also looks forward to collaborating with the IARLJ, in 2007, on the training programme for refugee law judges in the Commonwealth of Independent States. Africa and the CIS both generate and face mixed flows of economic migrants and refugees. Indeed, people travel, just like legal judgements.

That is why the theme chosen for this year's Conference, "Forced Migration and the Advancement of International Protection", is extremely timely. How to ensure that States taking steps to manage their borders are also taking measures to identify persons in need of international protection? The question is not merely legalistic. When tens of thousands of people, including women and children, fall victim to traffickers every year, and when an unknown number drown every year trying to cross the Mediterranean, the Gulf of Aden or the Caribbean, the question has enormous humanitarian implications.

My Office has recently developed a Ten-Point Plan of Action which sets out measures that can help preserve asylum when they are incorporated into migration procedures. The Plan illustrates UNHCR's commitment

to working with States to address protection concerns in the context of mixed population flows.

UNHCR and judges have a distinct yet complementary role to play in refugee status determination procedures. When judges adjudicate an asylum claim they are determining who is in need of protection on their territory, acting as a safeguard on the legitimate migration policies of States. UNHCR itself processed refugee applications in 78 countries last year, many of which experience mixed migration flows. But refugee status determination is primarily the responsibility of States, not UNHCR, which is of greater value when it acts as a catalyst, sharing the protection expertise it has built up over several decades' work in more than 100 countries.

Ladies and Gentlemen,

I wish I were physically present for your discussions. Our Assistant High Commissioner for Protection, Ms Erika Feller, is with you today and I encourage you to engage her in discussions about how judges can play an enlightening role at the nexus of refugee and migration movements.

I wish you every success with the Conference and look forward to continued collaboration with the IARLJ.

Thank you.

Statement by

Erika Feller

Mr. Chairman, Distinguished Justices and Judges, Ladies and Gentlemen

The partnership between UNHCR and the International Association of Refugee Law Judges now spans many years. I have had the privilege of witnessing our cooperation go from strength to strength, guided by a firmly held and shared belief in the rule of law as the most viable and effective framework for protecting refugees and other persons of concern to the High Commissioner. I am grateful for the invitation to address this seventh Association World Conference and am particularly interested in its theme of protection in the context of mixed migratory movements. It is not overstating the case to say that this is one of the more difficult problems currently besetting refugee protection, due to the way governments and civil societies have been responding to concerns, both real and imagined, about modern migratory movements, which are widely perceived as an unmanaged and threatening phenomenon.

I am particularly grateful for the opportunity to address you here in Mexico, a country with a long and proud tradition of offering asylum and indeed permanent settlement to refugees, and which currently has to confront major challenges to migration management. My address will review three themes which I see as of direct relevance to this Conference: the asylum-migration challenge; the role of the judiciary in advancing international protection; and UNHCR's own responsibilities here, with a particular focus on how and why we undertake status determination. Some thoughts on strengthened directions for our partnership will conclude this presentation.

The Setting

The global problem of displacement is vast in terms of its size and human impact. UNHCR's year end statistics for 2005 record 20.8 million persons as being of concern to the office. This figure includes refugees, asylum-seekers, returnees, stateless people and internally displaced persons. The refugee total alone stood at some 8.4 million persons, with women and children forming the significant majority and major host countries remaining predominantly in the developing world. More than 5 million refugees have been in exile for longer than 5 years, and a considerable number of these persons for decades. The IDP total of UNHCR concern, at 6.6 million, is also high, but indeed misleading in that it represents but a portion of the likely numbers of people displaced inside their own coun-

tries. A conservative estimate here is around 23.7 million persons. And the figure is on the increase.

While numbers remain deeply disturbing, equally of concern is the fact that asylum space has noticeably shrunk over recent years. This has made preserving access to, and the quality of, asylum quite a challenge. In the developing world the contours of the problem are very much shaped by the insecurity prevalent in many refugee hosting areas, the lack of freedom of movement, or of self sufficiency possibilities, in closed camp environments, and the precariousness of unregularised stay for urban refugees, who often live in marginalised communities around big towns. Asylum fatigue is a result of perceived imbalances in burden sharing, the destructive effect of protracted stay on the environment and community harmony, and security concerns flowing from the presence of combatants and militant supporters of conflicts or ideological causes just across the border.

The viability of the asylum institution is challenged in other countries by different sets of issues. Concerns about the costs of running asylum systems, about the precision of the definitions in the context of modern migration flows and the newer dimension of human smuggling, trafficking and terrorism, have led to a major re-shaping of asylum systems in countries in the North [and some in the South as well], with a long tradition of active political support for refugee protection. This has certainly contributed to the falling numbers we are witnessing. Overall the figures for arrivals of asylum seekers and refugees coming irregularly to countries in the north are at their lowest for a decade. (In the UK, for example, the number of claims went down by 50 per cent in two years, from 60,000 in 2003 to 30,500 in 2005.)

In this part of the world, figures speak for themselves. While, during 2005, only 687 asylum requests were registered in Mexico, 250,000 undocumented migrants were apprehended and deported back to their respective, mostly Central American, countries. This trend is in stark contrast to the situation in the 1980s, where Mexico hosted over 40,000 refugees, while migration was hardly an issue of debate.

This fall in numbers in global refugee figures over the past years is partly explained by changes in conditions in countries which, over recent years, have produced a major portion of the refugee arrivals, such as Afghanistan or Iraq, although current prognoses are no longer all positive here. Certainly, however, the more restrictive asylum policies now in place in many receiving countries have played their part as well. These policies have included heavier and indiscriminately applied border controls, ad-

ditional migration restrictions, and sub-standard asylum conditions for those who achieved entry. The numbers also mask the changing face of irregular migratory movements, with not only migrants but also refugees choosing channels other than the asylum channel to seek entry and protection. Asylum seekers come well informed. They are certainly aware of a certain disinclination to be flexible in applying the refugee concept, as asylum decisions in refugee status bodies and the courts attest. I will shortly return to this issue.

The Asylum/Migration nexus

UNHCR has been particularly concerned that asylum issues have gained an increasingly negative optic in political and public debate around the highly contentious issue of migration. One of the main underlying causes for the increasing inflexibility of asylum systems in many receiving countries is a deep concern among governments and civil societies about the specter of uncontrolled illegal migration. In some countries, this concern has a base. This is, though, not the justification, in our assessment, for generalised responses disproportional to the threat and perilously close to being at odds with international obligations.

As to the base, if we look at the month of August 2006 alone, Spain's Canary Islands registered some 6,000 irregular arrivals, which boosted the total of such arrivals since the beginning of the year to 20,000 persons. It is sobering to compare this to arrivals in 2005, when the total for the entire 12 month period was only 4,700. These movements are very mixed. Most who come are not refugees – or even asylum seekers. However among the groups are people with protection concerns with the not so dissimilar in neighbouring countries. Since the beginning of this year, the number of sea arrivals to Italy totals some 14,500 people, of which well over 12,000 landed on the tiny island of Lampedusa. And these figures for the European rim multiply themselves many times when one takes into account the huge numbers of people arriving in a similar manner to Yemen, or Libya, or those passing through southern Africa, across the Indian sub-continent, through South East Asia or the Balkans. Relevant here is a recent study of unaccompanied minors who were stranded at Mexico's southern frontier, from which we learned that 11 out of 75 children had serious protection needs. They were driven into the migratory flow by the absence of adequate protection in their own countries.

In actual fact, Spain and Italy have responded in a manner which takes careful account of their international responsibilities. In other countries confronted by irregular boat arrivals, or indeed irregularly arriving refugees and asylum seekers regardless of their mode of entry, this has not,

though, consistently been the case Asylum seekers and refugees actually account for a relatively small portion of these mixed movements, but they are a part of them. As most such movements take place in the absence of requisite documentation and frequently involve people smugglers, States regard them as a threat - to sovereignty, social harmony and security. They are a key policy issue for States, as well as a humanitarian challenge for governments and for organisations like UNHCR. Such irregular movements are directly responsible for hefty barriers being erected at borders, which impact generally and indiscriminately on economic migrants and persons with protection needs alike. Should asylum seekers manage to enter, they then more often than not confront a very lukewarm reception. Increased detention, reduced welfare benefits and restricted family-reunion rights are only a part of a slow but steady growth in processes and laws whose compatibility with the protection framework is rather tenuous.

In addition asylum seekers and refugees are likely to have to confront xenophobia and discrimination against foreigners, inflamed by misconceptions and populist policies which mix together all the categories that may be on the move – asylum seekers, refugees, illegal migrants, transnational criminals and even terrorists. The fact that many arrivals use the services of people smugglers has contributed to fears here. And it makes unfortunately little difference –at least until now – that the travelers are as much victims as they are beneficiaries of this flourishing trade in human misery. People smuggling more often than not results in serious violations of the human rights of those who are smuggled, including total disrespect for the right to life. People smugglers are as inclined to toss people overboard, bound and gagged, as to land them in safety. Those who make it have often had to travel in inhumane conditions and have regularly been victims of exploitation and abuse, including rape and other sexual violence.

Irregular migration is a global phenomenon. It is neither confined to particular regions nor uniform in its presentation. Almost five years ago, our Executive Committee encouraged UNHCR, through the Agenda for Protection, to promote better understanding and management of the interface between asylum and migration “so that people in need of protection find it, people who wish to migrate have options other than through resort to the asylum channel and unscrupulous smugglers cannot benefit through wrongful manipulation of available entry possibilities.”

UNHCR’s efforts are directed at having it recognised, in government policies and refugee status determination processes, that refugees are not migrants, at least as classically defined. There is a need and a legal obligation to treat them as a distinct category of persons. The refugee protection regime is premised on the international community’s recognition of

the specific rights and needs of these persons, which include but are not limited to the non-refoulement principle. We have made clear we agree that the growth in transnational crime and terrorist violence calls for extra vigilance; and that we appreciate the need to be sensitive to problems stemming from the mixed character of people movements. Our advocacy and our partnering has though, as a clear aim, countering attempts to put in question the distinctive situation of refugees, their need for international protection, their right to seek asylum and their entitlement to enjoy it. We promote responses which combine a coherent approach to migration management with the effective protection of refugees, two functions which are distinct, but complementary and mutually reinforcing. Here, the refugee protection instruments, notably the 1951 Convention, have to retain their centrality. In this day and age, it is sad to observe, this is no longer guaranteed. The Convention itself needs some protection!

Mr Chairman,

UNHCR has consistently rejected laying the migration problems of today at the door of the 1951 Convention, as if this instrument were somehow to blame. The Convention cannot be held accountable for its limits as a migration management tool. It was never intended to serve this role, but rather was drafted as a rights protection instrument. The refugee problem is, very centrally, an issue of rights – of rights which have been violated and of resulting rights, set out in international law, which are to be respected. Refugees – as other persons of concern to us – are victims of human rights abuses or human rights deficits, who lack a national government willing or able to redress their situation. Flight and seeking asylum is the best option for them and their family, to protect their right to life, security and dignity of person. The Convention has been, for over 50 years, the main tool that we have to ensure that this option is a realistic and realisable one. There is an obligation on all parties, as well as UNHCR, to have it applied in a manner faithful not only to its letter, but also to its objects and purposes.

Role of the judiciary

Here, the judiciary can be key. There are some very distinct areas where strong judicial supervision, or even appropriate intervention, can provide essential support for refugee protection.

First is the crucial moment of arrival at the borders of the asylum State. UNHCR fully recognizes the sovereign right of all States to control their borders and to protect the interests of the host population. We also share States' concerns that the institution of asylum not be exploited by people not requiring, or deserving, international refugee protection. On the other

hand, consistent with the Convention framework, any national migration control system must allow genuine asylum-seekers the opportunity to have their refugee claims fairly and effectively assessed. Regrettably, some of the most restrictive migration measures adopted by States have been placed within the purview of executive action, taking them somewhat outside the reach of routine judicial supervision. These measures include, for example, the interdiction border policies and accelerated “turn-around” procedures of some States, which can have serious consequences for refugees and the institution of asylum. Migration control measures deserve closer judicial scrutiny than hitherto, with one aim being to disentangle refugees and ensure the rights at issue enjoy the benefit of due process of law.

The second phase where judicial supervision is important is during the process that determines whether asylum-seekers are, in fact, in need of international protection and will be permitted to remain in the asylum State. States have a flexible margin of discretion to design and implement a national procedure that is appropriate to their national context. All procedures must, however, serve the humanitarian object and purpose for which they were intended – here, the effective identification and protection of the rights of refugees. Obviously, procedures must be implemented promptly and accurately, but expediency should not trump justice. A key function of the judiciary at this point is to ensure that administrative action satisfies basic principles of fairness and due process.

The judiciary is also at this point the guarantor that the international refugee definition is applied with the proper flexibility, in an objective manner uninfluenced by considerations which have nothing intrinsically to do with the refugee concept. If this sounds, by the way, self evident, it is not always the case in practice. There are regrettably notable instances of refugee status being denied, or a lesser status conferred, for reasons of public policy or foreign policy concerns

Thirdly, the judiciary has an important role to ensure that refugees and asylum-seekers are treated in a fair, dignified and humane way throughout the duration of their stay. There is a common but mistaken view that the only obligation owed by an asylum State is not to return people to places where they are likely to face persecution, or other serious human rights violations (the non-refoulement principle). The effect of this is that people are allowed to remain in the asylum State’s territory, but are often denied the most basic rights to support and sustain themselves during what is often a traumatic period of exile. In recent years, UNHCR has noticed a gradual curtailment of basic rights to adequate housing, education, medical support, family unity, work and social security. There has been

an increase in restrictions on people's freedom of movement and greater resort to different forms of detention – including of women and children.

Fully cognizant here of the dangers of judicial law making, I would draw attention to the scope for creative judicial intervention to make a positive difference. We have appreciated the efforts for example of the Supreme Court of India to prevent the expulsion of groups of refugees through creative interpretations of the national Constitution. There is no refugee law in India and hence no legislation providing for *non-refoulement*. However, the Court's interpretation of the constitutionally enshrined "right to life" has enabled it, in effect, to serve as a bar to deportation of refugees.

In another part of the world, decisions which have emanated from the Constitutional Court of Colombia bear careful and sympathetic analysis. Petitioned by hundreds of internally displaced citizens, who alleged that their constitutionally guaranteed rights were not being respected due to state inaction in the face of the huge displacement situation in the country, the Court undertook a comprehensive review of government policy in this area. Representatives of displacement organisations were explicitly included in the review process of the Court – and indeed the mechanisms put in place to follow up on it. Ruling T-025, handed down on 22 January 2004, was the culmination of the process, which included a series of 58 decisions over a 7 year period designed to define and strengthen IDP rights in Colombia. At an early stage the Court took the step to incorporate the UN's Guiding Principles on Internal Displacement as part of the prevailing law in Colombia. T-025 itself pointed to severe structural faults in public provision for the needs of IDPs which were deemed to be unconstitutional. The Court accordingly prescribed a number of binding remedies. The Court's intervention led to important public policy initiatives on the part of the Government, among them the National Plan for Comprehensive Assistance to the Displaced Population. It has also led to a substantial increase in the national budget for IDP support.

The openness of the Court to cooperation with international entities has been a significant feature of the entire process. The Court in fact requested UNHCR to furnish it on a regular basis with information and analysis of the situation of the internally displaced, as well as to be part of the monitoring processes in place to follow up on the Court's prescriptions. Government ministries were specifically instructed by the Court to report to UNHCR on progress being made to address internal displacement. This has considerably facilitated our interaction with government entities like the office of the Ombudsman and the Procurator General, which are now obliged to have in place intervention strategies to ensure the public instrumentalities assist and protect IDPs. In the course of 2005, the Court

issued several supplementary orders to different entities requesting them to speed up the pace of reform.

I am aware that these examples, while interesting in themselves, are not necessarily replicable elsewhere. However they do stand as examples of the judiciary taking a creative approach to bettering the protection available to the forcibly displaced. Of course, we encourage this in whatever ways might be possible.

This being said, and to round up this section on the contribution of the judiciary to refugee protection, I would reiterate UNHCR's long standing position that protection of refugees through resort to the judicial system serve as an adjunct to, not a substitute for, a credible national asylum procedure. There are several reasons for this. In our experience, the systems which have worked the best are those where the prime responsibility for refugee status determination falls on a specialised tribunal, with the role of the Courts being to review issues of consistency and general compliance. As mentioned earlier, refugee law is not an exact science. The definition in the 1951 Convention was intended to apply to circumstances generating refugees which are often chaotic, or at least not always clear on their face, and where application of the benefit of the doubt is a fairer way to adjudicate uncertainties than resort to the strict rules of evidence. To subject international law to minute legal dissection may well serve to eviscerate the spirit and ethical values of refugee protection. A "purposive" approach, rather than a strict constructionist approach, to interpreting international law is required to help to ensure that the focus is kept on the victim and the palliative purpose of protection.

There are additional factors to weigh. Not all governments have been happy about what they have perceived as "judicial meddling" in the management of a policy issue high on the national interest agenda. Governments have also become alarmed by the rising costs and delays inherent in a process built on multiple appeals. These concerns have been at the root of efforts in some quarters to corral the courts and limit their powers of review. This cannot be in the broader interests of preserving the rule of law.

UNHCR's role in supervising the international legal regime and in refugee status determination.

At this point, some of you might be querying the propriety of a UN humanitarian agency like UNHCR putting forward recommendations for the structure and processes of national legal systems of sovereign States. In particular, members of this Association from time to time raise doubts as

to whether UNHCR can and should serve as an authority on the legal interpretation of this instrument by States. This merits also some comment.

As to the propriety issue, we offer such recommendations because the responsibility to do so is, we believe, inherent in the mandatory, not discretionary, functions with which we have been vested by States. UNHCR was established as of January 1, 1951 by the General Assembly of the United Nations. According to its Statute, UNHCR has two principal functions – to provide international protection to refugees within its competence, under the auspices of the United Nations and to seek durable solutions for them, in cooperation with governments. The Statute defines who is a refugee and how UNHCR might provide for their protection. This Statute has a universal nature, meaning it applies in all Member States of the United Nations, including those which are not party to any of the international refugee instruments.

Article 8 of the Statute calls upon the High Commissioner to provide for the international protection of refugees, *inter alia*, by supervising the application of Conventions, by promoting measures calculated to improve the situation of refugees and reduce the number requiring protection, and by promoting also the admission of refugees, not excluding those in the most destitute categories, to the territories of States A corresponding article in the 1951 Convention, Article 35, entitled “Co-operation of the national authorities with the United Nations,” States:

“1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”

Thus the Convention establishes a formal link between the international authority responsible for the protection of refugees and the Convention defining their status and rights. The Contracting States recognize the protection function entrusted to UNHCR and undertake to facilitate the performance of this function. Many signatory States have implemented their obligation under Article 35 by granting UNHCR a role in their national procedures.

UNHCR exercises its supervisory role in a number of ways, including by developing standards, interpreting standards and applying them. As regards interpreting standards, UNHCR routinely provides advice to authorities, courts and other bodies on the interpretation and practical application of the provisions of the international refugee instruments. Such

advice frequently deals with the refugee definition. In an effort to promote a harmonized interpretation of the criteria in the refugee definition, UNHCR makes available guidance on the eligibility of certain groups of refugees and advice on the interpretation of the definition itself. Of particular note is the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, prepared by UNHCR in 1979 at the request of Governments, in order to provide guidance to their officials involved in refugee status determination. It was based on the practice of States and of 25 years of experience by UNHCR.

We have recently supplemented the Handbook with a series of seven Guidelines on particular issues: Religion, Membership of a Particular Social Group, Internal Flight or Relocation Alternative, Gender-related Persecution, Cessation, Exclusion and the application of the refugee criteria to victims of trafficking. These were all canvassed in the Global Consultations a couple of years ago. Each topic was examined in detail by government officials, members of the judiciary and of the legal profession, academics, UNHCR and non-governmental organizations. On some of the topics, like Membership of a Particular Social Group and IFA, there were wide divergences in national jurisprudence. Part of UNHCR's aim was to examine these in an effort to bridge them.

In addition to this doctrinal advice, UNHCR is often involved in precedent-setting cases. UNHCR's views are generally communicated as *amicus curiae* briefs or other submissions.

Turning to the issue of the authoritative nature of our advice, it may not be widely known but UNHCR itself is actively engaged in interpreting and applying the refugee definition in individual cases. While States have primary responsibility to determine the status of individuals arriving on their territory, UNHCR can itself undertake refugee status determination (RSD) under its own mandate. UNHCR normally does not do RSD in signatory States, but it certainly can [in some 30 such countries in 2005], applying virtually the same refugee definition as States. As the Statute makes protection a mandatory function for the Office, it can undertake RSD at the request of States, or on its own initiative, as may be required for protection reasons. And although UNHCR is accorded a special status as the guardian of the 1951 Convention and its 1967 Protocol, the Office is not limited, in the exercise of its protection functions, to the application alone of these treaties. Our competence to provide protection – and to determine eligibility for such protection under our mandate – is exercised separately from a state's treaty obligations.

This is a growth area for the office. UNHCR currently conducts RSD in

some 78 countries and last year received applications from almost 90,000 persons. In fact in 2005 UNHCR status decisions accounted for some 14% of the total global number of decided asylum claims.

One result of this longstanding activity is that UNHCR has accumulated considerable jurisprudential experience in the implementation of the 1951 Convention. This is, not least, the underpinning for the authoritative character of UNHCR's opinions which derive not only from the fact of our formal supervisory responsibility, but also from our widespread practical experience in applying its terms. The UNHCR Handbook has over time gained explicit recognition by different Courts and Tribunals globally spread as an authoritative text on the interpretation of the Convention Refugee definition. The Guidelines are with increasing regularity cited in judgments, for example in Australia, New Zealand, the U.K, and the U.S.A. For example, two of UNHCR's guidelines - on particular social group and on gender related persecution – have been extensively resorted to by the House of Lords in its October 2006 decision in the case of Fornah and K. UNHCR acted as intervener in this case.

Vision for the future

Mr. Chairman, I will conclude with some brief remarks about future directions for the Association.

Let me repeat that the IARLJ is a key and valued partner of UNHCR. A singular advantage of the IARLJ is that it offers a forum where judges can speak directly to judges, colleague to colleague, on the basis of shared interests but different experiences. This cross fertilization of thinking and analysis can only contribute positively to more harmonised approaches to interpreting and applying the basic protection concepts. When fundamental provisions like the non-refoulement principle come under attack, and we are told that it has no applicability, for example, outside the confines of national boundaries, it considerably helps our advocacy when we are able to point to a solid body of shared practice attesting to the contrary. Your association has great potential to build consensus on such issues at the higher common denominator of opinion.

I have mentioned in my presentation the areas we are particularly focusing on as we try and meet the challenge of protecting refugees within broader migratory movements. Perhaps this Conference will lead to the identification of specific areas for closer collaboration here between this Association and UNHCR. These areas might range from redoubled scrutiny of legislation which fails to make the necessary distinctions, through precedent setting judgments to confirm the specificity of the refugee concept – and in this context the flexibility of the Convention to make the

necessary distinctions – right through to committed advocacy with civil society to correct misconceptions and counter the deliberate mischaracterisation of refugees.

I wonder where you are at with your discussions on how to use the Association to develop jurisprudence in standard setting cases. UNHCR would welcome the opportunity for more structured dialogue with you in this regard, not least in the context of our own contributions, for example through Amicus Briefs. It could be very helpful for UNHCR, on a strictly confidential, non-attributable basis, to be able from time to time to draw on the legal expertise and reasoning skills of some of your members, to help us think our way through the issues from a practitioner's perspective. Similarly our Guidelines might benefit from a practitioner's review. To domestic lawyers and judges used to the precision of national law, such guidelines may seem somewhat imprecise. We are, however, encouraged by the increasing number of references to our guidelines in national jurisprudence, and I would be interested to have your own assessment in this regard. Perhaps there could be a role here for the IARLJ to assist us to frame our guidelines in the most "user friendly" format from a judicial perspective.

One such issue is the protection of unaccompanied minors. Hundreds of unaccompanied children are arriving, for example, on the Canary Islands or in Italy. Their care and treatment is a priority concern for the authorities and, where they are persons of concern, for us. There is a specific set of legal issues to work out, stemming from the best interest of the child principle and our responsibility to ensure that asylum claims are handled in an age and gender-sensitive manner. We cooperated closely with the Committee on the Rights of the Child in the drafting of its General Comment 6 of 2005 which sets out guidelines for the treatment of unaccompanied and separated children to ensure protection of rights prescribed in the Convention of the Rights of the Child. We are currently looking at how to give effect to these guidelines in countries where our assistance is sought. This is in part a capacity building and training responsibility, with legal content when it comes to the proper adjudication of asylum claims from children.

You may also wish to reflect in particular on how better to manage exclusion issues in an era of international terrorism. We would welcome new thinking here, both as regards the process of decision making and the criteria, including the balancing test in exclusion cases. This could be another good topic for a focused discussion with your members.

More generally, I was pleased to learn that there is now a chapter of the

Association for Africa. UNHCR continues to advocate that the Association undertake a more strategic review of where, region by region, members might contribute their expertise to professionalizing judicial processes in place for refugee protection, as well as provide training for non-judicial decision-makers in countries where the judiciary is not yet involved in refugee status determination. I hope that there will be time to discuss the feasibility of the Association developing a roster of IARLJ judges for these purposes.

Mr Chairman,

In summary, UNHCR is very grateful for the work of the Association and indeed for the committed and focused leadership provided to it by your President, Justice North. The initial contribution of your members to improving adjudication of refugee claims in countries still developing their asylum systems, and indeed in some UNHCR offices, has been appreciated. The role you are seeking to develop in harmonisation and standard setting at the international level holds much interest for us. The Association has moved from being, if I may so term it, something of a "gentlemen's club" to an association increasingly with its own identified niche in global protection work. If I have offered some perspectives on where your contributions could be further developed, it is in this spirit of appreciation and because we believe that there is even more potential to tap for a mutually beneficial relationship between your members and our organization.

Thank you.

Erika Feller,

Assistant High Commissioner - Protection UNHCR

Participación de Gilberto Rincón Gallardo

“La respuesta institucional del Estado Mexicano al fenómeno de la discriminación. El caso de las personas Refugiadas y Migrantes”

A la entrada del siglo XXI la humanidad enfrenta una paradoja que en el mediano plazo no parece resolverse. Por un lado, el mundo es el escenario en donde se desarrolla una tendencia integradora a nivel global principalmente en lo económico y con avances importantes en la interrelación de las instituciones políticas internacionales. Por otro, también es el espacio en donde en forma paralela, ésta tendencia integradora convive con la inercia contraria de prácticas extremas y patrones culturales que fomentan la desigualdad, la inequidad y dan pie a la fragmentación social. La discriminación es parte de esta última.

El racismo, la xenofobia, o la segregación por cuestiones de apariencia física, origen étnico, edad, género, estado de salud, discapacidad, lengua, preferencia sexual o condición económica, son prácticas discriminatorias comunes arraigadas en el desarrollo cultural de prácticamente todas las naciones en el mundo.

Alrededor del planeta los rostros de la discriminación tienden a expresarse en los grupos más desprotegidos y se traducen en la exclusión de los servicios de salud a las personas que viven con VIH/SIDA, en la marginación de los adultos mayores, en la cancelación de oportunidades educativas de las personas con discapacidad, en el despido laboral por orientación sexual o embarazo, en las formas diversas de rechazo social por origen étnico o, incluso, al genocidio por una supuesta superioridad cultural. En este marco, los problemas que enfrentan las personas refugiadas y migrantes, son escenarios crudos que reflejan las prácticas segregadoras y discriminatorias.

A pesar de la existencia de instituciones e instrumentos legales, locales y de carácter internacional que se han constituido en los últimos años, a fin de brindar protección a estos dos grupos humanos y hacer frente a todas las formas de discriminación, la realidad es que sigue habiendo una distancia muy amplia entre el espíritu de las normas incluyentes y las prácticas cotidianas de exclusión. Esto se debe a que para muchos gobiernos del mundo los temas que hoy en día encabezan sus agendas de prioridades internacionales, se vinculan con los problemas del terrorismo, la seguridad nacional, el narcotráfico o el crimen organizado. En contraste, los temas de integración y lucha en contra de la discriminación, no figuran como los más importantes, lo cual habla de una inercia que gira en contra de la inclusión social y que afecta al desarrollo pleno de todos los estados. Así pues, los avances en el plano humanístico parecen estar desfasados

respecto de las prioridades internacionales y de los logros y desafíos científicos y tecnológicos que caracterizan a la época que nos ha tocado vivir. Es evidente que aún nos queda un largo camino por recorrer en la lucha por el respeto a los derechos humanos y en la búsqueda de sociedades más igualitarias.

La historia de las migraciones y de los refugiados forma parte de los principales acontecimientos que han convulsionado nuestro mundo durante el siglo pasado y aún en el presente.

La persecución política, los conflictos armados, la intolerancia racial y religiosa, o los estigmas hacia una manera de convivir y de actuar han sido la causa para que miles de personas hayan tenido la necesidad de abandonar sus hogares, pueblos, comunidades y países, en busca de otros lugares que les ofrezcan mayores condiciones de seguridad y donde su vida no corra peligro. Es así como los grupos humanos se convierten en grupos de refugiados o migrantes.

Con respecto a la población migrante, en 1965 el número de personas que vivían fuera del lugar donde habían nacido ascendía a 60 millones; para el año 2000 el número se ubicó en 175 millones; y de acuerdo con el Informe 2005 sobre migración de la Organización de las Naciones Unidas que lleva por título *“Migración Internacional y Desarrollo”*, el número de los migrantes internacionales alcanzó los 191 millones de personas en el año 2005. De esa cifra el 60 por ciento de migrantes vive en los países desarrollados en donde las condiciones para su integración social distan de ser las óptimas. Si la tendencia de crecimiento migratorio continúa como hasta ahora, para el año 2030 habrá al rededor de 250 millones de migrantes internacionales en el mundo.

En materia de refugio, de acuerdo con datos estimados por el Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR) en el año 2005, existen alrededor del mundo 20.8 millones de personas refugiados y desplazadas.

Según las estadísticas publicadas en el informe *“Tendencias globales sobre refugiados en 2005”*, la gran mayoría de las personas desarraigadas en el mundo son recibidas en países en vías de desarrollo y sólo cinco nacionalidades representan cerca de la mitad de la población que atiende el ACNUR. Entre ellas se mencionan: los afganos que cuentan con 2.9 millones de refugiados; los colombianos, 2.5 millones; los iraquíes, 1.8 millones; los sudaneses con 1.6 millones de personas y finalmente, los somalíes que arrojan la cantidad de 839 mil personas refugiadas.

Asimismo, hoy en día se estima que existe casi un millón de solicitantes

adicionales de refugio emanados de todos los lugares del mundo, donde se viven conflictos políticos y armados, siendo la tendencia en el futuro cercano que el número de refugiados se acreciente.

La tendencia creciente en el futuro inmediato de ambos grupos humanos plantea un reto mayúsculo en términos políticos, económicos y culturales para todos los países, principalmente, para las naciones receptoras, pues por un lado, existe un beneficio local derivado de la presencia de estos grupos humanos en la sociedad que los recibe, y por otro existe un rechazo cultural por su presencia. El reto central es como beneficiarse de estos grupos humanos sin generar inconformidad en términos locales.

En tal sentido, es claro que así como crecen las instituciones públicas y privadas nacionales o internacionales que luchan para contribuir a la integración de los migrantes o de los refugiados, también crecen las actitudes de rechazo y segregación motivadas por los fundamentalismos nacionalistas o por una supuesta superioridad étnica y cultural que abonan en el sentido opuesto.

De manera general, puede afirmarse que la problemática del refugio y de las migraciones se analiza desde la perspectiva económica o política y casi nunca, se hace desde la perspectiva de la exclusión social y la discriminación.

De ahí que una de las características más notorias que distinguen la problemática de estos dos grupos humanos es precisamente la discriminación social por motivos culturales, misma que en la mayoría de los casos se desarrolla en un ambiente de rechazo, menosprecio y estigmatización sustentada en prejuicios sociales, intolerancia racial o cultural y que no sólo impide su integración social, sino que en casos extremos incluso llega a limitar el derecho fundamental más básico como es el derecho a la vida.

Desde esta perspectiva, la discriminación que sufren los refugiados y migrantes se traduce en detenciones arbitrarias, impedimento de la reunificación familiar, aplicación discrecional de la ley o condiciones poco favorables en su trato, siendo esto la base de la marginación social.

La discriminación contra estos grupos humanos está prohibida en virtud de tres documentos universales: La Declaración Universal de los Derechos Humanos que establece las bases éticas para que todas las personas, con independencia de su origen étnico o geográfico, gocen de los privilegios que el marco jurídico universal les otorga por el simple hecho de ser miembros del género humano; en materia de refugio, La Convención sobre el Estatuto de los Refugiados de 1951, y el Protocolo de 1967, así como la Declaración de Cartagena sobre los Refugiados que protegen los

derechos humanos de este grupo humano. En el caso de los migrantes, el documento más connotado ha sido el de la *Convención Internacional sobre la protección de los derechos de todos los trabajadores migratorios y de sus familias de 1990*.

Pese a que estos tres instrumentos internacionales protegen formalmente los derechos fundamentales de estos dos grupos humanos, muchos de estos derechos que deberían estar en pleno vigor son limitados a causa de la discriminación política, social o económica que tiene lugar en la mayoría de las naciones y que encuentra una base cultural para ello.

Desde el año 2001, en nuestro país dio inicio formalmente el combate institucional para prevenir y eliminar cualquier forma de discriminación que se realice en el territorio nacional. Los destinatarios centrales de dicho esfuerzo son 11 grupos considerados en condiciones de vulnerabilidad entre los que se encuentran por supuesto a los grupos humanos de migrantes y refugiados.

En México creemos que el derecho a la no discriminación no debe confundirse con la filantropía o la caridad que se expresa por el otro que se considera distinto. La no discriminación como derecho fundamental debe ser tutelado por el Estado y debe ser exigido por la sociedad. La discriminación como un trato diferenciado con un sentido de desprecio y de inferioridad a una persona o un grupo social sustentado en una estigmatización limita el ejercicio de derechos fundamentales, como en el caso de los refugiados y migrantes.

México no es ajeno al respeto y la garantía del derecho al refugio, por el contrario, nuestro país se ha caracterizado por brindar asilo y protección a personas de muy diversas nacionalidades.

Cabe mencionar de manera breve, el recibimiento de los españoles en la década de los años 30; la llegada de los nacionales chilenos en los años 70; y finalmente el cobijo de los salvadoreños y guatemaltecos en la década de los 80 todas ellas, muestras claras de la hospitalidad de nuestro país hacia el mundo entero.

El caso de los migrantes, nuestro país se ha convertido en las dos últimas décadas en una nación de origen, tránsito y destino de flujos migratorios. En tal sentido, se calcula que actualmente existen alrededor de 25 millones de mexicanos que viven fuera de nuestro país; alrededor de medio millón de migrantes que cruzan anualmente nuestro territorio para internarse en Estados Unidos; y cerca de 300 mil personas nacidas en otro país que de forma documentada o indocumentada, anualmente se quedan a vivir en México.

En tal sentido, puede señalarse que México ha sido vanguardia en la implementación de mecanismos legales para la protección de los refugiados y en la observancia de los mandatos a favor de los migrantes que se internan en nuestro país. Sin embargo, también debemos reconocer que existen actitudes discriminatorias en nuestro país tanto de funcionarios públicos como de grupos sociales hacia estos dos grupos humanos, lo cual es materia de nuestro trabajo.

La respuesta institucional del Estados Mexicano para combatir la discriminación que está operando actualmente en el país y que cobija a los Migrantes y Refugiados que lo habitan, se sustenta en cuatro pilares fundamentales: 1) La cláusula antidiscriminatoria contenida en el párrafo tres, del artículo uno de la Carta Magna (2001); 2) La promulgación de la Ley Federal para Prevenir y Eliminar la Discriminación (2003); 3) La creación del Consejo Nacional para Prevenir la Discriminación (2004), mecanismos con los que la población en general o los extranjeros en territorio nacional disponen para combatir en términos legales la discriminación de los grupos en condiciones de vulnerabilidad; y 4) el Programa Nacional para Prevenir y Eliminar la Discriminación que está en operación desde mayo de 2006.

Me permitiré en éste momento, hacer una breve revisión de la génesis y los detalles de la consolidación institucional e histórica del proyecto antidiscriminatorio mexicano. En el año 2001 se creó la Comisión Ciudadana de Estudios contra la Discriminación¹ que realizó un diagnóstico sobre esta problemática en el país y que, entre otros alcances generó un anteproyecto de Ley Federal para Prevenir y Eliminar la Discriminación, el cual sirvió de base para que el Congreso de la Unión aprobara por unanimidad en 2003 la actual Ley Federal para Prevenir y Eliminar la Discriminación². La Ley Federal para Prevenir y Eliminar la Discriminación de México, establece disposiciones para prevenir y eliminar todas las formas de discriminación, así como para promover la igualdad de oportunidades y de trato. Asimismo, enumera las conductas discriminatorias, incluidas las de raza y origen étnico, que quedan prohibidas y dispone de algunas medidas positivas y compensatorias que los órganos públicos y las autoridades federales deberán adoptar a favor de la igualdad de oportunidades de los principales grupos en situación de vulnerabilidad. Esta ley reglamentó la modificación que en el año 2001 se hizo al artículo primero de la Constitución política de los Estados Unidos Mexicanos en el que apareció, por primera vez en la historia de nuestro país, la prohibición

1 La Comisión se integró de manera plural con representantes de los principales partidos políticos, legisladores, funcionarios públicos, representantes de la sociedad civil, académicos y diversos especialistas que debatieron el problema de la discriminación en el país.

2 La Ley crea el Consejo Nacional para Prevenir la Discriminación como el Órgano del Estado Mexicano encargado de aplicar y habilitar la política antidiscriminatoria empezando por las dependencias públicas federales pero también expandiendo su ámbito de actuación hacia o a los particulares

explícita de las prácticas discriminatorias que lógicamente comprende el ámbito de todo el territorio nacional³. Esta modificación vino a llenar tanto un vacío jurídico, político e institucional en el país, como una necesidad concreta de la sociedad mexicana. La protección antidiscriminatoria se aplica al grupo de migrantes internacionales que entran al territorio nacional, así como a los refugiados y solicitantes de asilo.

Para la elaboración del marco legal antidiscriminatorio en México se tomaron en cuenta las exigencias contenidas en los instrumentos internacionales en materia de lucha contra la discriminación tanto en el nivel regional de la Organización de Estados Americanos como en el nivel global tutelado por la Organización de Naciones Unidas⁴. De ahí que la Ley Federal para Prevenir y Eliminar la Discriminación se ubica dentro de los estándares internacionales de derechos humanos.

La Ley Federal Para prevenir y Eliminar la Discriminación crea el Consejo Nacional para Prevenir la Discriminación (CONAPRED) que entra en funciones en abril de 2004. El CONAPRED es el órgano del Estado Mexicano encargado de articular la política antidiscriminatoria en todo el territorio nacional y de velar por el cumplimiento de la Ley Federal para Prevenir y Eliminar la Discriminación. Su misión es articular las acciones del Gobierno Federal y dar dirección al conjunto de estrategias del Estado para atender los problemas de discriminación en particular de los colectivos sociales que han sido históricamente colocados en situación de vulnerabilidad, tales como indígenas, mujeres, personas con discapacidad, adultos mayores, niñas, niños, adolescentes, refugiados, migrantes, personas con diversas preferencias sexuales, y personas con distintas creencias religiosas.

El CONAPRED desarrolla una estrategia de lucha institucional contra todas las formas de discriminación sustentado en cinco objetivos centrales:

1. La apuesta por el cambio cultural a través de la difusión de los principios y valores que sustentan a una convivencia respetuosa y tolerante en lo diverso; una nueva cultura en donde se respete el principio de igualdad que permita eliminar gradualmente las prácticas discriminatorias en el ámbito público y privado. (Acción de largo plazo)

3 El párrafo tercero de la Carta Magna señala que: "Queda prohibida toda discriminación motivada por origen étnico o nacional, el género, la edad, las capacidades diferentes, la condición social, las condiciones de salud, la religión, las opiniones, las preferencias, el estado civil o cualquier otra que atente contra la dignidad humana y tenga por objeto anular o menoscabar los derechos y libertades de las personas"

4 Los instrumentos considerados son diversos y van desde la Declaración Universal de los Derechos Humanos (1948), hasta el Protocolo Facultativo de la Convención sobre la Eliminación de todas las formas de discriminación contra la mujer (2000), pasando por la Declaración de los Derechos de los Niños (1959), la Declaración de las Naciones Unidas sobre la Eliminación de todas formas de Discriminación Racial (1963), el Convenio No. 169 sobre Pueblos Indígenas y Tribales (1989), la Declaración sobre los Derechos de las Personas pertenecientes a Minorías Nacionales o Étnicas, Religiosas y Lingüísticas (1992) y la Convención Interamericana para la Eliminación de todas formas de Discriminación contra las Personas con Discapacidad (1999), por sólo nombrar algunos.

2. El diseño de políticas públicas tendientes a prevenir y eliminar la discriminación. (Acción de mediano plazo)
3. La elaboración de estudios especializados en materia de discriminación (Acción de mediano plazo)
4. La posibilidad de proponer la armonización legislativa en nuestro país e influir en la revisión y creación de marcos normativos que incluyan cláusulas antidiscriminatorias; (Acción de mediano plazo) y
5. A través de mecanismos específicos de atención para las personas que han sido sujetas de discriminación como son la recepción de quejas y reclamaciones. (acción inmediata)

Las acciones del CONAPRED están sustentadas en una estrategia de vinculación nacional e internacional en virtud de la importancia que le otorgamos el establecimiento de vínculos interinstitucionales con los diferentes órganos de gobierno, organizaciones no gubernamentales y grupos de la sociedad civil interesados en promover la igualdad de oportunidades y orientados a luchar contra todas las formas de discriminación.

Finalmente, en mayo de 2006 se presentó ante el presidente Vicente Fox la primera política pública en la historia del país en materia de no discriminación, misma que lleva por nombre “Programa Nacional para Prevenir y Eliminar la Discriminación (PNPED)”, cuyo eje prioritario se centra en la atención a la discriminación y elaboración de políticas públicas que atiendan los ámbitos de: salud, educación, empleo y acceso a la justicia y que aplican a los 11 grupos en condiciones de desventaja que habitan en el territorio nacional. Este Programa obliga a toda la Administración Pública Federal a acatar los lineamientos y acciones contenidas en el mismo, a fin de cumplir con el principio constitucional de no discriminación y la promoción de la igualdad de trato y oportunidades.

Como se puede observar, la respuesta institucional de México busca corregir y compensar las desigualdades de los distintos grupos en situación de vulnerabilidad a través de la conformación de un proyecto de corto, mediano y largo plazo que podría sintetizarse en dos vertientes: atender directamente los casos prácticos de discriminación que sufran las personas en situación de vulnerabilidad y construir las condiciones sociales para incidir en un cambio cultural de nuestra sociedad, sustentado en la difusión de los valores de la convivencia el respeto a la diversidad y la observancia de las normas vigentes.

En materia de migrantes y refugiados hemos realizado hasta ahora diversas actividades que buscan atender sus necesidades. En materia de migración hemos mantenido una estrecha relación con las instituciones públicas y privadas como el Instituto Nacional de Migración y con la Organización Sin Fronteras I.A.P.. En materia de refugio hemos colaborado estrechamente con la Comisión Mexicana de Ayuda a Refugiados (COMAR), de

la Secretaría de Gobernación, con quienes hemos unido esfuerzos en la búsqueda de igualdad de trato y de condiciones de vida para los extranjeros que han decidido habitar nuestro país, así como con la Oficina Regional del Alto Comisionado de las Naciones Unidas para los Refugiados en México (ACNUR) y con la organización Amnistía Internacional. En ambos casos se ha participado con el Programa de Cooperación sobre Derechos Humanos México –Comisión Europea quines coincidimos plenamente en el derecho a la no discriminación.

Las tareas desarrolladas van desde la concertación de un convenio de colaboración, la capacitación a funcionarios públicos, la realización de actividades para difundir la cultura de la no discriminación a través de conferencias, seminarios y publicaciones, hasta la recepción de quejas y reclamaciones.

El combate institucional en contra de la discriminación apenas empieza en nuestro país, hemos realizado diversas acciones para atender las necesidades de los grupos de migrantes y refugiados. Sin embargo, no es suficiente; necesitamos generar mayores sinergias en torno al derecho a la no discriminación, por lo que resulta indispensable asegurar que las leyes y los procedimientos implementados para los migrantes, solicitantes de asilo y refugio les garanticen un trato digno e igualitario. En esta tarea las organizaciones no gubernamentales, como es el caso de la Asociación Internacional de Jueces en Derecho de Refugiados, son de gran valía.

Es importante también, lograr capacitar de la mejor manera posible, a las autoridades de migración y las instituciones gubernamentales que atienden a los extranjeros en nuestro país. Pero sobre todo, promover frente a la sociedad una conciencia de respeto e integración a hacia las personas extranjeras, valorando que con su historia y su presencia enriquecerán a la sociedad y la cultura de la nación que los recibe.

En este marco, el Consejo Nacional para Prevenir la Discriminación se siente honrado de participar en tan relevante Conferencia y hace votos para una consolidación de esfuerzos que permitan el establecimiento de una alianza estratégica entre todas las instituciones presentes, a fin de impulsar de manera conjunta una cultura de la tolerancia y de respeto e igualdad hacia todos los ciudadanos del mundo.

Muchas gracias.

*Gilberto Rincón Gallardo,
Presidente del Consejo Nacional para Prevenir la Discriminación.*

PROTECTING THE RIGHTS OF MIGRANTS AND ASYLUM SEEKERS: A Perspective from the EU – Refugees and Migrants

Elsbeth Guild

Introduction

Protecting migrants' rights is an increasingly important issue in a world where remittances from persons who have moved across international borders for economic activities has overtaken development aid in providing funds in many countries of origin¹. In this presentation I will examine the protection of migrants' rights in the context of asylum from the perspective of EU law. I will do this in three steps:

First, from the perspective of free movement of workers in the EU – what rights do workers have and how do they relate to asylum seekers and refugees;

Secondly, I will examine the rights which have been guaranteed to third country national workers in the EU and how they relate to asylum seekers and refugees;

Thirdly, what are the prospects for the future.

Free Movement of Workers: Protecting rights of asylum seekers and refugees?

Free movement of workers is one of the four fundamental freedoms of the EU. Enshrined in the 1957 treaty, it has been incorporated into secondary legislation which has been extended continuously over time. It has also been the subject of substantial jurisprudence by the European Court of Justice. The current secondary legislation which covers the field is Regulation 1612/68 and Directive 2004/38. From 1993 EU nationals gathered a second status, that of citizens of the Union. However, this is a very particular type of citizenship as the rights which attach to it only become apparent when the individual is outside his or her country of origin. Thus it can be classified as a sort of immigrants' citizenship.

The rights of workers who are nationals of one Member State and travel to another Member State include:

¹ OECD, Migration Remittances and Development, http://www.oecd.org/document/34/0,2340,en_2649_37415_35744418_1_1_1_37415,00.html

- The right to cross the border (now invisible except in respect of Ireland, the UK and the 10 Member States which joined on 1 May 2004);
- The right to look for work for a reasonable period (and to reside thereafter if self sufficient);
- The right to take any job unless excluded on the basis that the job is part of the public service and there is a direct link between the post and the acts of governance;
- The right to recognition of diplomas and professional qualifications and experience gained in the EU;
- The right to reside on the territory;
- The right to equal treatment with own nationals as regards working conditions, pay, dismissal, trade union participation and all social and tax advantages;
- The right to equal treatment as regards housing including social housing;
- The right to family reunification with a designated group of family members (including third country national family members) including spouses, children, including those over 21 so long as they are dependent on the worker, dependent parents and grandparents and dependent relatives in the direct descending line or the worker and/or his or her spouse; there is an equal treatment right only as regards unmarried partners; there is no income requirement which can be applied to this right of family reunification;
- The right to protection against expulsion except on grounds of public policy, public security and public health;
- Coordination of social security which includes four key principles; the individual can only be affiliated and paying into one social security system in one Member State at a time; the individual is entitled to non-discrimination with own nationals as regards social security, he or she has the right to aggregation of contributions made in different Member States in order to calculate benefits and the right to export benefits anywhere in the EU;
- Procedural rights, including appeal rights.

This is an impressive catalogue of rights for a migrant worker, and there are even some subsidiary rights which I have not included here. The European Court of Justice has taken great care to ensure that migrant workers are entitled to enjoy their rights fully and interprets all of the exceptions to the right of free movement and its corollaries narrowly. Not only does the migrant worker benefit from a wide right of non-discrimination with own nationals so as to get the best possible situation, but he or she also enjoys substantive rights whether or not those are accorded to the nationals of the host state such as a wide family reunification right which exceeds that available to own nationals in some Member States such as the UK

or the Netherlands. The right to coordination of social security is also very important for the migrant worker who pays social contributions in a state but may have little possibility of ever accessing the benefits of those contributions. Here the rights of aggregation and export are critical. When states make the enjoyment of social benefits dependent on continuing residence in the state then curtail the permission to reside to the migrant worker the result is that the worker can never aspire to enjoying the rights for which he or she has paid.

How does this rosy picture of workers' rights engage with asylum seekers and refugees? Here the glass darkens substantially. Protocol 29 to the Amsterdam Treaty 1999 which amended the EC Treaty provides that any application for asylum made by a national of one Member State in the territory of another may be taken into consideration or declared admissible only if the Member State of origin is derogating from fundamental human rights under the European Convention of Human Rights, if the Member State is being censured for human rights abuse, or if the Member State unilaterally determines to do so. Thus while workers from other Member States are welcomed and provided many rights of work, residence etc. person fleeing persecution in one Member State to another are to be excluded from the asylum system unless exceptional circumstances apply.

The hostility of the EU to asylum seekers does not end there. While EU national asylum seekers are virtually excluded from protection, they can normally rely on their citizenship to enjoy de facto protection under the guise of workers. Their generous regulation on social security (1408/71 now being replaced by 883/2004) while including in its personal scope refugees, in fact excludes them as, according to the European Court of Justice, they must have been affiliated to the social security systems of one than one Member State to come within the personal scope of the regulation². As they do not have free movement rights they cannot move to seek work in any other Member State than the one where they are resident and thus the apparent inclusion in fact constitutes exclusion. In 2003, a regulation was adopted – 859/2003 – which extends the EU system of coordination of social security to third country nationals who are legally resident. It does not, however, change the rule that the individual must have been affiliated to more than one EU social security system to enjoy the benefit of the system. Of course for refugees the key benefit which they would seek is that of equal treatment with own nationals.

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Third Country National Workers in the EU

In 1999 competence or responsibility was given to the EU to adopt binding legislation in the field of immigration and asylum. Three Member States specifically opted out of the new system – Denmark in full, and Ireland and the UK on a case by case basis. In fact, Ireland and the UK have opted into the binding legislation on asylum and irregular migration and out of everything else. One of the first measures adopted in the field of immigration was a Directive on third country nationals who are long term residents in the EU (2003/109). This directive had to be transposed into the national law of the Member States by 23 January 2006. At the time of writing not all have succeeded.

The directive applies to third country nationals who have resided lawfully in a Member State for five years and provides them with an EU status of long term resident. The individual must fulfil two other requirements besides the length of residence – he or she must have stable and regular resources to maintain him or herself and any dependents and sickness insurance. Member States are permitted to require a third country national to comply with integration conditions in accordance with national law³. Students benefit from inclusion in the directive but must complete ten years residence rather than five.

Certain categories of third country nationals are excluded, such as posted workers, diplomats but also refugees or anyone whose residence is based on a claim for international protection. While the European Commission has frequently confirmed that it is planning to produce a proposal for a directive on refugees' rights of movement nothing has happened and the deadline has constantly been shifted into the future.

Under the directive, third country national workers who acquire the status of long term resident do so as a matter of right not discretion by the Member State. Once they have the status (and the five years residence does not run from the entry into force of the directive but applies to any period of five years residence which is continuous and complete at the date of application) the individual acquires the following rights based on equal treatment with own nationals of the Member State:

- Access to employment and self employment outside the public service exception as for EU nationals;
- Education and vocational training including access to study grants;
- Recognition of professional diplomas, certificates and other qualifications in accordance with national procedures;

³ This requirement is much discussed in the literature see for instance S Boelaert-Suominen 'Non EU National and Council Directive 2003/109 on the Status of Third-Country Nationals who are long term residents: five paces forward and possibly three paces back' CMLRev 42(1011-1052) 2005.

- Social security, social assistance and social protection;
- Access to goods and services including housing;
- Freedom of association and trade union rights;
- Free access to the territory of the state;
- Security of residence and protection against expulsion except on grounds of public policy or public security;
- Procedural rights including appeal rights.

The individual also acquires the right to move to and reside in any other Member State to work or exercise some other economic activity, study or for other purposes. However, Member States can delay the acquisition of the right to work for a maximum of 12 months after the individual takes up residence in the second Member State. Also, the second Member State can require integration measures but only if the individual was not so required in the first Member State. Provision is made for the individual to acquire the same strong status in the second Member State as it is gradually lost in the first Member State.

Among the rights missing from the third country nationals directive which are of key importance to EU migrant workers is, of course, family reunification. This is dealt with in another piece of legislation – Directive 2003/86 – on the right to family reunification. This directive does apply to refugees as well as other third country nationals. It does not apply to nationals of the Member States. Those migrant workers enjoy wider rights of family reunification as set out above, while nationals of a Member State who have not exercised their right of free movement for economic activities remain subject to the national legislation of their Member State. Regarding persons with international protection, this directive applies only to refugees, not to asylum seekers no matter how long they have been waiting for a decision nor to those permitted to reside on the basis of temporary protection (my colleague Professor Groenendijk will be discussing the position of these persons under the directive relevant to them). Also excluded are persons granted subsidiary protection, that is anything short of full refugee status.

The right to family reunification for third country nationals is substantially less generous than that granted to EU national migrants. The group of family members with a right to family reunification is limited to spouses and minor, unmarried children. Member States may, if they wish include a wider group of family members including unmarried partners. The right is subject to a maintenance, accommodation and sickness insurance requirement. Further, Member States may place waiting periods of up to two years on the exercise of the right with an exceptional possible extension to three years. Once admitted the family members are entitled to educa-

tion, employment and self employment and vocational guidance on the same basis as the sponsor, though access to employment can be delayed for twelve months. After five years residence the family members gain an independent residence right and protection against expulsion in the event of the death of the sponsor or divorce.

For refugees the situation is slightly less rigorous. While the family relationships must predate the entry of the refugee to the EU Member State, there is no exceptional limitation regarding children over 12 (where Member States are entitled to apply integration conditions if they choose). Refugee children are entitled to be joined by their parents or legal guardian. Further, refugees are not required to provide evidence of stable resources, sickness insurance or accommodation for their family members (though Member States can demand this if the application is not made within three months of the individual being recognised as a refugee). Similarly, waiting periods cannot be applied to refugees and Member States are obliged to take into account other evidence than official documents to prove the family relationship where the documents are lacking.

The position of third country national workers in the Member States has been consolidated and as regards some Member States at least the situation is better now than it was prior to 1999. However, there remains a divide between the rights of migrant workers who are nationals of a Member State and those who are third country nationals. Refugees are generally the least favoured group, the most likely to be excluded for one reason or another from the scope of measures. They only fare better as regards family reunification than other third country nationals and in that case they must act quickly to benefit from the lowered requirements to have their family members join them.

Prospects for the Future

So far, the EU has not accommodated its refugees well within its legislation as regards their rights as workers. While this may be less serious as regards nationals of the Member States, many of whom may have been refugees in other Member States at one time or another, this is grave as regards third country national refugees. The Commission announced that it would be putting forward a proposal for a directive on long term resident status for refugees and persons with subsidiary protection but this has yet to see the light of day.

Refugees and persons with subsidiary protection in a Member State are excluded from Directive 2004/114 on the admission of third country national students, pupils and volunteers which must be transposed into the

national legislation of the Member States by 12 January 2007. This means that they will not enjoy the right to mobility as students which the directive provides for other third country nationals (though long term resident third country nationals already enjoy a higher level of education mobility rights than this directive includes). Directive 2005/71 provides a framework for the admission of third country national researchers to work in the EU. Applicants for international protection or enjoying temporary protection are again excluded from its scope though this time there is no express exclusion of recognised refugees in the Member States. It would be valuable to include recognised refugees expressly not least as this directive not only provides for the conditions for admission but also guarantees equal treatment with own nationals as regards pay and working conditions, including social security and tax benefits. One can only hope that such rights will be included in the directive on long term resident refugees when and if it is published.

Regulation 562/2006 provides a Border Code for the EU (except of course the opted out Member States). Under this regulation, which must be applied in the Member States by 13 October 2006, EU border may only be crossed at specified places subject to sanction. The only exception is a weakly worded statement regarding "international obligations" (article 3(3)). To cross the border a third country national must be in possession of a visa if required. Under Regulation 539/2001 which sets out the requirements as to who requires a visa to travel across an external frontier, article 3 provides that without prejudice to the European agreement on abolition of visas for refugees and stateless persons, nonetheless, refugees require a visa if the country in which they reside and which issued their travel documents is on the mandatory visa list and are exempt if it is not.

The Commission has now proposed a regulation for a Community Code on Short Stay Visas (COM(2006) 403). Once this measure is discussed, amended and adopted it will determine how short stay visas are issued to third country nationals seeking to come to any Member State (except those which are opted out). The rules in the regulation will apply in the Member States. The proposal includes some very welcome measures such as a right of review against the refusal of a visa and clear grounds on which visas should be issued or refused. In general, if the EU institutions adopt the text as proposed by the Commission the issuing of short stay visas to third country nationals is likely to improve though there are some very worrying provisions regarding the collection, storage, use and deletion of biometric and other data. However, there is not a lot of good news for refugees and asylum seekers in the proposal. The term refugee appears only once and that is in the explanatory statement where the Commission advises the reader that the concept of a third country national to whom

the regulation applies includes refugees (recognised in a third state). Asylum appears only in the visa application form in the declaration by the individual that he or she accepts the use of his or her data (including finger prints) to be used by the Member States' immigration and asylum authorities. In general there does not seem to be a favourable inclusion of person seeking international protection in either document.

A further aspect of the EU which needs to be born in mind in this consideration is its dynamism. It seems clear now that two new Member States will join the EU on 1 January 2007 – Bulgaria and Romania. Among the states which are officially candidates or treated as candidates are Turkey, Croatia and Macedonia. The Commissioner in charge of the area of freedom, security and justice has indicated that it is likely that in time the whole of the Western Balkans will be admitted to the EU. Thus countries which in the fairly recent past have been refugee producing countries have and will continue to be transformed into Member States. Not only does this change the shape of the EU and the reach of its law, but it also changes the status of those who are already within the EU and who have the nationality of the states joining. While this may be to the advantage of some – for instance irregularly residing Bulgarians and Romanians in other Member States will have the opportunity to regularise their status immediately if they are, for instance, self employed or students - others may find themselves at a disadvantage – for instance Romanians who have completed five years residence in a Member State and thus qualify under the long term resident third country national directive to move and work in another Member State – and will now become citizens of the Union though subject to transitional restrictions on free movement of workers which will not permit them to move to work in another Member State for up to seven years after accession.

The key to the intersection of workers' rights and refugees in EU law, however, is the rapid adoption of a measure to provide equality of access to work and working conditions for refugees and persons enjoying international protection in the Member States. It is most unfortunate that notwithstanding the provisions of the Geneva Convention 1951 and its protocol on gainful employment and welfare (articles 17 – 24), Member States have now established a system where refugees are treated less favourable than other third country nationals and very much less favourably than migrant workers who have the nationality of a Member State.

*Elsbeth Guild,
Professor of European Migration Law, Radboud University Nijmegen,
Partner, Kingsley Napley, London.*

HUMAN RIGHTS: THE REFUGEE CONVENTION AS A BLUEPRINT FOR COMPLEMENTARY PROTECTION STATUS

Dr. Jane McAdam

A. INTRODUCTION

Since coming into force in 1954, the Refugee Convention¹ has been the central international instrument on refugee status, supplemented by the 1967 Protocol² which extended its temporal and (with respect to some States) geographical application. In the half-century since the Convention's inception, international human rights law has evolved as a sophisticated system of rights and duties between the individual and the State, which has affected traditional notions of State sovereignty and behaviour in an unprecedented manner.³ Yet, despite the influence of 'international human rights law' in regulating State behaviour, there has been a general reluctance by States, academics and institutions to view human rights law, refugee law and humanitarian law as branches of an interconnected, holistic regime,⁴ particularly when it comes to triggering eligibility for protection beyond the scope of article 1A(2) of the Refugee Convention.

Complementary protection is largely about this intersection. It is a relatively new term in the Australian context,⁵ but is a feature of most other western protection regimes. It describes protection granted by States to individuals on the basis of international protection needs falling outside the 1951 Convention framework. It may be based on human rights treaties, such as the prohibition on return to torture in article 3 of the CAT⁶ and to torture, inhuman or degrading treatment or punishment in article 7 of the ICCPR,⁷ or on more general humanitarian principles, such as providing

1 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

2 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

3 eg Human Rights Act 1998 c 42 (UK).

4 It is refreshing to note, however, that the 2006 International Law Association (British Branch) conference considered these issues under the general conference theme: 'Tower of Babel: International Law in the 21st Century-Coherent or Compartmentalised?'.
5 Australia has no formal system of complementary protection. The only means for an asylum seeker to have a non-Con-
vention protection claim considered in Australia is if, following a negative primary decision and an unsuccessful appeal to
the Refugee Review Tribunal, he or she seeks to invoke the non-compellable, non-delegable and non-reviewable discretion
of the Minister for Immigration and Multicultural and Indigenous Affairs under section 417 of the Migration Act 1958 (Cth).
For a critique of this section and suggested alternatives to it: Senate Select Committee on Ministerial Discretion in Migration
Matters: Senate Select Committee on Ministerial Discretion in Migration Matters Report (Commonwealth of Australia
March 2004)

6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December
1984, entered into force 26 June 1987) 1465 UNTS 85.

7 International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171.

assistance to persons fleeing from generalized violence.⁸ Importantly, complementary protection derives from legal obligations preventing return, rather than from compassionate reasons or practical obstacles to removal.

For many years, many States have offered some kind of protection to people they have variously described as 'de facto refugees', 'B status refugees', 'OAU and Cartagena-type refugees' and 'humanitarian refugees'. But one of the chief problems has been the ad hoc nature of the protection offered to these non-Convention refugees, and the lack of a clear status for those permitted to remain. These regimes have varied from granting them identical rights to Convention refugees, to nothing more than a tolerated status with protection from *refoulement* but little more. Protection has thus been precarious; posited as a purely humanitarian gesture dependent on the goodwill of particular States, and the political inclinations of their populace.

The drastic effects of being tolerated but not granted a proper status are well-documented.⁹ It is therefore essential to secure a legal status for anyone whom a State recognizes is in need of international protection. Although the last decade has seen increasing resentment towards refugees as governments around the world have stigmatized asylum seekers as economic migrants, using them as scapegoats for unemployment, social unrest and even terrorism, there has simultaneously been a trend to examine the legal foundations on which States' obligation to protect might rest. Accordingly, the once ad hoc systems of complementary protection have started to find their proper foothold in international and regional human rights law.

For example, in 1999, the United States enacted laws implementing its obligations under article 3 of the CAT, granting protection to people who are 'more likely than not' to be tortured if returned to a particular country.¹⁰ In 2001, Canada decided to grant the same protection it gives to refugees, which is permanent residence, to people fleeing torture, as well as to those facing a personal risk to life or a risk of cruel and unusual treatment or punishment in certain defined circumstances. Most recently, the European Union in April 2004 adopted the first binding, supranational instrument on complementary protection, known as the Qualification Directive. This implements the EU States' protection obligations under international law and the European Convention on Human Rights. By contrast, Australia is notable for its lack of any comparable system.

While States have examined their obligations under international law not to deport people to certain conditions, they have so far been less diligent in

⁸ See D Perluss and JF Hartman 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Virginia J of Intl L 551; GS Goodwin-Gill 'Non-Refoulement and the New Asylum Seekers' (1986) 26 Virginia J of Intl L 897; cf K Hailbronner 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1986) 26 Virginia J of Intl L 857.

⁹ Ahmed v Austria (1997) 24 EHRR 278.

¹⁰ See US Citizenship and Immigration Services 'History of the United States Asylum Officer Corps' <<http://uscis.gov/graphics/services/asylum/history.htm#torture>> (16 November 2005). Relevant legislation is listed there.

looking to international law to define what legal status those people should be given. Instead, political rather than legal arguments have been used to defend the creation of protection hierarchies. For example, in the EU, the Qualification Directive says that States must not remove people facing a real risk of the death penalty or execution, torture or inhuman or degrading treatment or punishment in the country of origin, or a serious and individual threat to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict.¹¹ On these bases, people can claim protection. However, although permitted to stay, these people do not get the same rights as Convention refugees. Instead, they get 'subsidiary protection': lesser entitlements with respect to family unity; access to and length of residence permits; eligibility for travel documents; access to employment; social welfare entitlements; health care entitlements; access to integration facilities; and rights of accompanying family members.

Although an EXCOM Conclusion on complementary protection was adopted in October 2005, it does not explicitly address the question of the status of beneficiaries. Instead, it contains important but relatively elusive statements calling upon States to 'provide for the highest degree stability and certainty by ensuring the human rights and fundamental freedoms of [beneficiaries of complementary protection] without discrimination',¹² and affirming that complementary protection should be applied 'in a manner that strengthens, rather than undermines, the existing international refugee protection regime'.¹³ Similarly, it emphasizes the importance of applying and developing international protection in a manner that avoids the creation or continuation of protection gaps.¹⁴

This paper seeks to establish the fundamental conceptual connections between international refugee law and human rights law in order to argue that under international law, beneficiaries of protection, whether as Convention refugees or otherwise, are entitled to an identical status.

B. THE INADEQUACY OF NON-REFOULEMENT + HUMAN RIGHTS LAW ALONE

Why do I think it is necessary to find a way of giving Convention status to beneficiaries of complementary protection? After all, there is a whole body of universal human rights law which applies to everyone, irrespective of their nationality or formal legal status.¹⁵

11 Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

12 ExCom Conclusion No 103 (LVI) 'The Provision of International Protection including through Complementary Forms of Protection' (2005) para (n).

13 *ibid* para (k).

14 *ibid* para (s).

15 Although certain exceptions exist with respect to political rights reserved for citizens (art 25 ICCPR); see also arts 12(3), 13. See Human Rights Committee 'General Comment 15: The Position of Aliens under the Covenant' (11 April 1986), reinforced by Human Rights Committee 'General Comment 31: The Nature of the General Legal Obligation Imposed on States

While that is true, in practice, characteristics like nationality or formal legal status can significantly affect the extent of rights an individual is actually accorded. In reality, States do differentiate between the rights of citizens and the rights of aliens (and even between different categories of aliens), promising this on their sovereign right to determine who remains in their territories and under what conditions. While the rights set out in the Refugee Convention are not inherently superior to those in the universal human rights treaties, being largely based on the latter,¹⁶ they are applied in a different way. Whereas a grant of Convention refugee status entitles the recipient to the full gamut of Convention rights, no comparable status arises from recognition of an individual's protection need under a human rights instrument. The Refugee Convention alone creates a status recognized in domestic law.¹⁷

Thus, although I would like to be able to point to human rights law as offering a complementary and, in part, more generous set of rights than the Refugee Convention, the generality and vagueness of those rights, combined with a lack of implementing mechanisms at the domestic level, make them in practice comparatively weak. Although the universal human rights instruments grant a comprehensive set of rights to all persons within a State's jurisdiction,¹⁸ international human rights law is strong on principle but weak on delivery.¹⁹ There is therefore a gap between the theory of human rights and the ability to enjoy those rights.²⁰

It is for this reason that I seek to demonstrate, through historical analysis, why the status set out in the Refugee Convention should attach to all those whom the principle of non-refoulement protects. This does not have to be viewed as an attempt to broaden the scope of article 1A(2), but rather as recognition that the widening of non-refoulement under customary international law requires a concomitant consideration of the status which its beneficiaries acquire.

Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [10]; Committee on the Elimination of Racial Discrimination 'General Recommendation XI on Non-Citizens (Art 1)' (19 March 1993) in UN Doc A/46/18.

16 Many of the provisions of the Convention were based on the UDHR and the draft ICCPR and ICESCR: see nn 26 and 27 below.

17 H Lambert 'Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue' (1999) 48 *International and Comparative Law Quarterly* 515, 519; Ahmed v Austria (1997) 24 EHRR 278; BB v France App No 30930/96 (9 March 1998). It is not surprising that treaties such as the CAT do not articulate a resultant status for those who benefit from human rights-based non-refoulement. For example, the purpose of the CAT was not to enumerate the rights of persons protected from refoulement, but rather to strengthen the existing prohibition of torture and other cruel, inhuman or degrading treatment or punishment under international law through a number of supportive measures. See JH Burgers and H Danelius *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers Dordrecht 1988). Hathaway argues that refugee rights consist of 'an amalgam of principles drawn from both refugee law and the [human rights] Covenants', and that refugee 'status' should now be understood as comprising a combination of these: JC Hathaway *The Rights of Refugees under International Law* (CUP Cambridge 2005) 9. Certainly, where this is the case, that more comprehensive status should also be accorded to beneficiaries of complementary protection for the same reasons as advanced above.

18 With the exception of certain rights granted to citizens only: (n15).

19 Thanks to Prof Chris McCrudden (Lincoln College, University of Oxford) for this description.

20 UNHCR 'Note on International Protection' A/AC.96/898 (3 July 1998) [45].

C. THE REFUGEE CONVENTION AS A HUMAN RIGHTS TREATY²¹

In 1947, the Commission on Human Rights adopted a resolution that 'early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any Government, in particular the acquisition of nationality, as regards their legal status and social protection and their documentation.'²² The Ad Hoc Committee on Statelessness and Related Problems was asked by ECOSOC to draft a binding legal instrument to implement articles 14 and 15 of the Universal Declaration of Human Rights,²³ firmly cementing the Convention's foundations in human rights law. Many of its substantive provisions were based on principles of the UDHR²⁴ and the embryonic ICCPR and ICESCR, known then as the draft Covenant on Human Rights.²⁵

The Convention's Preamble states its aim as assuring 'refugees the widest possible exercise of ... fundamental rights and freedoms'. The Convention was to establish practical but universal standards²⁶ for the rights of refugees that went beyond the lowest common denominator, 'since [it was said] a convention would hardly be useful if it contained only the minimum acceptable to everyone.'²⁷ Early General Assembly resolutions support its underlying human rights basis, with an emphasis on assisting the most needy,²⁸ affirming basic principles relating to solutions,²⁹ and recommending increased protection activities.³⁰

The resulting Refugee Convention is a specialist human rights treaty that reflects the tenets of the UDHR, ICCPR and ICESCR in such provisions as the acquisition of property, the right to work, housing, public education, public relief, labour legislation and social security, and freedom of movement.³¹ Moreover, it reinforces States' protection of refugees as an

21 IC Jackson *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers The Hague 1999); UNHCR 'Note on International Protection' UN Doc A/AC.96/975 (2 July 2003) [49]–[52] emphasizes relevance of human rights law to refugee issues.

22 Commission on Human Rights Report to ECOSOC on the 2nd Session of the Commission Held at Geneva from 2 to 17 December 1947 (1948) UN Doc E/600 [46], in P Weis 'Human Rights and Refugees' (1971) 1 *Israel Yearbook on HR* 35, 37.

23 Ad Hoc Committee on Statelessness and Related Problems (AHC) First Session 'Summary Record of the 1st Meeting' (NY 16 January 1950) UN Doc E/AC.32/SR.1 (23 January 1950) [4] (Secretariat).

24 Comments on the Draft Convention and Protocol: General Observations' Annex II to AHC 'Draft Report of the Ad Hoc Committee on Statelessness and Related Problems' (16 January–February 1950) UN Doc E/AC.32/L.38 (15 February 1950) 36 (art 3 non-discrimination), 46 (art 26 education); AHC 'Refugees and Stateless Persons: Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems' (Document E/1618) UN Doc E/AC.32/L.40 (10 August 1950) 31 (France on UDHR art 29(1)).

25 Comments on the Draft Convention and Protocol: General Observations' (n24) 58; see UN Doc E/1572, 12 (art 32 (then art 27) expulsion).

26 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (CP) 'Summary Record of the 2nd Meeting' (Geneva 2 July 1951) UN Doc A/CONF.2/SR.2 (20 July 1951) 18 (High Commissioner); CP 'Summary Record of the 3rd Meeting' (3 July 1951) UN Doc A/CONF.2/SR.3 (19 November 1951) 10 (France).

27 AHC First Session 'Summary Record of the 25th Meeting' (NY 10 February 1950) UN Doc E/AC.32/SR.25 (17 February 1950) [68].

28 UNGA Res 639 (VI) of 20 December 1952; UNGA Res 728 (VIII) of 23 October 1953.

29 UNGA Res 1166 (XII) of 26 November 1957; ECOSOC Res 686 (XXVI) B of 21 July 1958.

30 UNGA Res 1284 (XIII) of 5 December 1958 [1], in GS Goodwin-Gill 'The Language of Protection' (1989) 1 *IJRL* 6, 14.

31 J Patnogie 'International Protection of Refugees in Armed Conflicts' (reprinted by UNHCR Protection Division from *Annales de Droit International Médical* (July 1981)) section 4.

international legal duty, arising from article 14 of the UDHR and embodied in binding form by the principle of non-refoulement in article 33 of the Convention. As one commentator remarks: 'The framers' unambiguous reference in the Preamble of the 1951 Convention to the Universal Declaration of Human Rights indicates a desire for the refugee definition to evolve in tandem with human rights principles.'³² Lauterpacht and Bethlehem stress that the law on human rights that has emerged since the Convention's conclusion is 'an essential part of [its] framework ... that must ... be taken into account for purposes of interpretation.'³³ UNHCR has also emphasized that:

The human rights base of the Convention roots it quite directly in the broader framework of human rights instruments of which it is an integral part, albeit with a very particular focus. The various human rights treaty monitoring bodies and the jurisprudence developed by regional bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights are an important complement in this regard, not least since they recognize that refugees and asylum-seekers benefit both from specific Convention-based protection and from the range of general human rights protections as they apply to all people, regardless of status.³⁴

In so far as there is no *legal* justification for distinguishing between the status granted to Convention or extra-Convention refugees,³⁵ it makes sense that the Convention, as a 'Magna Carta for the persecuted',³⁶ applies to both. I argue that since the Convention is itself a specialist human rights instrument, the protection conceptualization it embodies is necessarily extended by developments in human rights law, rather than via the conventional means of a protocol. It therefore acts as a form of *lex specialis* which applies to persons encompassed by that extended concept of protection, that is, by complementary protection.

I now turn to two elements of the Convention regime that support the application of Convention refugee status to other groups of protected persons: article 1A(1) and Recommendation E of the Final Act.

32 MR von Sternberg *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (Martinus Nijhoff The Hague 2002) 314.

33 E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP Cambridge 2003) [75].

34 UNHCR 'Note on International Protection' UN Doc A/AC.96/951 (13 September 2001) [4].

35 UNHCR's Observations on the European Commission's Proposal for a Council 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' 14109/01 ASILE 54 (16 November 2001) [46]; UNHCR 'Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive' (March 2004) 2.

36 CP 'Summary Record of the 19th Meeting' (Geneva 13 July 1951) UN Doc A/CONF.2/SR.19 (26 November 1951) 27 (International Association of Penal Law).

1. 'Humanitarian Refugees': Article 1A(1)

Analysis of the Convention's conceptualization of 'protection' invariably focuses on the refugee definition in article 1A(2), since an individual must satisfy its requirements to trigger Convention status. Article 1A(1) extended the benefits of the 1951 Convention to any person covered by pre-1951 refugee instruments—predominantly victims of armed conflict or communal violence. This provision is generally overlooked as an historical remnant. However, though eligibility under this provision is retrospective, the fact that the Convention recognizes all previous refugee definitions as giving rise to Convention status is significant. First, the incorporation of these definitions necessarily broadens the Convention's conceptual basis of protection, making it difficult to sustain the argument that, conceptually, the Convention does not support the grant of its international legal status to persons fleeing situations of armed conflict or communal violence. This has particular significance for persons seeking complementary protection on the basis of civil war, and challenges the EU's current approach of creating a new and separate protection status for such persons.

Secondly, even though an applicant today cannot invoke an article 1A(1) instrument as the basis of an asylum claim, the fact that Convention status flows from the definitions contained in those instruments, which embody what Melander has termed the 'humanitarian refugee' concept,³⁷ makes it more difficult to justify differential treatment for persons seeking complementary protection on similar grounds. Not only has State practice continued to recognize both 'humanitarian' and Convention refugees, but that the dominant legal refugee instrument implicitly retains the humanitarian concept of protection within its definitional provision.

Thus, while the text of article 1A(1) does not support an argument that the provision itself gives rise to additional grounds for claiming protection under the Convention, its implicit incorporation of earlier legal definitions of 'refugee' (and the concepts of protection which those definitions embody) supports the view that the Convention tolerates a broader protection concept than article 1A(2) might suggest, and that Convention status is the appropriate status for persons in need of international protection for humanitarian reasons.

37 G Melander 'Refugee Policy Options—Protection or Assistance' in G Rystad (ed) *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (Lund University Press Lund 1990) 146–47.

2. Recommendation E of the Final Act

Recommendation E of the Final Act of the Conference of Plenipotentiaries, which is appended to the Refugee Convention, expresses 'the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees, and who would not be covered by the terms of the Convention, the treatment for which it provides.' This was proposed by the UK delegation because it felt that a general recommendation was required to cover those classes of refugees who were altogether outside the scope of article 1A(2) of the Convention.³⁸

Recommendation E reveals that the drafters of the 1951 Convention to some extent 'envisaged a complementary protection system',³⁹ but one which *extended* the operative provisions of the Convention to additional classes of protected persons. It does not suggest that a separate system of protection would be necessary. Read in this way, the Recommendation is a most useful guiding principle in the complementary protection debate. Though aspirational rather than asserting a firm legal duty, the Recommendation helps to counter claims that the Convention is too restrictive to absorb the additional groups of refugees covered by complementary protection sources, or that the Convention was not intended to apply to additional groups.

Recommendation E is important in two respects. First, with respect to eligibility, it encourages the extension of protection to individuals not encompassed by the Convention definition of a refugee. Secondly, with respect to substantive rights, it envisages the application of the Convention framework to persons covered by extended eligibility, tacitly recognizing that the source of the harm causing flight is irrelevant for the purposes of status. This is in fact the position adopted in the 1969 OAU Convention (Organization of African Unity Refugee Convention), which, as a regional complement to the 1951 Convention, applies Convention rights to persons fleeing external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of the country of origin.⁴⁰ This is very significant in light of EU developments, where subsidiary protection status instead results in a lower form of rights than Convention status. Recommendation E supports the argument that there is no legal justification for creating two levels of rights simply by distinguishing between the source of harm (or the legal basis for protection).

38 CP 'Summary Record of the 35th Meeting' (Geneva 25 July 1951) UN Doc A/CONF.2/SR.35 (3 December 1951) 44.

39 H Storey and others 'Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention?' (Joint ILPA/IARLJ Symposium 6 December 1999) (copy with author) 4.

40 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 art 1(2).

The Hungarian refugee crisis of 1956 provided the first real challenge to the Convention's definition of a 'refugee' in article 1A(2), and reflects the first instance of widespread Convention-related complementary protection. An internal UNHCR memo in 1957 revealed that:

On the whole ... no Government has, as far as we know, raised any objection to the application of the Convention to Hungarian refugees who otherwise fulfill the conditions of Article 1 of the Convention.⁴¹

D. 'COMPLEMENTARY' VERSUS 'SUBSIDIARY': A FINAL WORD

In December 2001, the parties to the Refugee Convention adopted a Declaration '[r]ecognizing the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope'.⁴² UNHCR has repeatedly called for States to respect the primacy of the Convention,⁴³ as have successive General Assembly resolutions.⁴⁴

Creating a protection hierarchy, as the EU has done in the Qualification Directive, reflects a very literal interpretation of respecting the Convention's primacy. Simply entrenching the Convention as the pinnacle of protection does not engage with the underlying protection principles it reflects, and may in fact undermine its primacy by siphoning refugees into complementary categories. Conceptually, the affirmation of the Convention's primacy is, in effect, a commitment to respect its protection principles and refrain from diluting its scope by developing the law *outside* its boundaries. The Convention's primacy would be better observed if it were recognized as the source of international protection status for all persons protected by *non-refoulement*.

To provide maximum protection, international human rights treaties must not be viewed as discrete, unrelated documents, but as interconnected instruments which together constitute the international obligations to which States have agreed. In effect, therefore, this paper argues for a reconsideration of international law as a holistic and integrated system. Compartmentalizing international law into parallel but autonomous and

41 Memo from P Weis to Mr J Mersch, UNHCR Branch Office in Luxembourg 'Application of 1951 Convention to Hungarian Refugees' (28 May 1957) Ref.G.XV.7/1/8, 6/1/HUN [3], in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

42 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (Geneva 13 December 2001) UN Doc HCR/MMSP/2001/09 (16 January 2002) <www.unhcr.ch/cgi-bin/texis/vtx/protect> (18 February 2003) Preamble [2], [4].

43 eg EXCOM 'Global Consultations on International Protection: Report of the Meetings within the Framework of the Standing Committee: Report of the First Meeting in the Third Track (8–9 March 2001) UN Doc A/AC.96/961 (27 June 2002) [14].

44 UNGA Res 49/169 of 23 December 1994 [5]; UNGA Res 50/152 of 21 December 1995 [5] (emphasis added).

non-intersecting branches leads not only to stultification, but to ineffectual implementation of the interlocking duties which States have undertaken to respect. As one commentator has poignantly observed:

In the past forty years the rich first world countries have received so many *de facto* refugees that it would not have made any difference if they had agreed to an expanded international definition In fact, it would here have helped clarify and identify those circumstances which were insufficiently clear-cut to merit recognition as refugee-like situations.⁴⁵

By retaining the political discretion to determine to whom, and when, protection will be granted, States have in fact complicated the protection regime. Diverging statuses, different eligibility thresholds and variations from State-to-State have created incentives for asylum-seekers to forum-shop and appeal decisions granting subsidiary status. It is arguably in States' own interests to grant a single legal status based on the Refugee Convention to all people who benefit from the principle of *non-refoulement*. In this way, States can acknowledge complementary protection as the natural 'extraterritorial' response to their commitment to uphold and promote respect for human rights. A creative use of human rights law can thus enhance the legal status of refugees and asylum-seekers,⁴⁶ basing international protection on the individual's *need*, rather than on which treaty provides the legal source of the obligation.

*Dr. Jane McAdam,
BA (Hons) LLB (Hons) (Syd) DPhil (Oxon); Senior Lecturer; Faculty of Law,
University of NSW; j.mcadam@unsw.edu.au. At the time when this paper was
presented, the author was a member of the Faculty of Law, University of Sydney.
A longer version of this paper is forthcoming in an edited collection by Hart
Publishing, Oxford, 2008.*

⁴⁵ P Nobel 'Blurred Vision in the Rich World and Violations of Human Rights—A Critical Assessment of the Human Rights and Refugee Linkage' (1992) 91 Bulletin of HR 74, 80.

⁴⁶ GS Goodwin-Gill 'The Language of Protection' (1989) 1 IJRL 6, 16.

INTERNATIONAL MIGRATION: SECURITY CONCERNS AND HUMAN RIGHTS STANDARDS¹

Prof. François Crépeau

Introduction

Human history has been marked indelibly by migration. Exclusionary discourses that assert the homogeneity of nation states might seek to deny it, but population heterogeneity has always been the norm. The resulting diversity has enriched numerous societies, and host countries have benefited immeasurably from the contributions made by immigrants and refugees.

Constitutional, regional and universal standards dedicated to the protection and promotion of rights and freedoms of all in general, and of migrants in particular, are more sophisticated, and implementation mechanisms are more effective than before. These instruments have been developed to impose on states duties toward individuals based, not on their nationality, but on their humanity.

But recently, states whose sovereignty is affected by many aspects of globalization in the economic and social fields, have tried to regain political ground by emphasizing their traditional mission, that of national security. In the past two decades, the phenomenon of the “securitization” of the public sphere has emerged. The tightening of migration laws and policies in many of the destination countries has led to a decrease in the legal opportunities for international migration, creating an environment that is very conducive to migrant smuggling and all other means of irregular migration. The events of 9/11 gave authorities more incentive to radically change migration policies and make them harsher toward unwanted migrants.

We are in a situation where, although international human rights law standards stress the fundamental rights of all individuals in the face of state action, states often attempt to define the individual rights of migrants more narrowly by emphasizing the non citizen legal status of such people. Thus, while the gap between “us” and “them” has been constantly reduced through the prism of the international human rights movement (implementing the human rights paradigm, which is *inclusive*), this gap has been widened by states in their continuing search to exercise migration controls

¹ This paper draws extensively from: CRÉPEAU, François, NAKACHE Delphine, “Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection”, (2006) *IRPP Choices* 12 (1). On line: <http://www.irpp.org/fr/index.htm>.

through a variety of ever more sophisticated means (based on the territorial sovereignty paradigm, which is *exclusive*).

Canada is facing this dilemma, as are all other Western countries. Both paradigms are simultaneously affecting all migrants. Canadian authorities feel the “pressure” of migration at the borders and have tried to prevent irregular migration with an array of deterrent and repressive measures.

How, then, is it possible to reconcile these two paradigms? One key objective in the attempt to reconcile, in law, the sovereignty and human rights paradigms is to recognize that the principle of territorial sovereignty cannot justify unlimited human rights violations based on nationality. This idea will drive our developments towards a conception of territorial sovereignty that is compatible with the mechanisms and structures of the international human rights regime.

The first part of this paper will explain the increasing protection of the human rights of migrants in Canadian and international law. The second part will demonstrate how, paradoxically, the rights of non citizens have been eroded in recent years through the enactment of a stricter migration regime in Canada. It will furthermore focus on the changes that have occurred under various security agendas, especially since 9/11.

Part I. Increased protection for the human rights of migrants in domestic and international law

A. THE PROTECTION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Human rights instruments have been developed to impose on states duties toward individuals based not on their nationality but on their humanity. They entitle non citizens to equality before the law, to a fair hearing before an independent and impartial tribunal in proceedings that affect their rights and obligations, and to an effective remedy to enforce their substantive rights under international conventions. Canadian standards provide non citizens with a high level of protection generally consistent with international human rights norms.

Since 1982, fundamental rights and freedoms have been set forth in the *Canadian Charter of Rights and Freedoms* (hereafter the *Charter*), providing an essential conceptual framework in asylum and migration issues, as government legislation, programs and policies have been tested against its standards. Section 1 of the *Charter* prescribes a duty to protect rights and freedoms of everyone, except for limitations foreseen by the law, which are

reasonable and justified in a free and democratic society. Until now, this test has been submitted to a strict interpretation in order to provide the largest scope of rights possible.

In the *Charter*, only sections 3 (right to vote and be elected), 6 (right to enter and remain in the country) and 23 (minority language educational rights) specifically protect citizens. All other rights, including the right to equality and to not be discriminated against on the basis of national origin (s. 15), should equally apply to all human beings under the purview of the *Charter*, and the Supreme Court has said that this means “every person physically present in Canada and by virtue of such presence amenable to Canadian law” (*Singh*, 1985).

According to Section 7, fundamental justice is owed to foreigners. The Supreme Court, in *Singh*, held that refugee claimants - that is, claimants who are neither citizens nor permanent residents of Canada - are entitled to claim the protection of section 7 of the *Charter*, which provides that everyone should enjoy security of the person. This encompasses “freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.” Specifically, *Singh* established that the assessment of a risk to the security of the person means an assessment of the threat to any of the three rights guaranteed to a refugee - that is, the right to status determination, the right to appeal a removal or deportation order and the right to protection against refoulement - and stressed that impairment of these rights would threaten security of the person, as they were “the avenues open to [the refugee claimant] under the Act to escape from [...] fear and persecution.” (*Singh*, 1985) The court then determined that the procedure used in Canada to decide a refugee claim did not comply with the principles of fundamental justice because it did not provide an adequate opportunity for claimants to state their case and to respond to contrary evidence. The *Singh* decision had a significant impact on refugee law in Canada, pushing the federal government to create the Immigration and Refugee Board of Canada (hereafter IRB) in 1989 in order to provide an oral hearing to eligible refugee claimants. Section 7 applies to “everyone,” and the court saw no reason to exclude refugee claimants from its scope. In essence, the Supreme Court of Canada embraced a theory of reciprocity of obligations and rights; that is, if asylum-seekers are to be subject to the full force of Canadian law, then they are logically entitled to benefit from Canadian standards of respect for human dignity. Since *Singh*, the Supreme Court has had occasion to examine the *Charter* rights of non citizens in a variety of immigration and refugee protection concerns. Section 15(1) of the *Charter* guarantees equality before and under the law, as well as the right to “equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical dis-

ability.” Canadian courts still struggle with section 15 and its interpretation. In *Andrews*, the Supreme Court initially took a broad view of the guarantee of section 15 as it applies to foreigners. The court there held that section 15 prohibits discrimination on the basis of the analogous ground of citizenship. The inference from *Andrews*, then, is that the institutional and procedural safeguards afforded to Canadian citizens should be made available to similarly situated non citizens. In fact, this has not really happened (*Andrews*, 1989).

In *Chiarelli*, the Supreme Court rejected the claim that the *Immigration Act* violated section 15 by authorizing the deportation of only non citizens. This does not mean, however, that the manner in which the decision to deport is taken can be arbitrary in any way (*Chiarelli*, 1992). In *Baker and Suresh*, the Supreme Court outlined the principles governing the content of the duty of fairness that applies in cases of a deportation order, including participatory rights, but the analysis never developed around the concept of equality before the law (*Baker*, 1999; *Suresh*, 2002). The *Andrews* test was revisited in the *Law* case and made more stringent, adding in particular a requirement that the discrimination must constitute a violation of human dignity. In the very few cases where the rights of non citizens have been at stake since *Law*, and even more since 9/11, the courts have taken a very positivist attitude and upheld quite systematically the distinctions made by the government or the legislature among citizens, permanent residents and foreign nationals. The courts found little violation of human dignity in the differentiated treatment of foreigners as foreigners (*Law*, 1999).

In conclusion, Canadian law contains valuable standards for non citizens in general and asylum-seekers in particular. However, each has limitations, and these limitations are exacerbated by the present immigration context, which is characterized by an emphasis on security and a narrower reading of the rights and interests of non citizens.

B. USING INTERNATIONAL LAW IN INTERPRETING DOMESTIC STANDARDS

The concept of using international human rights law as guidance in the interpretation of Canadian law standards has been accepted by the Supreme Court of Canada in its case law. Moreover, the enactment of the *Charter* has engaged the Canadian courts in an intense process of better defining and defending migrants’ human rights.

Given the prevailing dualist approach regarding the role of international law within Canada’s legal system, internalizing unimplemented international standards within Canadian law can be problematic. Over the years, however, the Supreme Court of Canada recognized the important role of

international law in interpreting the Constitution. The Supreme Court of Canada has articulated some important guiding principles, especially in migration matters. In fact, in Canada, the majority of the case law concerning the use of international human rights standards in domestic law seems to emerge from the administrative realm, and most of those administrative cases concern some aspect of immigration or refugee law. One of the reasons for this situation is that, traditionally, state authorities have dealt with foreigners with almost complete discretionary powers. In accordance with the principle that immigration is a privilege not a right, it was believed that foreigners had no right to oppose any decision affecting them made by competent authorities. With the advent of the constitutional protection of human rights and the recognition of international human rights law as a source of interpretation, however, this situation has changed considerably in Canada.

A good example of this trend can be seen in the way international law is used to interpret Canada's *Immigration and Refugee Protection Act* (hereafter the *IRPA*), which itself contains the definition of "refugee" and the exclusion provisions found in the 1951 Refugee Convention. It is not infrequent to see IRB decisions using human rights standards elaborated in international instruments in order to determine whether the claimant fears persecution.

Decisions from the Supreme Court confirm this trend. In *Pushpanathan*, the Supreme Court held that the "purpose" and "context" of the 1951 *UN Refugee Convention* are applicable in determining the meaning of an exclusion clause. Since the purpose of incorporating article 1F(c) of the 1951 *UN Refugee Convention* in the *IRPA* was to implement that convention, an interpretation consistent with Canada's obligations under that convention had to be adopted (*Pushpanatan*, 1998).

In *Baker*, the Supreme Court established that, although Canada had never incorporated the 1989 *UN Convention on the Rights of the Child* into domestic law, the immigration official exercising discretion in deportation cases was nevertheless bound to consider the "values" expressed in that convention, specifically the principle of "the best interests of the child" (*Baker*, 1999). *Baker* was of tremendous importance for administrative law, since it directed administrative decision makers to look to those values in conventional international human rights law that resonate with the fundamental values of Canadian society in order to identify the relevant considerations delimiting their discretionary decision-making powers.

In *Suresh*, a case decided after 9/11, the Supreme Court, recognizing that Canada has a legitimate interest in combating terrorism but is also committed to fundamental justice, decided that expelling a suspected terrorist to a country where he faced the risk of torture, violated the principle of

fundamental justice protected by section 7 of the *Charter* and confirmed the absolute prohibition of torture and the principle of non-refoulement “even where national security interests are at stake” (SCC, *Suresh*, 2002).

More recently, on post-9/11 measures relating to foreigners suspected of terrorist activities (e.g. a security certificate allowing for the indefinite detention of foreigners upon the issuance of a security certificate based on evidence that will never be disclosed to the foreigner concerned), the Supreme Court rejected the Government’s argument that foreigners could be submitted to treatments that would be considered utterly unacceptable if applied to nationals: « The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process [...] it entails the *right to know the case put against one*, and the *right to answer that case* » (*Char-kaoui*, 2007).

In conclusion, there are important judicial pronouncements on the domestic application of international human rights law standards. Although much depends on the particular circumstances of the case, we see from the Supreme Court’s decisions that the weight of international standards can be important. This is especially significant when trying to limit the discretionary nature of government’s decisions regarding foreigners who are suspected of terrorist activities.

C. AN INCREASING ROLE FOR INTERNATIONAL HUMAN RIGHTS LAW

Of all treaty bodies, the UN Committee against Torture (CAT) has to date been the most active in developing case law on behalf of rejected asylum seekers who, by bringing individual complaints, are looking to human rights treaties for alternative protection against deportation to their countries of origin: this puts political pressure on states not to send a person back to a place where s/he is likely to experience torture or cruel, inhuman or degrading treatment or punishment. The cases decided by the CAT have moved the law on refugee protection in a positive direction. Several countries, including Canada, have been involved in the jurisprudence of CAT. In a 1994 case, the CAT found that Canadian authorities had an obligation to refrain from forcibly returning Tahir Hussain Khan —a Kashmiri activist from Pakistan and a rejected asylum-seeker in Canada - to Pakistan (CAT, *Khan*, 1994). Similarly, in December 2004, hearing a complaint from a relative of a deserter officer of the Mexican army, whose application for refugee status in Canada had been rejected, the CAT found that the Canadian refugee determination system had been unable to correct an erroneous decision (CAT, *Falcon Rios*, 2004). The CAT puts the protection of the indivi-

dual ahead of the sovereign powers of the state. Unless the state disproves the applicant's evidence, the committee will favour protecting the human rights of the non citizen.

In March 2006 however, Canada refused to stay deportation to Iran of Mostafa Dadar, a former member of the Iranian Air Force under the Shah regime, who was convicted in Canada of aggravated assault and sentenced to eight years in prison and therefore deemed a danger to public order. The deportation of Dadar has been decided in spite of the CAT recommendation assessing that it would amount to a breach of Article 3 of the 1984 *UN Convention against Torture* (CAT, Dadar, 2005). Again, in March 2007, a Canadian civil servant decides that the Canadian decision rejecting refugee status is more credible than the conclusion of CAT on the issue of the risks of torture in case of return of the individual to the country of origin (*Falcon-Rios*, 2007)

Canada's refusal to abide by the CAT conclusions perfectly illustrates the tension between the individual rights and State's interests: when faced with security issues, States still believe that they can evade their human rights obligations.

Part II. The Canadian migration regime: An erosion of foreigners' rights

In dealing with security and immigration issues, Canada has taken a number of steps to reduce the rights and freedoms of non citizens. It has strengthened its control over non citizens through harsher immigration measures to police the external borders. This is true for all countries of the Global North and of many immigration countries of the Global South, although in different ways, since each country has a different legal, constitutional and international setting. *Preventive measures* are used to prevent irregular migrants from setting foot on the territory, while *deterrent measures* allow for such rash treatment of undesirable foreigners that it is hoped that other foreigners in a similar situation will think twice before trying to reach the territory.

A. Deterrence measures

- Elimination of appeals: the credibility issue.

Since the early 1990s, Canadian immigration law has undergone distinct changes, with the elimination of most forms of appeal previously available to foreigners. Judicial review remains available, however. A rejected refugee claimant can apply to the Federal Court, but only with leave from the court and essentially only on purely legal issues. Leave is rarely given, and the courts are not required to provide a reason when they deny leave. From

1998 to 2004, 89 percent of the applications to the federal courts for judicial review of refugee claim determinations were denied leave. If we compare the number of applications granted leave during this period (under 4,000), with the number of claims refused by the Immigration and Refugee Board during this period (just under 87,800), we find that only 4 percent of claimants have had the opportunity to have the decision against them reviewed by a federal court. Furthermore, when a claimant is granted leave by the court, factual mistakes will generally not be corrected since the court is not required to review the factual analysis unless that analysis is found to have been wholly unreasonable. If the original decision-maker considered all the evidence in a reasonable way but reached the wrong conclusion, the court will often not intervene. In this way, the management of immigration files is certainly made more efficient, but human rights protection has been radically diminished.

- **The Refugee Appeal Division: a broken promise**

In 2001, the *IRPA* created the Refugee Appeal Division (RAD), where refugee determinations could be reviewed. This right to an appeal on the merits for refugee claimants was balanced by a reduction from two to one in the number of IRB members hearing a case. In 2002, the government implemented the new law without implementing the RAD, thus delaying indefinitely a migrant's right to appeal.

- **Reduced legal aid**

In Canada, the refugee determination process, based on the *Charter*, is quasi-judicial and each refugee claimant has the right to a hearing with full interpretation and the right to counsel. However, it has never been deemed important in Canadian law and policy to provide sufficient legal aid to help migrants prepare their cases. Although the refugee determination system is under federal jurisdiction, legal aid in such matters has been left to the provincial legal aid regimes without ensuring adequate funding. In Ontario, the average legal aid fee for a refugee determination case is still over C\$1,500. In Quebec, it is C\$455, which represents three hours of work if an interpreter is not required. In Manitoba, there is no legal aid for migrant cases.

- **Increased detention**

Although Canada's detention practice is not as harsh as what can be seen in other countries, such as the United States or Australia, immigration detention has increased considerably in the past years, essentially because the *IRPA* and its regulations provide the citizenship and immigration minister with stronger authority to arrest and detain people who pose a security risk and those whose identity is in doubt. As stated in section 55(2) of the *IRPA*, a person may be detained if that person is (1) not likely to appear for an

examination, an inquiry or removal, (2) likely to pose a danger to the public or (3) undocumented or improperly documented. While these grounds are the same as in the former legislative regime, the provisions that allow detention are broadened. First, foreign nationals and permanent residents can be detained at any point in the claim process for identity reasons, whereas in the past they could only be detained on the basis of identity at the port of entry. Second, under section 55(3) of the *IRPA*, immigration officers have wider powers to detain all foreign nationals and permanent residents at a port of entry (1) on the basis of administrative convenience (for example, to continue the interview) or (2) when they have “reasonable grounds to suspect” inadmissibility on the basis of security or human rights violations. Third, section 55(2) of the *IRPA* expands the provisions for detention of a foreign national *without a warrant* at any stage of the determination process and for any ground for detention. Whereas there were previously some limited circumstances in which foreign nationals within Canada could be arrested without a warrant, immigration officers are now authorized to arrest all people who are inadmissible, even if they are not about to be removed. The expansion of detention for lack of proper identity documentation is of particular concern. Those seeking asylum are often forced to leave their countries without proper identity documentation because it is precisely their identity that puts them at risk. Moreover, one major criterion of detention in this context is the officer’s “satisfaction” with the level of the migrant’s “cooperation” in establishing his or her identity. The utility of requesting that the asylum seeker take all measures to establish his or her identity is, however, questionable because such cooperation is required as soon as people enter the country, when they are under a great deal of stress and, given their experience in their home country, may still have a high degree of distrust of public authorities. Moreover, asylum-seekers may not want to cooperate in establishing their identities because applying to the authorities of the home country for documentation may put family or colleagues still there at risk of persecution. Asylum-seekers are not compelled by the Canadian authorities to ask their embassies to provide them with identity documents, but they are *strongly urged* to do so, and the willingness to do so is viewed as clear evidence of cooperation. In addition to broader legal power to detain non citizens, the government is making more use of the detention power. In 2003-04, 13,413 people were detained. This is an increase of 68 percent over the numbers for 1999-2000. The number of detention days is not given by the recently established Canada Border Services Agency in its performance report, but we know from Citizenship and Immigration Canada’s 2003 performance report that, in 2002-03, non citizens were in detention for a total of 165,070 days, which is a 17 percent increase in the number of detention days over the previous fiscal year. Despite security concerns, most of the money allocated to increased detention capacity is not being used to detain people considered threats to security;

it is being used to respond to the increase in the detention of migrants with no adequate identification.

- **Excessive penalties for migrant smuggling**

Trafficking in people and migrant smuggling must be distinguished from one another. Despite the human rights concerns associated with smuggling and trafficking, it is actually law enforcement concerns such as the war against terror, organized crime and irregular migration that have moved this issue up on the international policy agenda. Canada ratified in May 2002 the two protocols to the 2000 *UN Convention against Transnational Organized Crime* dealing with trafficking and smuggling, respectively. Although these two protocols stipulate that the migrants themselves should not be subject to criminal prosecution because of their illegal entry, they require contracting states to criminalize the conduct of traffickers or smugglers and to cooperate with other states to strengthen international prevention and punishment of these activities. The new *IRPA* consequently modified the penalty for migrant smuggling. The new Act imposes tougher maximum penalties for organizing irregular entry into Canada. For example, helping 10 individuals or more to cross the border irregularly, without any threat to persons or property, is an offence punishable by life imprisonment. This is more than the punishment for rape at gunpoint, which carries a maximum sentence of 14 years, and it is the same as that imposed for acts of genocide or crimes against humanity. Last, but not least, the Canadian legislation does not distinguish between people who are motivated by humanitarian concerns and others. Contrary to the *Smuggling Protocol*, the *IRPA* does not require remuneration or a benefit. Thus, someone who helps a family member flee persecution can be refused an asylum hearing or lose permanent residence without the possibility of appeal. The deterrent effect of such grossly exaggerated penalties is doubtful, especially when, because of the "Global North Fortress," most irregular migrants and most asylum-seekers must use help of some kind to enter Global North countries for any reason.

- **The Canada-US Safe Third Country Agreement**

In December 2002, Canada and the US signed a safe third country agreement, which came into force in December 2004. This agreement allows each country to send back all the asylum-seekers who have reached its territory by way of the other. The rule applies only at a land port of entry; it does not apply to claims made at an airport, port or ferry landing or to claims made inside Canada. Figures provided by Citizenship and Immigration Canada (CIC) indicate that from 1995 to 2001, approximately one third of all refugee claims in Canada (31 percent to 37 percent annually) were made by claimants known to have arrived from or through the US. Concretely, the agreement is expected to severely reduce the numbers of the now approximately 15,000 refugee claimants who arrive yearly in Canada from the

United States. Many nongovernmental organizations in Canada as well as the United Nations High Commission for Refugees have questioned the basic premise that the US is a safe country for all asylum-seekers. Although both the US and Canada are signatories to the 1951 *UN Refugee Convention* and the 1967 *Refugee Protocol*, certain US practices are of great concern: detention procedures, the expedited removal process (which excludes a full hearing of the claim and does not provide adequate procedural guarantees against refoulement or return to the country where there is a risk of persecution or torture), the one-year time limit to file a claim in the US, the more restrictive definition of refugee than that used in Canadian case law especially regarding gender-based persecution. The difference between the practices of the two states is most striking on the issue of the detention of children for immigration-related reasons. The United States routinely detains unaccompanied minors who lack legal status in the US and may be asylum-seekers, whereas in Canada they are protected according to their “best interest,” as stated in *Baker*. It is also very difficult for asylum seekers to prove that they meet the exceptions to the safe third country rule, in circumstances where documentation is scarce. Moreover, the safe third country agreement creates a lucrative market for smugglers, who transport asylum-seekers across the border illegally.

In conclusion, as a result of the recent multiplication of restrictive migration policies, the vulnerability of migrants has increased and their rights have unquestionably been reduced at all stages of the migration process.

B. PREVENTIVE MEASURES

• Visa regimes

Many countries now use visa regimes to prevent the movement of people from source countries to their territory. Canada requires visas for the nationals of countries deemed to produce large numbers of asylum-seekers or overstayers. Canada and the US have, under the *Smart Border Agreement*, harmonized visa requirements, resulting in a situation where the citizens of some 175 countries now require visas to enter the two states. While visa regimes have purposes other than stopping asylum flows, the linkage with asylum has become clear with, for example, the imposition of a visa requirement for Hungarians by Canada in 2002. Visa requirements are the most frequent migration control device and are most effective when they are used in conjunction with carrier sanctions.

• Carrier sanctions

Carrier sanctions are fines or other penalties imposed by states on airlines, railways and shipping companies for bringing foreign nationals to their territory without the required documentation. These sanctions transfer migration management to private carriers, who, if they wish to avoid substantial fines,

must make decisions on the possession and authenticity of the documents presented by travellers. Canada's *IRPA* has several provisions that make carriers responsible for the removal costs of passengers arriving at Canadian airports without proper documents (ss. 148[1][a], 279[1]). Under the *IRPA*, the Canada Border Services Agency (hereafter CBSA) charges a carrier an administration fee for each traveller arriving with improper documents. The CBSA has signed agreements with most airlines flying regular routes to Canada. Carriers with good performance records pay reduced administration fees. Carriers without signed agreements pay C\$3,200 for each traveller with improper documents. For carriers with signed agreements, the fee drops to between zero and C\$2,400, depending on the carrier's history of transporting undocumented travellers. Airlines, in turn, agree that immigration control officers will train their staff and assist them at foreign airports in identifying passengers with improper travel documents. Pre-inspection agreements also enable countries to post immigration officers at airports, train stations or ports of foreign countries to screen out improperly documented migrants.

- **Interdiction and interception mechanisms**

Like most Global North countries, Canada has increasingly resorted to interception and interdiction abroad to prevent irregular migrants from entering its territory, without distinguishing in any meaningful way between migrants in need of protection, i.e. refugees, and other migrants. Interdiction policies place obstacles in the path of the "right to seek and enjoy asylum", as outlined by the Inter-American Commission on Human Rights in the *Haitian Interdiction* case in 1996. All these measures aim to enhance the efficiency of interception of undocumented foreigners before their arrival at the Canadian border. Furthermore, controlling the actions of Canadian immigration or intelligence services overseas is extremely difficult. Even if thousands of immigration files are processed annually and systematic discrimination is alleged, little can really be done. Canadian authorities have adopted systematic policies for the interception and interdiction of irregular migrants outside of Canadian territory and international cooperation in this field is very active.

- **Externalization of asylum protection**

Thirty-two percent of Canada's interceptions in 2000 were made in the migrant's country of origin or in countries that lack a refugee protection system comparable to Canada's. Canada recently had some 50 migration integrity officers (MIOs) in 39 key locations overseas. The work of Canada's MIOs resulted in an interdiction rate of 72 percent in 2003. Although verification is next to impossible, this figure means that of all attempted irregular entries by air, 72 percent (over 6,000 individuals) were stopped before they reached Canada. Since 1999, more than 40,000 people have been intercepted by the MIO network before they boarded planes for North America.

C. THE AGENDA OF SECURITISING MIGRATION

• **Migration as part of a new international security paradigm**

After 9/11, the fear of terrorism led to the adoption of antiterrorist measures and the reinforcement of the security-related policy apparatus in Canada and elsewhere. On October 12, 2001, the minister of citizenship and immigration announced immigration measures to be integrated in the new antiterrorist strategy. The funds to be allocated to this antiterrorism plan between 2001 and 2007 were estimated at C\$7.7 billion. In December 2003, the prime minister created the Public Safety and Emergency Preparedness (PSEPC) portfolio, essentially Canada's equivalent to the American Department of Homeland Security (DHS). PSEPC is designed to coordinate policy, break down organizational bottlenecks and bring a stronger national security focus to the operations of key agencies, including the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service (CSIS), the Canada Firearms Centre (CFC), Correctional Service Canada (CSC), the National Parole Board (NPB) and the Canada Border Services Agency (CBSA). The CBSA is the agency in charge of the border control functions of several departments (including Citizenship and Immigration Canada). It is responsible for conducting intelligence screening of visitors, refugees and immigrants and for deporting people. PSEPC has a total annual budget of C\$ 4.9 billion and employs more than 52,000 people. The DHS's budget is US\$ 41.1 billion and it employs around 183,000 people, which represents a doubling of its funding since 2001. This department is thus in charge of implementing the *Smart Border Action Plan*, as well as the security measures included in the *IRPA*.

• **Canada-US immigration cooperation: the *Smart Border Action Plan***

On December 12, 2001, Canada and the United States signed the *Smart Border Agreement* and its companion 30-point action plan. The action plan outlines several ways in which these immigration-related commitments will be implemented, including the development of common biometric identifiers, the establishment of joint passenger analysis units at key international airports in Canada and the US, the development of compatible immigration databases, the increase in the number of Canadian and US immigration officers at airports overseas. No provision is made in these measures for more fully fledged implementation of the *1951 Refugee Convention* or other human rights obligations. The provisions relating to the communication of passenger information illustrate this particularly well.

• **Communication of passenger information**

In November 2001, US President Bush signed a bill making it mandatory for foreign airlines to communicate to American authorities the lists of their passengers, as well as certain additional information. Since January

2002, the US has refused landing to planes when this information has not been duly transmitted. In December 2001, the Canadian House of Commons gave effect to the requirements of this controversial legislation in an amendment to the *Aeronautics Act*. In October 2002, Canada implemented its passenger information system (PAXIS) at Canadian airports to enable it to collect advance passenger information on individuals travelling to Canada, and in July 2003 it began implementing the passenger name record (PNR) component of PAXIS. Work is underway to develop an automated process enabling Canada and the United States to exchange immigration data.

• **National security measures in the *Immigration and Refugee Protection Act***

The introduction of counterterrorism legislation is included as an objective in the *Smart Border Action Plan*. As a result, President Bush signed the *USA PATRIOT Act* in October 2001, and in Canada the *Antiterrorism Act* came into force in December 2001. In 2003, a counterterrorism subgroup was created under the auspices of the US-Canada Cross-Border Crime Forum. One of the reasons why Canada's new antiterrorism legislation has largely sat on the shelf is that Canadian authorities have focussed on using immigration law as a means to detain suspected international terrorists. Although the *Anti-terrorism Act* departs from some traditional criminal law principles, it still has requirements such as proof beyond a reasonable doubt of a prohibited act with fault, a three day limit on preventive arrest and the ability of trial judges to stay proceedings if secret evidence will result in an unfair trial. In contrast, the administrative law apparatus of the *IRPA* sought to allow for the preventive detention and the removal of non citizens on the basis of secret evidence not disclosed to the deportee. Thus the *IRPA* can be seen as one of the legislative responses to 9/11.

• **The expansion of security-based inadmissibility grounds**

In 2002, the *IRPA* expanded the inadmissibility categories to permit refusal of entry on the basis, *inter alia*, of security (s. 34), serious criminality (s. 36) and organized criminality (s. 37). According to section 34, permanent residents and foreign nationals can be ruled inadmissible to Canada for espionage or subversion against a democratic government; institution or process; subversion by force of any government; terrorism; posing a danger to the security of Canada; acts of violence that could endanger the lives or safety of persons in Canada; or membership in an organization reasonably believed to engage in espionage, subversion or terrorism.

Under the *IRPA*, if security issues arise at any stage of the refugee determination process the claim for refugee status will either be found ineligible for referral to the IRB or suspended. Moreover, the *IRPA* removed the power to review removal orders against any person, even a permanent resident, who is inadmissible on the grounds of security, violating human or international

rights, serious criminality and organized criminality. The inadmissibility classes relating to security risks are extremely contentious, in terms of both definition and implementation.

- **Easier detention of suspects**

Compared to the *Anti-terrorism Act*, the *IRPA* provides for much broader powers to arrest and detain foreigners on security grounds. Under the *IRPA*, preventive detention can go well beyond the 72 hours provided for in the *Anti-terrorism Act*; the review is made not by a judge, but by an official of the Immigration Division of the IRB; the continuation of the detention can be based on the ground that “the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights” (s. 58[1][c]); this preventive detention without charge can continue for an indefinite period, with a review every 30 days. This power to arrest and detain a foreigner without a warrant where an officer has “reasonable grounds to suspect” (s. 55[3][b]) that the foreigner is “inadmissible on grounds of security” (s. 34[1]) remains very problematic. (FC, *Jaballah*, 2004).

- **Security certificates: a different regime from that of the *Criminal Code***

Security certificates, as an instrument for removing permanent residents and foreign nationals who pose a threat to the security of Canada, have been available under Canadian immigration legislation since 1991 in their present format. The *IRPA* strengthens the security certificate process, including suspension or termination of a claim for protection, broader provisions on organized crime, elimination of appeals and streamlining the removal process. According to the *IRPA*, a certificate must be signed by both the minister of public safety and emergency preparedness and the minister of citizenship and immigration (s. 77). The decision to sign a security certificate is based on either a security intelligence report issued by CSIS or a criminal intelligence report issued by the RCMP. Once signed, a security certificate is referred to the federal court for judicial review, but it pre-empts all other immigration proceedings, including applications for refugee status: these proceedings are suspended until the federal court makes a decision on the certificate. The procedure adopted by the federal court for reviewing security certificates is extraordinary under section 78 of the *IRPA* because it involves the judge being required to hear the evidence in private and in the absence of the person named in the certificate or their counsel. The judge hears the evidence and information in private “to protect national security or the safety of any person.” Such information can be used by the judge to determine the reasonableness of the certificate, but it cannot even be included in a summary of other evidence that can be provided to the person named in the certificate.

Somewhat similar procedures are available under the *Anti-terrorism Act* with respect to preserving the confidentiality of information obtained in confidence from a foreign entity or for protecting national defence or national security. The criminal trial judge has the right, however, to make any order, including a stay of the entire criminal proceedings, that he or she “considers appropriate in the circumstances to protect the right of the accused to a fair trial” (s. 38[14]). Such orders are not contemplated under Canadian immigration law. Indeed, if the judge upholds the security certificate as reasonable, the person named is subject to removal without appeal and without being eligible to make a claim for refugee protection. If the judge determines that the certificate is unreasonable, the certificate is quashed (s. 81). Traditional standards of due process and adjudicative fairness are thus disregarded in the name of national security.

Foreign nationals who are the subject of a security certificate are automatically detained until the certificate has been reviewed by the judge. Permanent residents may also be detained if there are reasonable grounds to believe that they are “a danger to national security or the safety of any person or unlikely to appear at a proceeding or for removal” (*IRPA*, ss. 82-4). The detention warrant is subject to a judicial review under subsection 83(1) within 48 hours of the initial detention and is subject to a mandatory review every six months thereafter under subsection 83(2). There is no limit on the time that a person subject to a security certificate may be detained. During the review of the deportee’s detention, the judge may hear evidence in the absence of the deportee, refuse disclosure of information to the deportee, deny cross examination and rely on evidence that would otherwise not be admissible. Lastly, there are no provisions for release comparable to section 515 of the *Criminal Code*, which allows for the release of even the most dangerous individuals on surety bail or cash deposit. *Jaballah’s* example is instructive: he was denied interim release notwithstanding the fact that 14 individuals were prepared to act as sureties. (FC, *Jaballah*, 2004)

The security certificate process provides the person subject to a security certificate with the option of initiating, at any point prior to a finding by a federal court judge that the security certificate is reasonable, an “application for protection” (*IRPA*, s. 112[1]). This application is on the basis that he or she is a “person in need of protection” — that is, a person who, if returned to his or her country of nationality or former habitual residence, would face a substantial risk of death, torture, or cruel and unusual treatment or punishment. However, even if the minister finds that the person will face a risk of death or torture, the application for protection may still be refused under “exceptional circumstances.”

In *Charkaoui*, as we have seen, the Supreme Court rejected the government’s justification and affirmed the right of any detainee to substantially know

the case against him and his right to answer it. It suggested mechanisms found in foreign jurisdictions to deal with information that would seem too confidential, and gave one year to the government to change the legislation (Charkaoui, 2007).

The measures taken by Canada in its fight against unwanted migration are a threat to the security and the privacy of the non citizen. These powers are not necessarily recent, but in the past they were either temporary or exceptional and in any event would be subject to the zealous supervision of the courts. What is new is their amplification and the related attempt to limit the supervisory jurisdiction of the courts.

CONCLUSION: THE RIGHT TO EQUALITY AND THE ROLE OF THE JUDICIARY

What can be done in order to reconcile the human rights paradigm with the territorial sovereignty paradigm? There is no clear-cut answer to such a question, but the solution is definitely to ensure that states' security measures duly respect their obligations regarding the fundamental rights of all, including migrants, since protection of these rights has become the overarching legitimacy test for all government action. One key element is to recognize that the principle of territorial sovereignty cannot justify unlimited violations of individuals' rights and freedoms that are based on nationality. In other words, territorial sovereignty has to be conceived in a way that is compatible with existing international and national human rights regimes. It is essential therefore to recognize and clarify the rights of non citizens in the state sovereignty context.

Furthermore, the equality principle requires that migrants *never* be deprived of basic protections of physical security and fair trial, and consequently selective denial of those protections would never be reasonable or proportionate.

The constitutional guarantee of the right to equality before the law has often been interpreted as inapplicable to proceedings relating to foreigners whose situation is irregular. The reasoning behind this exemption is that such proceedings do not correspond to anything to which a citizen could be subjected. However, if an effect-based interpretation is adopted, there would be no reason to distinguish the detention of a foreigner from any other person's detention, since the effect of the detention in both cases is exactly the same. Deportation proceedings can also be distinguished by reference to their consequences. If the risk posed to an individual by a particular proceeding is death, torture or detention, or cruel, inhuman or degrading treatment, there is no reason to consider that proceeding to be less serious than those that would subject citizens to similar treatment, such as criminal or extradition

proceedings. The Supreme Court of Canada has in the past been committed to protecting the rights of all, including foreigners in the country. The challenge today is to define the scope of the right to equality for foreigners in “times of crisis.” In other words, the judiciary is starting to address the issues raised by the new immigration and security measures.

In applying and addressing the provisions related to the new security and migration legislation, judges should continue to hold Parliament to the high standards embodied in the *Charter*. Courts have consequently an immense role to play not only in defining the right to equality as it applies to foreigners, but also in encouraging societal recognition that meaningful equality implies protecting foreigners against human rights abuses to the same extent that citizens are protected. Societal recognition facilitated by the judiciary is extremely important in a period when sensationalist media and alarmist politicians call for strict border control, detention of asylum-seekers and deportation of illegal migrants, which they purport to justify by singling out migrants as being responsible for a whole range of social problems. A new equilibrium between the requirements of security and the protection of the rights and freedoms of all, and those of migrants, in particular, will only be achieved by allowing the judiciary to test over time the constitutionality of the new security measures against the *Charter* standards of procedural fairness, fundamental justice and equal rights. Except for those few rights that are legitimately reserved for citizens (including that to remain in the country), foreigners in Canada should enjoy the same rights as citizens and should be treated in substantially the same way as citizens. There is no rule of law when human rights guarantees are applied selectively.

François Crépeau,
Professor of International Law Canada research Chair in International
Migration law Centre for International studies University of Montreal
francois.crepeau@umontreal.ca

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TRAFFICKING: PREVENTION, PROTECTION, REINTEGRATION AND PROSECUTION.

Oscar E. Lujan

Of all the violations and abuses known to man, the trafficking of women and children is one the most egregious violations we face today. First, in order to attack the problem of trafficking, one should make a concerted effort to eliminate confusion between trafficking and smuggling. Furthermore, additional misunderstandings occur when translating between the English and Spanish language. I recall years ago at a regional conference on migration deliberating a number of hours over the proper usage of the word trafficking and the Spanish word "*trafico*." As we speak about trafficking, it is important to differentiate between trafficking and smuggling. Once we understand trafficking is not smuggling but an outcome of smuggling, we are ready to translate concepts and meanings. One might assume the word trafficking translates into *trafico* but that is not the case, *trafico* means smuggling. A common error as trafficking translates to *trata*. Many people do not know the difference between trafficking and smuggling and in a number of English-Spanish websites address trafficking as *trafico*. Without a doubt we are speaking of egregious violations to the rights of women and children, as they become merchandise on the labor and sex trade for profit.

For now, the definition is clear and If we thought slavery ended years ago in the Americas, we need to look closer at the movement of persons resulting forced labor and sexual exploitation. It is estimated that on an annual basis about 600,000 to 800,000 people are victims of trafficking. Mostly women and children are trafficked within and across national borders. During my assignment as the Deputy District Director for INS operations in Latin America and the Caribbean from 2000 to 2003, we encountered a number of trafficking cases and others on the verge of converting from smuggling to trafficking. During my career with INS and now as the District Director of United States Citizenship and Immigration Services, I have had the opportunity to participate in a number of forums and multinational workgroups addressing smuggling and trafficking. During the past seven years, I have had the pleasure of representing the United States at the Regional Conference on Migration or RCM. The RCM as its referred to, consists North and Central American countries, the Dominican Republic along with observer and contributing organizations such as the IOM and UNHCR. For purposes of this brief speech and following comments, additions or critiques by members of the distinguished panel, I would like to address trafficking within a three-pronged approach: Prevention, Protection and Prosecution.

Prevention

Prevention can take a number of forms from printing basic brochures warning women of tactics used to lure vulnerable populations into the sex trade to radio and television public service announcements. Governments in a global effort coordinate with international and non-governmental organizations for this purpose. Leading actors and singers have taken up the cause within the prevention framework, most notably the well known singer Ricky Martin in coordination with the International Organization for Migration will launch TV commercials and provide support through his non-profit foundation focusing on the dangers trafficking poses to Colombian children in the context of sexual exploitation. Other prevention programs include school programs in vulnerable communities designed to educate potential victims about the realities of trafficking and recruiting methods. Prevention can take many forms and sizes, but most importantly, it is the first step to attacking trafficking at all levels.

Unfortunately, even as efforts are made to prevent trafficking there will be victims of forced labor and sexual exploitation. Protection of victims can range from the establishment of shelters to hotlines for victim assistance and alternatives to immediate deportation. An example of this is the recent establishment of a shelter in San Salvador for the protection and reintegration of victims of trafficking. The United States has worked closely with the Government of El Salvador to establish a shelter whereby victims of trafficking can seek counseling in the effort rehabilitate and reintegrate. In Los Angeles, California, there are community-based services providing culturally appropriate and language specific services such as mental health counseling and emergency shelter. The United States Department of Justice has established a worker exploitation complaint and rescue line by asking the television and print media to publicize the service offered in victim assistance. There are other protections mechanisms allowing alternatives to deportation in the form temporary or permanent residency.

In the United States, a destination country for many, by *passing the Victims of Trafficking and Violence Protection Act of 2000*, which includes the Violence Against Women Act of 2000, Congress created two new categories of nonimmigrant visas, the "T" and "U" visas. T visas are available to individuals who are victims of "a severe form of trafficking in persons." Severe forms of trafficking include sex trafficking of persons under 18 years of age, or recruiting or obtaining persons for labor or services through the use of force, fraud, or coercion "for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." Nearly all grounds of inadmissibility may be waived in these cases, and individuals granted T visas might adjust to permanent residency three years after they are granted the T visa. There is a limit of 5,000 T visas that may be issued in one

year, and 5,000 adjustments of T-visa holders that may be granted. This numerical restriction applies only to principals and not to spouses, sons, daughters, or parents of the principal immigrant.

The other visa created by the act is the U visa, which is available to immigrants who are either victims of or who possess information concerning one of the following forms of criminal activity: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, hostage holding, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy, or solicitation to commit one of these offenses. A federal, state, or local official must certify that an investigation or prosecution would be harmed without the assistance of the immigrant or, in the case of a child, the immigrant's parent. Nearly all grounds of inadmissibility may be waived in these cases, and individuals granted U visas might adjust to permanent residency LPR status three years after they are granted the U visa. There is a limit of 10,000 U visas that may be issued in one year, applicable only to principals and not to dependents.

Applicants for the T visa will be granted expanded access to government benefits regardless of their immigration status. To qualify, a trafficking victim must either be under 18 years old or obtain certification from the U.S. Dept. of Health and Human Services (HHS) that she is willing to assist in every reasonable way in the investigation and prosecution of trafficking perpetrators (neither actual cooperation nor even the existence of an investigation is required; the victim must merely show willingness to cooperate); and she has made a bona fide application for a T visa that has not been denied (or she has been granted permission by the attorney general to stay in the U.S. to assist in a prosecution of traffickers). Although the language of the act is somewhat imprecise, it appears that those who meet the conditions listed above will be eligible for all programs funded or administered by federal agencies (including HHS, the U.S. Dept. of Labor, and the Legal Services Corporation) to the same extent as refugees. In the case of food stamps and Supplemental Security Income, trafficking victims will be eligible to an even greater degree. As a practical matter, qualifying trafficking victims should be eligible for refugee-specific programs (such as those administered by HHS's Office of Refugee Resettlement) and for all non-refugee-specific federal programs on the same basis as U.S. citizens.

Prosecution

The prosecution of traffickers is perhaps the one of most challenging dilemmas facing law enforcement agencies throughout the world. First, in order to prosecute, there must be appropriately worded legislation, which provides governments the tools to attack trafficking. In the United States *The Trafficking Victims Protection Act of 2000*, enhances pre-existing criminal penalties in other related laws. Other countries within the region such as Belize, Nicaragua and Canada have specific anti-trafficking legislation. In the case of Mexico, legislation remains a legislative proposal and may become a law in the near future. The multinational coordination among prosecutors provides a formidable weapon against organizations operating on a transnational scale. In addition to laws and draft proposals, successful prosecutions rest in the ability of government officials to develop investigative cases, which lay the pathway for the prosecution. The role of training is critical in developing the skills and abilities of law enforcement, border agents, consular and local police in order to recognize and prosecute traffickers, as well as to assist trafficking victims and avoiding treating victims as criminals. USCIS in coordination with other agencies as well as non-government organizations such as the International Organization on Migration and the United Nations High Commissioner on Refugees provide a three-day interactive learning seminar in Spanish bringing together NGO's, police officers, lawyers, judges, immigration, customs and consular officials. These seminars are designed to educate and increase public awareness about the situation of victims of trafficking, especially youth, children and women and explore strategies for community driven initiatives to prevent and combat trafficking. The opening day of the seminar provides the participants with a general background of the topic and serves to unit participants behind this common cause. Participants spend the second day in smaller group sessions, facilitated by the trainers, focusing on prevention, prosecution, and protection and developing strategies and action plans for combating trafficking. The final day's seminar allows the participants the opportunity to present their ideas from the previous two days and consider how to most effectively employ their newly developed strategies in their country of origin.

Now, you may wonder why we coordinate such training with United Nations High Commissioner for Refugees. Refugee women and children are the most vulnerable of groups. Throughout the world there are persons fleeing persecution whether it be religious, political, or gender based and in an attempt to flee such persecution, those using smugglers to assist them end up in trafficked situations. Refugees fleeing may be deported to their country of origin where they stand to face greater harm from repressive governments. In some cases, this can mean death. The topic of refugees and trafficking requires much more attention and research in order to prevent

TRATA DE PERSONAS, ESPECIALMENTE MUJERES Y NIÑOS

Justice Ana V. Calzada

Buen día, señor Mariano Azuela Guitrón, Presidente de la Suprema Corte de Justicia de México; señor Antonio Guterres, Alto Comisionado de las Naciones Unidas para los Refugiados; Juez A. M. North, Presidente de la Asociación Internacional de Jueces en Derecho de Refugiados, distinguidos Jueces y Expertos, señoras y señores:

Es un gran honor participar en esta Séptima Conferencia Mundial de la Asociación Internacional de Jueces en Derecho de Refugio.

Agradezco a las instituciones y funcionarios de los Estados Unidos Mexicanos por todas sus gentilezas. Reciban de mi parte cordial felicitaciones por la extraordinaria organización de esta Conferencia que mucho contribuirá al desarrollo regional del Derecho de Refugio.

Dados los momentos críticos que actualmente se viven en el mundo, este foro resulta de la mayor importancia. Tengo la certeza que las experiencias que aquí se expresen, así como las conclusiones que resulten, significarán un avance importante en beneficio de la protección de los refugiados.

En primera instancia, me parece importante hacer referencia a la aclaración semántica que el expositor Sr. Oscar E. Lujan realizó en su intervención. La claridad de estos conceptos, resulta esencial para ejercer una lucha efectiva contra este flagelo que afecta a toda la humanidad. Asimismo, considero que las precisiones apuntadas, son imprescindibles para crear figuras penales, que permitan la persecución de quienes cometan estas violaciones a los derechos humanos de mujeres y niños.

Ahora bien, no obstante lo anterior, es oportuno señalar, que existe consenso en el mundo de habla hispana, en cuanto a que el término más apropiado para referirse al tema es trata. El diccionario de la Real Academia Española lo define como: tráfico que consiste en vender seres humanos como esclavos; ó tráfico de mujeres, que consiste en atraerlas a los centros de prostitución para especular con ellas. Por otra parte, en su artículo 3, el *Protocolo para Prevenir, reprimir y sancionar la trata de personas, especialmente mujeres y niños* que complementa la Convención de las Naciones unidas contra la delincuencia organizada transnacional, define el término "trata de personas" como la captación, el transporte, el traslado, la acogida o la recepción de personas, recurriendo a la amenaza o al uso de la fuerza u otras formas de coacción, al rapto, al fraude, al engaño, al abuso de poder o de una situación de vulnerabilidad o a la concesión o recepción de pa-

gos o beneficios para obtener el consentimiento de una persona, que tenga autoridad sobre otra, con fines de explotación.

En este sentido, no deja de ser desalentadora la ausencia, a nivel mundial, de datos que arrojen una mejoría sobre el tema, ya que cada año millones de personas, la mayoría mujeres y niños, son engañadas, vendidas, coaccionadas o sometidas de alguna manera a situaciones de explotación, de las cuales no pueden escapar. Constituyen la mercancía de una industria mundial, que mueve miles de millones de dólares y que está dominada por grupos de delincuentes muy bien organizados que operan con impunidad.

El «nuevo comercio de esclavos», como se le ha denominado, ha crecido en los últimos tiempos en gravedad y magnitud. Aunque es difícil obtener cifras precisas, se calcula que entre 45.000 y 50.000 mujeres y niños son trasladados cada año por los traficantes únicamente hacia los Estados Unidos. El aumento del número de casos de trata de personas, así como su expansión a zonas que antes no estaban tan afectadas, coincide con el aumento de las dificultades económicas, -especialmente en los países en desarrollo y en los países con economías en transición-, los enormes obstáculos a la migración legal y la existencia de graves conflictos armados.

La trata de personas es un fenómeno que afecta a todas las regiones y a la mayoría de los países del mundo. Aunque las rutas de los tratantes cambian constantemente, un factor que permanece constante, es la distinción económica entre los países de origen y los países de destino. Al igual que con todas las demás formas de migración irregular, la trata de personas presupone invariablemente el traslado de un país más pobre a otro más rico. Los tratantes, trasladan a mujeres procedentes de Latinoamérica y del sureste asiático a América del Norte, y a otros países de su región de origen. También trasladan a africanas hacia Europa occidental. La desintegración de la ex Unión Soviética y la gran inestabilidad económica y política resultante han conducido a un aumento espectacular en el número de mujeres de Europa central y oriental que caen en manos de los tratantes. La trata de personas, también prolifera durante y después de conflictos sociales prolongados. La ex Yugoslavia se ha convertido en uno de los principales destinos de la trata de personas, así como en un importante centro de operaciones y de tránsito de mujeres procedentes de Europa central y oriental. Existen indicios de que durante la crisis de Kosovo, mujeres y niñas fueron secuestradas por grupos armados o sacadas con engaños de los campos de refugiados del norte de Albania. Varias organizaciones internacionales, han informado de que cada vez es mayor la trata de personas que tiene por origen y destino Kosovo y otras zonas de la ex Yugoslavia debido, al parecer, a una mayor demanda de prostitución, por parte de trabajadores extranjeros adinerados.

Métodos utilizados por los tratantes

Los tratantes utilizan diversos métodos para reclutar a sus víctimas, que van, desde el simple rapto, hasta la compra de la persona de manos de su propia familia. Sin embargo, en la mayoría de los casos, la víctima potencial de la trata ya está buscando una oportunidad de emigrar cuando se le acerca un conocido o es atraída por un anuncio. A algunas se les hace creer que son reclutadas para trabajar legalmente o casarse en el extranjero. Otras, saben que se les recluta para la industria del sexo, e incluso que serán obligadas a trabajar para devolver lo mucho que ha costado su reclutamiento y transporte, pero son engañadas sobre sus condiciones de trabajo. Se teje así, una compleja red de dependencia en la cual los tratantes generalmente intentan adueñarse de la identidad jurídica de la víctima, confiscando su pasaporte o sus documentos. Su entrada o permanencia en el país de destino suele ser ilegal, lo cual no hace más que aumentar su dependencia de los tratantes. Está también muy extendida la servidumbre por deudas, que permite controlar a las víctimas de la trata y garantizar su rentabilidad a largo plazo. Según se ha informado, con frecuencia los tratantes recurren a la coerción física y a actos de violencia e intimidación.

Los tratantes rara vez son detenidos y casi nunca procesados. Las penas impuestas por la trata de personas son relativamente leves, cuando se las compara con el contrabando de drogas o de armas. Una de las razones por las que la trata de personas no es objeto de una mayor represión, es el escaso número de casos documentados. Esto se explica fácilmente porque, en la mayoría de los casos, las víctimas de la trata, son consideradas simplemente como delincuentes por las autoridades del Estado receptor y, a menudo, son detenidas, procesadas y deportadas. Si a esto se le suma el temor a las represalias de los tratantes, se comprende que las víctimas de la trata no se sientan inclinadas a cooperar con las autoridades policiales en los países de destino. La ignorancia de sus derechos y protecciones legales, los obstáculos culturales y lingüísticos y la ausencia de mecanismos de apoyo, hacen que las mujeres víctimas, de la trata, se sientan aún más aisladas e impiden que busquen justicia o que reciban respuesta de las autoridades judiciales.

Situación de la Trata de Personas en América Latina y Costa Rica

Costa Rica es principalmente un país de origen, tránsito y destino de mujeres y niños víctimas de la trata para fines de explotación sexual. Mujeres y niñas víctimas de la trata para fines de explotación sexual, proceden de Nicaragua, República Dominicana, Colombia, Guatemala, Ecuador,

Cuba, Perú, China, Rusia y Filipinas; mujeres y niños costarricenses, son víctimas de la trata interna para el mismo fin. El gobierno, reconoce que el turismo sexual con menores de edad constituye un serio problema. Costa Rica es un país de tránsito de víctimas de la trata con destino a Estados Unidos, México, Canadá y Europa. Hombres, mujeres y niños también son víctimas de la trata, por lo general dentro del país, para realizar trabajos forzosos como trabajadores domésticos, trabajadores agrícolas y trabajadores de la industria pesquera.

Mediante Ley N°8315 del 26 de setiembre del 2002, la Asamblea Legislativa de Costa Rica aprobó el Protocolo para Prevenir, reprimir y sancionar la trata de personas, especialmente mujeres y niños que complementa la Convención de las Naciones unidas contra la delincuencia organizada transnacional. Entre otros aspectos, en su numeral 9.1 y siguientes, dicho instrumento jurídico internacional establece que los Estados Parte establecerán políticas, programas y otras medidas de carácter amplio con miras a prevenir y combatir la trata de personas, y proteger a las víctimas, especialmente las mujeres y niños, contra un nuevo riesgo de victimización. Asimismo, se establece que los Estados Parte procurarán aplicar medidas tales como actividades de investigación y campañas de información y difusión, así como iniciativas sociales y económicas, con miras a prevenir y combatir la trata de personas.

No obstante, la mayoría de organismos internacionales, y ONG's coinciden en que el Gobierno de Costa Rica no cumple plenamente con las normas mínimas para la eliminación de la trata de personas, pero reconocen que actualmente realizan esfuerzos importantes para lograrlo. En los últimos años, las autoridades investigaron numerosos informes sobre personas menores de edad víctimas de la trata para fines de explotación sexual, cooperaron con las investigaciones internacionales de trata, e iniciaron una nueva campaña pública de concientización dirigida a niñas y mujeres jóvenes vulnerables a la explotación sexual comercial. Una de las principales recomendaciones es que el Poder Ejecutivo costarricense trabaje con la Asamblea Legislativa (Poder Legislativo) para aprobar la legislación requerida contra la trata de personas, dada la carencia de una ley especial para el abordaje del tema, con las consecuentes dificultades que ello genera en la persecución de los delitos que involucran la trata. También se recomienda mejorar los servicios a las víctimas, e incrementar las investigaciones y procesamientos de los tratantes. Por último, existe la necesidad de desarrollar un plan de acción y designar una autoridad coordinadora para que dirija la cooperación interinstitucional.

Procesamiento, Protección y Prevención de la trata de personas en Costa Rica.

a) Procesamiento

Los expertos internacionales, coinciden en que en los últimos años Costa Rica obtuvo un éxito limitado en los esfuerzos relacionados a la aplicación del Protocolo de las Naciones Unidas contra los tratantes de personas, y las leyes siguieron siendo insuficientes para hacer frente a todas las expresiones de la trata. El principal problema en este ítem, es la carencia de una ley especial para el abordaje de la trata de personas; por consiguiente, los delitos que involucran la trata son difíciles de perseguir. Ante el vacío jurídico se utilizan una variedad de normas penales contra los tratantes de personas, pero la lentitud del sistema penal, aunado al primer aspecto mencionado, impide contar con datos precisos sobre los casos que involucran la trata de personas que tuvieron como resultado sentencias condenatorias, en los últimos años. En la práctica, los esfuerzos se centran principalmente en la lucha contra explotación sexual comercial de menores, para lo cual se trabaja muy de cerca con autoridades nicaragüenses y estadounidenses. En este sentido, es necesario adecuar las legislaciones de cada país centroamericano de forma armónica, y fortalecer la coordinación entre los órganos acusadores (fiscalías), así como la creación de una unidad especial de Tratas en la Fiscalía General de Costa Rica, para equiparar la situación con el resto de centroamérica. Resulta importante destacar que como resultado de estas investigaciones conjuntas se ha logrado condenar a algunos tratantes que habían montado redes internacionales, algunos de los cuales recibieron una condena de 154 años de cárcel por varios delitos de abuso sexual y suministro de drogas a menores, así como de producción de pornografía infantil.

b) Protección

En este aspecto, las autoridades gubernamentales reconocen que los esfuerzos para la protección a las víctimas de la trata se ven limitados de manera importante, en gran medida debido a limitaciones presupuestarias. Tampoco ayuda el hecho de que se continúa con la práctica errada de aplicar sanciones a algunas víctimas por actos ilícitos que éstas cometieron como resultado directo de haber sido víctimas de la trata. Aún así, se han logrado evidentes mejoras en este aspecto, de manera que actualmente en su gran mayoría, quienes son reconocidas como víctimas no enfrentan detenciones, sino que se les permite solicitar la repatriación; o en su lugar, pueden solicitar permisos de trabajo o la condición de refugiados. Sin embargo, el país carece de servicios oficiales de protección para las víctimas, ya que no existen albergues estatales o centros de salud destinados a las víctimas de la trata.

c) Prevención

En materia preventiva, se continuó con una campaña ya existente para contrarrestar el turismo sexual con menores, y se lanzó una nueva campaña por medios de comunicación masiva que alerta a las mujeres jóvenes contra los peligros de la explotación sexual comercial. Por otra parte, en diciembre del 2005 el Poder Ejecutivo emitió un decreto ejecutivo que creó la Coalición Nacional contra la Trata de Personas y el Tráfico Ilícito de Migrantes, que coordina el Ministerio de Gobernación y Policía. No obstante, debido a problemas presupuestarios, el gobierno continúa dependiendo en gran medida de terceros, para hacer conciencia en la población civil, y brindar capacitación contra la trata.

*Justice Ana V. Calzada,
Magistrada de la Corte Suprema de Costa Rica.*

WHY IS IT SO DIFFICULT TO CRACK DOWN ON HUMAN TRAFFICKING?

Dr. Helga Konrad

Panel: Human Trafficking

If we use the unveiling of the UN Protocol against Trafficking in Persons as the starting point for the modern era of confronting human trafficking, trafficking in persons has now received concerted international attention for more than five years. This was when broad enactment of new anti-trafficking laws started, the funding for anti-trafficking projects and programmes began to flow, and more governments, organizations and individuals have dedicated increasing attention to this problem.

Yet, in spite of all these activities, there doesn't seem to be evidence of a substantial reduction of human trafficking.

So, why is it so difficult to crack down on human trafficking? Why has human trafficking remained undiminished?

On the one hand, many people have become committed to the cause of fighting human trafficking and have developed extensive expertise on the issue, while, on the other hand, many of those who are responsible for curbing this crime – the governments and government authorities -, have not yet fully understood the true nature of human trafficking, namely the fact that it is a horrendous crime and violation of human rights, and are still being sidetracked to other agendas, such as fighting illegal immigration, controlling migration, fighting prostitution, fighting terrorism, fighting organised crime, etc. Meanwhile, almost everyone has picked up the politically correct language, but at the back of their heads many people and unfortunately also many authorities – when confronted with human trafficking - continue to think of prostitutes, illegal aliens, illegal workers, bogus asylum seekers – to put it in a nutshell, of suspects of all sorts.

They keep missing the point, that we are dealing with victims of a serious crime, with people who have been lured, tricked, sold into slavery-like situations where they are exposed to threat, intimidation and often brutal violence, situations from which it is often hard if not almost impossible to escape.

Let's have a closer look at the assumptions on which this fight against human trafficking has been based so far. Some significant answers may be found, if we test them under the magnifying glass of effectiveness and efficiency when it comes to obtaining sustainable solutions for curbing this crime.

- Many destination countries in Europe and beyond generally put the emphasis on preventing irregular immigration and on combating asylum abuse. Concentration on border controls, deterrence and immediate repatriation of migrants and very often also of victims of trafficking is frequently the beginning of a vicious circle. Studies confirm that a high percentage (up to 50%) of those immediately deported are re-introduced into the criminal cycle of human trafficking. Although such measures are obviously short-sighted, it is stubbornly held that they are effective means of self-protection serving the interests of state security.
- The lesson we have to learn is that current immigration responses to the problem of human trafficking are almost always inadequate. It is from the fact that these people are considered as illegal immigrants (and often as illegal workers) that criminals and criminal organisations draw their profits.
- Another problem impeding effective dealing with human trafficking is caused by the fact that people smuggling is constantly confused with human trafficking and the two are used interchangeably. Some of the later victims may well have accepted the services of smugglers, to get to a foreign country, or they may cross borders illegally, but the fact that they are deprived of their freedom, that they are put into slavery-like situations, creates a clear distinction. Smuggling of people ends in general with the arrival of the people smuggled at their destination. Whereas human trafficking involves the ongoing exploitation of people in order to generate illicit profits for the criminals. Trafficking in human beings is distinctly different from human smuggling and as such requires specialised measures for its investigation, prosecution and prevention.
- Clarification is also called for as regards migration in general. It is true that the movement of people, voluntary or forced, presents multiple aspects, implications and dilemmas for states. As a rule, migrants in general and irregular migrants in particular are at the mercy of traffickers and their accomplices. Unfortunately the trend towards establishing a link between migration and international crime / terrorism is rising. Due to the fact that migration has been generally set in the framework of combating organized crime and criminality, human rights protection has been subordinated to control and anti-crime measures, which has extremely negative impacts on how human trafficking is approached and on the protection of victims of this crime.
- The tendency to view human trafficking primarily or exclusively as a national security issue has detrimental implications for the rights and needs of trafficking victims. It tends to detract attention from a victim-centred approach and to concentrate exclusively on a law enforcement strategy, which very often is not tailored to fight trafficking in persons, but to fight criminal activities in general. On the other hand, the

legal tools, that are available for law enforcement in the fight against organized crime, such as wire tapping, tracking the financial assets of the criminal enterprise, addressing the crime from beginning to end, long-term undercover investigations and/or surveillance etc., are hardly ever utilized in human trafficking cases.

- So the lesson we have to learn is that human trafficking must not be seen primarily or exclusively from the perspective of national security. Fighting human trafficking must not be seen only as a fight against organised crime. It is first and foremost a horrendous violation of human rights. It follows that trafficking in human beings is both a law enforcement issue and a human rights concern, and that there is no either or. Both issues must be tackled together, if we wish to be successful.
- In the practice of most of the destination countries – in Europe and beyond -, even when victims are allowed to stay temporarily (an anti-trafficking measure long recognized as an integral part of an effective fight against human trafficking with strong preventive impact), support for them depends on whether they are willing to cooperate with law enforcement authorities and even more so whether they are considered useful to the prosecution. State interests take precedence over the right of victims to protection of their physical and mental integrity. This attitude is also influenced by the assumption that the offer of a temporary stay would attract more migrants and might be abused. But the legalisation of the status of a trafficked person is a crucial element in any effective victim and witness protection strategy, and may help to assist a much greater number of trafficked persons, who would normally not dare to seek refuge for fear of deportation.
- A particular and problematic issue arises from the interference between various laws, more specifically between the laws on trafficking in human beings and the legislation on immigration. Since in most countries crossing borders illegally is a crime (some people have false documents etc.), victims of trafficking are often prosecuted (arrested, deported) for being illegal aliens. This is a serious obstacle to a successful prosecution, because it impedes and prevents the cooperation between the victim and the authorities. State authorities must ensure that victims of trafficking are not subject to criminal or administrative liability and sanctions for acts arising from the trafficking situation.
- Very often corruption and human trafficking go hand in hand. Occasionally governmental and other officials acting in their official capacity facilitate or even contribute to human trafficking. This may be due to a prevailing culture of corruption in some countries, which is so deeply ingrained in people's minds that it is almost impossible to overcome. It is time to be serious about tackling corruption and abuse of official duties in the context of trafficking in persons. There will be

no progress against trafficking in persons while the rule of law continues to be undermined in this fundamental way. Bringing actions against such officials will have to become a priority: They should not only be charged with corruption but also as traffickers by virtue of their central role in aiding and abetting human trafficking. Especially in this context, financial investigations must become a corner stone of any serious anti-trafficking strategy.

- Another important issue to be taken into consideration is that trafficking in persons is a very complex problem, and cannot be captured in a single 'snapshot'. It is better characterized as a series of actions unfolding like a 'movie'. This means that it does not happen within a given moment in time and then it is over, nor does it happen in one place. It is not perpetrated only in the country of destination, where the victim or the criminal is discovered. It is much rather a chain - or series - of criminal offences and of human rights violations, starting in the country of origin and extending over time and across countries of transit into countries of destination. (Even internal trafficking involves a series of crimes and human rights violations that extend over time). Realising that human trafficking is a chain of criminal activities explains why a strategy based upon lining up "deterrence" at the borders is not adequate and stops short of the envisaged aim. It is indispensable to disrupt the chain of trafficking from beginning to end by targeting the perpetrators along the entire continuum. The problem is that virtually no one actually addresses it as such. There are hardly any investigations of human trafficking that link up the criminal activity in the countries of origin with the criminals in the countries of destination. There is hardly any institutionalised and concerted follow-up of victims, once they have been returned to their countries of origin.

Very often governments and government authorities consider human trafficking to be less important than other crimes. There is a lack of unreserved commitment to putting a halt to this modern form of slavery. Considering that human trafficking is a 30 – 35 billion dollar criminal business annually and involves tens or rather hundreds of thousands of people, it is obvious that we have at most, at best, scratched the surface of the problem. Most of the countries around the world –including the EU member States and the Western European countries - are content with attempts to thaw the tip of the iceberg and shy back from looking below the surface at this massive criminal business that generates many billions of dollars year upon year – money that is a dead loss to the development of countries, money whose source is the utter misery of people and that feeds other criminal rackets.

While law enforcement in many countries has improved on its ways of

investigating trafficking cases by employing proactive and intelligence-led methods and by setting up national and transnational joint investigation teams, it is that which happens before and after investigation proper that gives cause for concern.

The weak points are, on the one hand, the identification of victims and of trafficking situations and, on the other hand the judiciary.

The moment of identification of potential trafficking victims is critical in all of this. Law enforcement in many countries is at best trained to discover and/or investigate sex trafficking cases, but hardly any other form of human trafficking. If an individual is not recognized as a trafficking victim there is no chance of rescue and little or no chance of initiating a case against the traffickers. The other problem is that frequently cases are dismissed because of lack of evidence (which is based almost exclusively on the testimony of the victims, while hardly any additional evidence is secured), and with very few exceptions the sentences handed down fail to reflect the severity of the crime.

The status of victims of trafficking in criminal proceedings deserves particular attention. Frequently victims suffer from severe trauma. To expose them or force them too early to confront the traumatising experience may cause additional traumatisation. The victims must, therefore, not be instrumentalised in the interests of state criminal prosecution. They must have the right to refuse to testify, and if they agree to testify, they should be able to do so in a non-confrontational environment. In any case, the process of testifying against the trafficker must not re-victimise a victim, must not cause additional damage to the victims, but should be an empowering, positive experience through which the victim's rights are protected and promoted.

While there are signs of progress in the fight against human trafficking, especially when it comes to institutional mechanisms that did not exist several years ago, little has changed for those who have fallen victim to this crime.

What follows is that states and their authorities need to play a crucial role in changing the perception of victims of human trafficking. Governments and their authorities must recognise them as victims by the way they treat them. The status and protection of trafficked persons has to be established as being consistent with the status of victims of a serious crime and not with that of criminals.

In search of an easy answer to this complex and multi-dimensional problem of human trafficking, repeated attempts have been made to reduce it to a simplistic, often one-dimensional issue. Some individuals/organizations see human trafficking solely as a problem of illegal migration, or solely as a labour market issue, or solely as a demand-driven problem, or solely as a problem of prostitution, or solely as a problem of organised

crime. This is a tunnel-vision that is not designed to lead to a desirable outcome. The criteria of success in fighting human trafficking must never be reduced to one single field of action, but need to cover all the elements necessary to properly respond to trafficking cases including preventive measures such as poverty reduction, economic empowerment, fighting discrimination etc. The only focus that matters is to identify trafficking situations properly (and in much larger numbers), to protect victims properly, to investigate trafficking situations properly, to prosecute them properly and to convict the perpetrators to serve time in jail that reflects the severity of the crime.

*Dr. Helga Konrad,
International consultant on Combating trafficking in human beings 1060 Vienna,
Girardigasse 8/10.
Former Austrian Federal Minister for Women's Affairs (1995-97) and MP,
currently active as International Consultant, chaired the Stability Pact Task
Force on Trafficking in Human Beings for South Eastern Europe from
2000-2004 and was OSCE Special Representative on Combating Trafficking in
Human Beings from 2004-2006.*

*drhkonrad@aon.at
Mobile: +43 664 4087011
Fax: +43 316 301918*

ARE TRAFFICKED PERSONS CONVENTION REFUGEES?

Prof. James C. Hathaway

My task is to bring the discussion of trafficking home to the primary concern of refugee law judges: namely, can a trafficked person qualify for Convention refugee status?

The critical starting point is the “savings clause” contained in Art. 14 of the Trafficking Protocol,¹ which provides explicitly that nothing in the Protocol affects “rights, obligations and responsibilities of States... under international law, including international humanitarian law and international human rights law and, in particular... the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* contained therein.” This clause is important because the Trafficking Protocol itself establishes no mandatory duty to protect trafficked persons as such (such efforts being encouraged, but ultimately left to domestic discretion²). In the result, a binding duty of non-return will ordinarily only accrue to a trafficked person able to establish his or her Convention refugee status. The question, then, is whether refugee law is up to the human rights task impliedly assigned it by the Trafficking Protocol.

My answer is a very cautious “maybe.”

First, refugee law will not provide protection to every trafficked person simply because he or she has been, or is at risk of being, trafficked. Only a subset of trafficking victims will ever qualify for Convention refugee status.

Second, the subset that qualifies will be **very tiny indeed** unless a conceptual innovation in our understanding of the nexus (“for reasons of”) clause is embraced. This innovation, which I term a predicament-oriented approach, was recommended in the 2001 Michigan Guidelines on Nexus to a Convention Ground,³ and more recently embraced in the UNHCR’s 2006 Guidelines on Victims of Trafficking and Persons at Risk of Being Trafficked.⁴ But it is an innovation which presently enjoys only a toehold in the jurisprudence of state parties.

1 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, in Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the Work of its First to Eleventh Sessions, U.N. Doc. A/55/383 (2000), Annex II, entered into force Dec. 25, 2003 (“Trafficking Protocol”).

2 Each state party is required only to “... consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases”: Trafficking Protocol, at Art. 7.

3 “The Michigan Guidelines on Nexus to a Convention Ground,” (2002) 23(2) Michigan Journal of International Law 207-221 (hereafter “Michigan Nexus Guidelines”).

4 “The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked,” U.N. Doc. HCR/GIP/06/07, Apr. 7, 2006 (hereafter “UNHCR Trafficking Guidelines”).

As a preliminary matter, refugee law judges are likely to be asked to look at claims of one of two types. Some people will be escaping traffickers – they fled abroad in the face of recruitment efforts at home, or escaped their traffickers once already outside their own state. Alternatively, claims may involve more prospective claims of risk – “I’ve fled my home country because if I stay there I will be trafficked.” The main difference between these two types of case is simply that in the first category of claim (persons escaping traffickers at home or abroad), there is likely to be individuated evidence, perhaps even of past persecution, which makes the well-founded fear inquiry comparatively easy. In the second category of claim, the judge will of necessity focus more on human rights data, in particular the treatment meted out to comparably situated persons, in order to assess the well-founded fear. But such evidence is increasingly easy to come by given the activism of states in monitoring this issue.⁵

Even where there is a well-founded risk, the gravity of feared harm will, of course, need to rise to level of severity implied by the notion of “being persecuted.” Given the definition of trafficking - which focuses on the risk of **exploitation** in the context of sexual or forced labor, slavery, servitude, and the like⁶ – this element will rarely be controversial.

There must also be a failure of home state protection. In many of the cases decided to-date, relevant evidence has been lacking. But this will not be universally true.⁷ Even where agents of the state itself are not directly involved in sanctioning or operating the trafficking rings (which they sometimes are), evidence provided by such sources as the US State Department makes clear that only a minority of states – most of them **not** the primary countries from which trafficked people come – are complying with even “core standards” for the criminalization, prosecution, and punishment of traffickers.⁸ There is, then, every chance that evidence of a failure of home state protection will be found.

There is moreover little reason to believe that many trafficked persons will run afoul of one of the cessation or exclusion clauses. Even with the international criminalization of trafficking, it is important to recognize the Protocol deems only those who **operate** trafficking schemes – not those who **are**

5 Of particular note is the United States Department of State’s “Trafficking in Persons Report” (issued annually since 2001).

6 Trafficking is “... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs...”: Trafficking Protocol, at Art. 3.

7 See generally J. Hathaway, M. Foster, and P. Mathew, “The Role of State Protection in Refugee Analysis,” (2003) 15(3) International Journal of Refugee Law 444-460; and C. Branson and P. Dauns, “The Notion of State Protection” in this volume.

8 Most recently, it was reported that only 23 states were in full compliance with even basic anti-trafficking norms. In contrast, 79 were relegated to Tier II status (deemed to be making significant efforts), 32 to a Tier II Watch List (formally committed to anti-trafficking, but real challenges remain) and 12 – Belize, Burma, Cuba, Iran, Laos, North Korea, Saudi Arabia, Sudan, Syria, Uzbekistan, Venezuela, and Zimbabwe – were relegated to Tier III, meaning that they are deemed to be in fundamental non-compliance: U.S. Department of State, “Trafficking in Persons Report” (2006).

trafficked – to be the subjects of transnational criminal liability.⁹ And even if under the domestic laws of the state considering the asylum claim prostitution or other activities which trafficked persons are often compelled to undertake are unlawful, the threshold for exclusion under the Refugee Convention would not be met. As we all know, Art. 1(F)(b) requires evidence of a serious, non-political crime **committed outside the country of refuge** for exclusion to ensue. Any criminality in the state of arrival may normally be prosecuted and give rise to legitimate criminal punishment there – but it is not grounds for exclusion from refugee status.

This leaves us, finally, with the definitional issue that I believe is hard: the nexus, or “for reasons of” clause. The problem is not really with finding that most victims of trafficking **may be defined by** a Convention ground (though courts have quite rightly rejected the circularity of social group claims based on risk due to membership of a group of “trafficked persons”). In fact, most trafficked persons are members of a particular social group which can attract recognition, eg. “women,” “children,” or “the poor.”¹⁰ The challenge, however, is to determine whether the risk faced is “**for reasons of**” membership of some such group.

In part, the difficulty of finding a relevant nexus follows from the continuing insistence of at least some courts on the duty to show the primacy of the Convention ground in defining a causal connection to risk. But the view embraced by both the Michigan Nexus Guidelines¹¹ and the UNHCR Trafficking Guidelines¹² – namely, that the Convention ground need only be a relevant factor contributing to the risk, not the sole, or even dominant cause of same – is now more generally acknowledged to be correct. For example, the European Union’s recently-in-force Qualification Directive requires only that there be “a connection” without qualification¹³ – not necessarily “the” connection, or even “the primary” connection. And as Lord Bingham concluded in the recent House of Lords decision in *Fornah*, the Convention ground need

9 “Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct [prohibited by the treaty]”: Trafficking Protocol, at Art. 5.

10 See generally J. Hathaway and M. Foster, “Membership of a Particular Social Group,” (2003) 15(3) *International Journal of Refugee Law* 477-491.

11 “In view of the unique objects and purposes of refugee status determination, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized”: Michigan Nexus Guidelines, at para. 13.

12 “To qualify for refugee status, an individual’s well-founded fear of persecution must be related to one or more of the Convention grounds, that is, it must be “for reasons of” race, religion, nationality, membership of a particular social group or political opinion. It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause”: UNHCR Trafficking Guidelines, at para. 29.

13 “In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1”: European Union 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,” O.J. 304, 30/09/2004 (hereafter “EU Qualification Directive”), at Art. 9(3).

only be “an effective reason” (not the only or even the primary reason).¹⁴ With that hurdle overcome, the real nexus concern is rather reaching consensus on **just what** the Convention ground needs to be connected to.

If one adopts the narrowest view – that generally thought to be required by the decision of the U.S. Supreme Court in *Elias-Zacarias*,¹⁵ that is that the only way to show nexus is by demonstrating the relevantly invidious intention of the immediate agent of persecution – then such claims will generally fail. After all, most traffickers are motivated to traffic simply to make money – they couldn’t care less about hurting someone **because** she is a woman, black, or poor – they simply want to exploit someone, to profit from their misery, whoever they are.

Not even the more progressive understanding of nexus pioneered in the UK decision of *Shah and Islam*¹⁶ and effectively adopted in the common law world outside the US¹⁷ – that nexus can also be shown by connecting the state’s **failure of protection** to a Convention ground – will generally help in trafficking cases. Where home countries fail to provide protection, they are usually just overwhelmed or incompetent. Rarely if ever, do they seek to deny protection **because of** the trafficked person’s identity.

But there is a third and much more promising optic on nexus, originally advocated in the Michigan Nexus Guidelines of 2001,¹⁸ and subsequently

14 *Fornah v. Secretary of State for the Home Department*, [2006] UKHL 46 (U.K. House of Lords, Oct. 18, 2006), at para. 17.

15 “The ordinary meaning of the phrase ‘persecution on account of... political opinion’... is persecution on account of the victim’s political opinion, not the persecutor’s. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion... Elias Zacarias objects that he cannot be expected to provide direct proof of his persecutors’ motives. We do not require that. But since the statute makes motive critical, he must provide some evidence of it, direct or circumstantial”: *INS v. Elias Zacarias*, 502 US 478 (U.S. Supreme Court, Jan. 22, 1992).

16 “... [S]uppose the Nazi government... did not actively organize violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbors. A Jewish shopkeeper is attacked by a gang organized by an Aryan competitor... The competitor and his gang are motivated by business rivalry and the desire to settle old personal scores... Is he being persecuted on ground of race? ... [I]n my opinion, he is. An essential element in the persecution, the failure by the authorities to provide protection, is based upon race. It is true that one answer to the question ‘why was he attacked?’ would be ‘because a competitor wanted to drive him out of business.’ But another answer, and in my view the right answer in the context of the Convention, would be ‘he was attacked by a competitor who knew he would receive no protection because he was a Jew’”: *Shah and Islam v. Secretary of State for the Home Department*, [1999] 2 WLR 1015 (U.K. House of Lords, Mar. 25, 1999).

17 “... I should with great deference but no hesitation reject out of hand the view that the autonomous, international meaning of the Convention involves the proposition that the whole sense of ‘for reasons of...’ has a single reference, namely the motive of the putative persecutor. No authority binds this Court so to hold, and to do so would confine the scope of Convention protection in a straightjacket so tight as to mock the words [in the Convention’s preamble]: ‘The widest possible exercise of these fundamental rights and freedoms’”: *Sepe v. SSHD*, [2001] INLR 376 (Eng. C.A., May 11, 2001). Thus, for example, the High Court of Australia has also rejected the narrow U.S. approach to nexus. “Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state (emphasis added)”: *MIMA v. Khawar*, (2002) ALJR 667 (Aus. High Ct., Apr. 11, 2002) per Gleeson C.J.

18 “The causal link between the applicant’s predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm, or which cause the applicant’s country of origin to withhold effective protection in the face of a privately inflicted risk... The causal link may also be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the Convention ground contributes to the applicant’s exposure to the risk of being persecuted”: Michigan Guidelines on Nexus, at paras. 8, 10.

embraced in the UNHCR's 2006 Trafficking Guidelines.¹⁹ Simply put, this predicament-oriented understanding of the "for reasons of" clause holds that even where the persecutor is not motivated to hurt by a Convention ground; and even where the state of origin is not motivated to withhold protection by a Convention ground; the risk may **still be for reasons of a Convention ground** where that Convention characteristic – sex, age, class – puts the victim in harm's way. That is, the refugee definition is satisfied where sex, age, or class made the applicant **vulnerable to trafficking**.²⁰

This optic aligns with the ordinary meaning of the words of the Convention refugee definition. Where sex, age, or class explains why a person is at risk of being trafficked, then the risk is, in a common sense way of approaching things, "for reasons of" sex, age, or class. And indeed, there is tentative support for such an approach in at least a few decisions rendered in the trafficking context.²¹

This approach to nexus is impliedly adopted in, for example, the interpretation in many states, now codified in the European Union's Qualification Directive, that persons who resist conscription into armies engaged in unlawful combat are to be recognized as refugees on grounds of their political opinion.²² Their opposition does not explain why they are the objects of conscription – the government just wants to recruit bodies. It doesn't explain why the state won't protect them – it just wants its military objectives served. But opposition to the unlawful war **does** explain why this particular resister is facing the risk of punishment. That is, it explains his or her exposure to the risk, the underlying reason for the predicament of "being persecuted."

19 "Trafficking in persons is a commercial enterprise, the prime motivation of which is likely to be profit rather than persecution on a Convention ground. In other words, victims are likely to be targeted above all because of their perceived or potential commercial value to the traffickers. This overriding economic motive does not, however, exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking. Scenarios in which trafficking can flourish frequently coincide with situations where potential victims may be vulnerable to trafficking precisely as a result of characteristics contained in the 1951 Convention refugee definition... *Members of a certain race or ethnic group in a given country may be especially vulnerable to trafficking and/or less effectively protected by the authorities of the country of origin.* Victims may be targeted on the basis of their ethnicity, nationality, religious or political views in a context where individuals with specific profiles are already more vulnerable to exploitation and abuse of varying forms. Individuals may also be targeted by reason of their belonging to a particular social group. As an example, among children or women generally in a particular society some subsets of children or women may be especially vulnerable to being trafficked and may constitute a social group within the terms of the refugee definition. Thus, even if an individual is not trafficked solely and exclusively for a Convention reason, one or more of these Convention grounds may have been relevant for the trafficker's selection of the particular victim (emphasis added)": UNHCR Trafficking Guidelines, at paras. 31-32.

20 See generally J. Hathaway and M. Foster, "The Causal Connection ("Nexus") to a Convention Ground," (2003) 15(3) International Journal of Refugee Law 461-476.

21 "... [T]here is a wealth of other evidence... before us suggesting that, by virtue of family patriarchy, filial piety, ignorance, and the restricted choices of many rural Fuzhounese families caused by poverty, residence restrictions and government policies, many young rural Fuzhounese are victimized and exploited by their poor rural families, and that, pursuant to this exploitation, they are at risk of forced migration to work abroad illegally and remit funds to the family, with an attendant risk of a number of serious human rights abuses, and an even greater risk of forced re-migration should the initial attempt at illegal migration fail... If the claimant fits within [this] poorer, exploitative profile, then he might face a serious possibility of forced re-migration should he be returned to China...": XUG, Canadian CRDD Dec. No. TA0-02066 (2000). See also Australian RRT Decs. V01/13868 (2002) and V03/16442 (2004).

22 "Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of... prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)...": EU Qualification Directive, at Art. 9(2)(e).

Indeed, a thoughtful dissenting decision in the U.S. Ninth Circuit Court of Appeals authored by Judge Ferguson argues, persuasively in my view, that the U.S. Supreme Court's decision in *Elias Zacarias*²³ actually endorses predicament-oriented thinking on nexus (though it failed to find relevant evidence on the facts of the case).²⁴ Thus, in *Tecun Florian* – a claim involving risk of being persecuted for resistance to conscription by guerrilla forces – Judge Ferguson opined in dissent that where an individual's Catholic beliefs taught him to resist killing, he was properly deemed to be at risk “for reasons of” his religion, even though the guerrillas did not target him for that reason, and the government did not withhold protection for that reason:

Both the INS and the majority contend that people persecuted because they engage in expression inspired by political beliefs are not entitled to asylum in America. This is wrong...

The [US Supreme] Court emphasized in *Elias Zacarias* that there was no evidence that the petitioner in that case held any political opinion which motivated his decision to resist joining the guerrillas... [T]he Court in *Elias Zacarias* held only that asylum was unavailable to a person whose refusal was based on a non-protected ground, like ‘fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few’...

Elias Zacarias does not require us to deny Mr. Tecun Florian's petition... The tenets of his Catholic faith taught him to refuse anyone who asked him to participate in killing other human beings. We have found that similar beliefs constitute a political opinion.²⁵

In sum, to the extent that a predicament-oriented approach to nexus is adopted, refugee law is **capable** of protecting at least a seriously at-risk subset of trafficked persons. But so long as this understanding of nexus – despite its affirmation by, in particular, scholars and the UNHCR – remains poorly understood and only occasionally embraced in judicial decisions, the refugee law savings clause in the Trafficking Protocol may in practice be of little contemporary import to the victims of human trafficking.

*Prof. James C. Hathaway,
James E. and Sarah A. Degan Professor of Law, and Director of the Program in
Refugee and Asylum Law, University of Michigan Law School, USA.*

²³ *Supra* note 15.

²⁴ “Even a person who supports a guerrilla movement might resist recruitment... The record in the present case not only failed to show a political motive on Elias Zacarias' part: it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously believed that Elias Zacarias' refusal was politically based”: *INS v. Elias Zacarias*, 502 US 478 (U.S. Supreme Court, 1992).

²⁵ *Tecun Florian v. INS*, 2000 US App Lexis 3758 (U.S. C.A. 9th Cir., Mar. 14, 2000), per Ferguson J. in dissent.

PANEL HUMAN TRAFFICKING

Justice Lawal Uwais

First of all permit me to express my gratitude to the International Association of Refugee Law Judges for inviting me to participate in this Conference and to contribute as a panellist to the paper ably presented by Mr. Oscar Lujan.

Ideally, I would have preferred to read Mr. Lujan's paper before writing mine. This, however, due to time constraint and logistics, has not been the case. Therefore, my situation is that of the blind commenting on what he has not seen but perceived. I crave for your indulgence. Happily the invitation letter gave me the option to either comment briefly on the topic or comment particularly on the presentation of the main panel speaker. In the circumstance I can only attempt to do the former and not the latter.

In the last two decades the world has experienced tremendous increase in human trafficking which is a transnational criminal activity, that has been described as modern slave-trade. This phenomenon has not left out any region of the world in its operations and indeed my country – Nigeria experiences the activities of traffickers both internally and internationally.

Article 3 of Palermo Protocol on Trafficking widely defines trafficking in persons to mean "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, fraud, of deception, of the abuse of power or of position of vulnerability or of the giving or receiving of payments of benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

Trafficking and smuggling of human beings are capable of being confused or regarded to be one and the same thing. There is however a difference between them. While trafficking involves threat or use of force or other forms of coercion, abduction, fraud, deception or abuse of power; smuggling generally implies a degree of consent between transporting agent and the smuggled individual. There is no such consent in the case of trafficking. It is significant to note, that by virtue of Article 3 of the Palermo Protocol on Trafficking, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is considered to be trafficking in person, whether or not force, coercion and deception are involved. Where economic migrants are deceived or coerced into situations of forced labour and slavery-like practices, or the work is exploitative, involving illegal forced labour or debt bondage or is below national and international labour standards, that is also considered

to be trafficking. According to the U.S State Department Trafficking in Persons Report of 2003 it is “difficult to imagine but sadly true (that) millions of people around the world still suffer in silence in slave-like situations of forced labour and commercial sexual exploitation from which they cannot free themselves. Trafficking in persons is one of the greatest human rights challenges of our time”.

Human Rights Watch estimates that every year 800,000 to 900,000 men, women and children are trafficked across international borders into forced labour or slavery-like conditions. Trafficking here includes all acts related to the recruitment, transport, transfer, sale or purchase of human beings by force, fraud, deceit or other coercion including blackmail, fraud, deceit, isolation, threat or use of physical force, or psychological pressure. The ILO (United Nations International Labour Organisation) reported that Asia has three quarters of the 12.3 million people that are believed to be in forced labour worldwide. In Nigeria, government has, in response to the issues of trafficking in persons, set up anti-trafficking units within the Police Departments throughout the country, enacted anti-traffic legislations and established a body known as the National Agency to Prohibit Trafficking in Persons (NAPTIP). The government has also domesticated the U.N. Convention on Transnational and Organised Crime and the Convention’s Supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children. In addition, Nigeria has been a vanguard of cooperation between countries in the West African sub-Region as well as in Europe and other regions where Nigerians are trafficked in order to share information and collaborate in law enforcement effort to combat trafficking. Non-governmental organisations (NGOs) have also been working in providing care services for victims of trafficking as well as preventing initiatives in the States of the Federation known to suffer high rate of human trafficking.

Traffickers in Nigeria are often not strangers, they are people known to the communities where they live or operate. They are members of organised criminal networks that move people into forced prostitution in foreign countries. Some of them are men who import foreign-born women, ostensibly for marriage but in reality for the purpose of holding them in servitude and subjecting them to sexual abuse. They are families that import men, women and children to work in forced labour in the offices, factories, farms and homes and subject them to sexual and physical assault. They could also be friends, teachers, family members, tourists, lawyers, travel agencies, religious leaders, orphanages, diplomats and embassy staff, immigration officials, professional recruiters, money-lenders, transporters and hoteliers.

On the other hand, victims of the traffickers, are poor families who seek a better life abroad or in any other location outside their home or villages. They are children who have been given out unsuspectingly by their parents to family

friends, relations or even strangers in the hope that such people will provide a better future for their children through education or apprenticeship but who turn around to exploit and abuse the children. They may be young and adventurous people who wish to travel and seek fortune abroad. They could also be people running away from discrimination, natural disaster or lack of equal opportunities in their localities.

Often traffickers obtain their victims by pretending to have good intentions towards them. They offer to help solve the financial problems of their victims or their families or to secure good jobs, marriages or educational opportunities abroad. They also offer to help secure traveling documents or in the case of children to help find a good home. In many situations traffickers also purchase a child or force parents and guardians to give up their child, due to some outstanding debt or outrightly kidnap their victims.

The prevention of human trafficking requires several types of interventions. Some of these are of low or moderate cost and can have immediate impact. They include awareness campaigns that allow high risk individuals to make informed decisions and strong legislation which if enforced through prosecution and conviction serve as effective deterrent.

In addition to ratifying and domesticating the UN Convention Against Transnational Organised Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nigeria has enacted in 2003 the following laws against human trafficking:

1. Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 and
2. Child's Rights Act, 2003.

In conclusion, human trafficking undoubtedly presents a serious challenge to the world. It seems for the moment there is no immediate solution to the menace. However, this is a war that humanity cannot afford to lose. It must be won.

M.L. Uwais

Former Chief Justice of Nigeria.

Afri-Investment House, Plot 2669, Aguiyi Ironsi Street, Maitama, Abuja, P.M. B 5049, Abuja, Federal Capital Territory, Nigeria.

Phone Number and Fax Number: + 234 9 4137945; + 234 9 4139999

*E-Mail: maryamu@wali-uwais.com
maryamu@leapafrika.org*

BIENVENIDA AL INSTITUTO DE LA JUDICATURA FEDERAL

Jaime Manuel Marroquin Zaleta

*“mi paz es la de los otros
y no sé si la querrán,
esos otros y nosotros
y los otros muchos más,
todos somos una patria,
patria es humanidad”*

Con estas palabras, el poeta uruguayo Mario Benedetti hacía suya una idea que, años atrás, esbozara José Martí. Con la libertad que permite el arte, me gustaría transmitir a ustedes, una posible interpretación de las palabras de ambos poetas latinoamericanos. Patria es humanidad significa, que al principio de la solidaridad humana no lo atan las fronteras de los países; que el mismo compromiso que tenemos con nuestros compatriotas, debemos tenerlo también con otros seres humanos que no lo sean; trasladando la idea de la Literatura al Derecho, podemos decir que, al sostener que patria es humanidad, estamos atendiendo al llamado que, hace casi treinta años, hiciera a la comunidad jurídica internacional ese preclaro jurista norteamericano de nombre Ronald Dworkin: la invitación a tomar los derechos humanos en serio; en este caso, la protección de los derechos de los refugiados, de los desplazados internos y los asilados políticos.

En este contexto, de protección para todas aquellas personas que se encuentran fuera de su país de origen, y no pueden, o no quieren, volver a éste debido a temores fundados de ser perseguidas por motivos de raza, religión, nacionalidad, pertenencia a determinado grupo social y opiniones políticas, se inscriben los esfuerzos de la Asociación Internacional de Jueces en Derecho de Refugiados y de ésta, su 7ª Conferencia Bienal Mundial, que ha sido denominada: *“Migración Forzada y el Avance de la Protección Internacional: La interacción entre la Migración, el Derecho Internacional de los Derechos Humanos y Determinación de la Condición de Refugiado”*.

En esta Conferencia, expertos en la materia intercambian desde el día de ayer, puntos de vista sobre los derechos de los refugiados; sobre el derecho de asilo y su impacto en temas de migración; sobre la importancia de los instrumentos regionales de protección de refugiados así como sobre la necesidad de adoptar las decisiones internacionales como políticas públicas eficaces al interior de los países. Como Director de esta Escuela

Judicial, a todos los participantes les doy la más cordial bienvenida, y les expreso mi reconocimiento y agradecimiento por haber escogido este lugar para la realización de tan importante evento. Hago votos porque las mesas de trabajo den los frutos que todos esperamos.

El hecho de que hoy estemos en México, no es producto de la casualidad. Se debe, en parte, a la visita que en febrero de este año, recibí del Juez Anthony North, de la Corte Federal de Australia y Presidente de la Asociación, con quien me siento particularmente identificado, ya que nuestras hijas, aunque no se conocen, viven en el lugar más distante de esta ciudad de México: la bella ciudad de Perth en Australia. Pero también se debe al papel que México ha asumido históricamente, en la protección y apoyo a los refugiados de otros países. Españoles, chilenos, argentinos, guatemaltecos, nicaragüenses, entre otros, en los días difíciles de sus naciones, han acudido a esta tierra en busca de la protección que no han encontrado en la suya.

No es casualidad tampoco que sean juzgadores quienes se reúnen esta mañana para intercambiar experiencias y opiniones sobre el derecho de refugiados. Los desplazamientos de personas, cualquiera que sea el motivo y la denominación que adquieran, no sólo representan un desafío para las autoridades administrativas del lugar al que emigra el grupo desplazado, reto que consiste en apoyar a dicho conglomerado humano con la infraestructura necesaria para que continúe la vida en las mejores condiciones posibles; sino que, además, invariablemente tales movilizaciones se traducen en problemas jurídicos que deberán resolver los tribunales, entre ellos, el régimen de propiedad y tenencia de la tierra, la vulneración de las garantías individuales, el acceso a los centros de salud. No en balde, la Convención sobre el Estatuto de los refugiados, adoptada en Ginebra, Suiza, en 1951, incluye entre sus disposiciones un artículo expreso sobre el derecho de acceso a los tribunales. Este proceso de judicialización, no es otra cosa que el signo de los tiempos del Estado Constitucional de Derecho.

La presencia de todos ustedes en este recinto y en el marco de esta conferencia mundial, es, finalmente, resultado del camino andado por generaciones en la construcción de instituciones internacionales y nacionales encargadas de proteger los derechos de refugiados y desplazados. El camino, no ha estado exento de problemas y peligros, de desvíos y regresiones. Pero aun en las situaciones más desesperadas, en las que, por motivo de las guerras, de las crisis económicas o de la intolerancia, los seres humanos han tenido la desgracia de abandonar sus hogares, en busca de un mejor futuro o, sencillamente, en busca de un futuro, la comunidad internacional y los propios estados han diseñado instituciones sólidas de apoyo para esos grupos humanos. En otras palabras: Pese a todo, no hay

razón para la desesperanza, aún en las situaciones más desesperadas.

El siglo XX y los albores del siglo XXI son buen ejemplo de las dificultades de este camino. A pesar de los avances tecnológicos y científicos, siguen existiendo marcadas condiciones de desigualdad entre los pueblos; a pesar de los avances de la medicina, siguen muriendo seres humanos por enfermedades curables; a pesar del reconocimiento de los derechos de los refugiados, las violaciones a sus derechos humanos más elementales, siguen siendo una constante en las sociedades contemporáneas. Es por ello que, deseo retomar el concepto de solidaridad que enuncié al principio de mi intervención, como el único camino posible para tratar a los refugiados.

Los refugiados son un desafío para la solidaridad humana. Un desafío urgente, que debemos entender en todos sus causas y efectos, para poder esbozar soluciones integrales. Permítanme, poner de muestra un botón: el crecimiento del número de refugiados y desplazados en el mundo es alarmante: en 1970, 2.5 millones de personas; en 1980, 8.2 millones; en 1990, 17 millones y en el 2000, 21.8 millones, que han disminuido a 19.2 millones, según datos publicados por el Alto Comisionado de Naciones Unidas en la materia. Las causas de este incremento van desde el crecimiento demográfico, particularmente en los países de África, Asia y América Latina y la desigual distribución de la riqueza, hasta la integración producida por los medios de comunicación, las recientes manifestaciones de xenofobia, y, particularmente, las guerras y conflictos internos.

En la descripción del camino seguido por generaciones, es justo recordar que, en aquel lejano año de 1921, el Dr. Fridtjof Nansen, de origen noruego, tuvo que enfrentar problemas similares cuando fue designado por la Sociedad de las Naciones, como Comisionado para los Refugiados Rusos; con él, dio inicio un proceso que, desde entonces, y a pesar de los problemas del mundo, no se ha detenido. Es cierto que los esfuerzos iniciales de protección a los refugiados, se vieron interrumpidos por la Segunda Guerra Mundial, pero también debemos recordar que, como consecuencia de ese conflicto bélico, el derecho de los refugiados, encontró un nuevo y mejorado marco jurídico.

En efecto, como resultado de la guerra, se emitió la resolución 428 de la Asamblea General de la ONU de 1950, que creó el Alto Comisionado de las Naciones Unidas para Refugiados, así como la citada Convención del Estatuto de los Refugiados de 1951, que fuera reformada por el Protocolo adicional de 1967, para ampliar el concepto de refugiados más allá de los confines originales, pensados para los europeos de la posguerra. Estos dos últimos instrumentos, ratificados por México el 7 de junio de 2000, son

el marco jurídico que define las obligaciones de los estados parte, en la protección internacional de los refugiados.

En la actualidad, el problema que se plantea es saber en qué medida el marco jurídico actual responde a las necesidades de protección y asistencia de refugiados, asilados y víctimas de los conflictos internos. En qué medida, el marco jurídico responde al principio de solidaridad. Respuestas a estas interrogantes escucharemos de las voces de los jueces y expertos que hoy nos acompañan; voces que seguramente propondrán políticas públicas de protección, así como de prevención y de solución de los conflictos, que, en su conjunto, contribuyan a velar por el respeto a los derechos humanos de los refugiados en cualquier latitud.

Para terminar, quisiera citar una idea de ese gran mexicano universal que fue Octavio Paz, quien alguna vez comparó el fenómeno del desplazamiento de personas entre América Central, México y Estados Unidos, como algo tan natural como el viento y las corrientes marinas. El desplazamiento de personas es algo natural, que difícilmente se podrá modificar mientras las condiciones de vida no cambien. Sin embargo, no debemos perder de vista que lo ideal sería que los seres humanos no tuvieran que verse obligados a abandonar nunca, en contra de su voluntad, sus lugares de origen. Cuando esto ocurra debemos pensar, como ayer y como hoy, que todos los seres humanos somos una misma patria, y, como querían Martí y Benedetti, que la noción de patria es la humanidad.

Muchas gracias y bienvenidos.

*Jaime Manuel Marroquin Zaleta,
Director General, Instituto de la Judicatura Federal de México.*

INTERNATIONAL REFUGEE AND HUMAN RIGHTS LAW: SIDES OF THE SAME COIN

Louise Arbour

Video Presentation

It is a pleasure to be able to send a message to you, although I would have much preferred to be with you in person. Needless to say, I attach great importance to the work of the judiciary in all of its spheres. Your organisation and the support it provides in ensuring proper, independent interpretation of the Refugee Convention – in particular its definitional and cessation clauses – is of key importance, for new adjudicators and appellate judges. Drawing on international practice and experience can only result in more coherent and more legally sound jurisprudence. I also think you have an important role to play in disseminating a broader understanding of refugee law, including its definition, to encompass the full range of international human rights law.

I have to say that I am often confronted, and equally dismayed, by a very dualist view of international refugee law, on the one hand, and international human rights law on the other. The notion of these two fields of international law as occupying two separate and distinct *champs d'application* has proven surprisingly persistent. Those who so regard these two disciplines in fact do a disservice to both.

I am quite convinced that such a division is wrong as a matter of principle, of law and of practice. As a matter of principle, refugee law and human rights law both belong to that body of international law that emerged so starkly from the ashes of World War II – that part of law that places the individual at the centre of legal discourse and the human person as the holder of rights and obligations. Alongside refugee and human rights law, come international humanitarian and international criminal law to complete the quadrangular picture of the corpus of international law aimed first and foremost at the protection of the individual. In this fundamental philosophical sense, then, international human rights and refugee law are cut from the selfsame legal and jurisprudential cloth.

At the legal level, international courts and tribunals have made clear that international law is to be understood as composite whole – that is to say, a State's responsibilities in a particular situation must be examined by reference to the full range of international obligations applicable in a situation. This results in an at times admittedly complex exercise of giving effect

to varying sets of obligations in order to maximise the complementarities and practical impact of each; each body has an *effet utile* affecting the construction and interpretation of the other. The most common example of this complementarity arises in the interpretation of doubtful provisions where the scope of particular obligations is at issue. In conducting this quintessentially judicial exercise, courts are well-placed to draw on principles and provisions of other parts of what might be called the international law on the protection of the person in defining a contested provision.

For instance, the definition of article 1 of the Refugee Convention - who is a refugee - has given rise to perhaps more litigation in national courts than any other single provision of national law. Here as elsewhere, human rights are of real aid in construing the proper scope and providing a richer understanding of what amounts to "persecution", a phenomenon which I would argue is by definition inherently a human rights notion. A compelling example of a gender-sensitive analysis was applied to the refugee definition in Islam v Home Secretary, where the House of Lords carefully analysed the situation of discrimination and vulnerability to harm of women in Pakistan before concluding that they constituted a "particular social group" entitled to claim the protection of refugee status. Indeed, Lord Hoffman made the implicit quite explicit in describing the Refugee Convention as a human rights instrument.

While human rights law thus plays an important role in interpreting who is to be recognised as a refugee, similarly, in deciding when cessation clauses operate to deprive an individual of protection, no picture can be complete unless full account is taken of the human rights situation in the State of origin, both in general and as applied to the individual. Likewise, in examining the proper reach of exclusion clauses, an approach informed by human rights law insists on a reasonable level of scrutiny in circumstances where notions of, for instance, national security are invoked. I offer these as instances of illustration of the broader principle that human rights law is so inextricably linked with refugee law that an approach to interpretation that draws one for the understanding of the other can only be the richer and – I suggest – the more likely correct as a result.

In various circumstances, the different areas of law cover the same substantial ground. The best example of this is the non-refoulement obligation set out in article 33 of the Refugee Convention, on the one hand, and, on the other, article 3 on the Convention against Torture and article 7 of the International Covenant on Civil and Political Rights. There is also great similarity in the due process provisions applicable to expulsion of aliens set out in article 32 of the Refugee Convention and article 13 of the Covenant on Civil and Political Rights. While the common ground of

these provisions is substantial, it is not redundant, as a particular State may well be part to only some of the relevant treaties.

I should add that where the boundaries of one area of the law are indeed clear, other parts of international law may nevertheless step in and afford a level of protection which, as the sum of all parts, may often be beyond the ability of one instrument or body of law to confer. The exclusion provisions in article 1(F) and 33(2) of the Refugee Convention, for example, exclude from certain categories of persons the conferral of refugee status and protection against refoulement to persecution. Nonetheless, human rights law operates to afford a basic level of protection in these circumstances, and ensuring that one wrong is not compounded by a second wrong in the form of exposure to a supplemental violation of human rights.

Finally, human rights law further complements refugee law by strengthening the effective enjoyment of the right to asylum and international protection – human rights law requires positive protection of the family unit and of children, provision of housing, education and health, comprehensive access to justice and imposes a searching prohibition on discrimination which, in many respects, go well beyond what was envisaged in the 1950s in the minds of the drafters of the Refugee Convention. In this sense, then, human rights law operates to complete and perfect the full promise of international protection first articulated by the Refugee Convention, not just in receiving States, but also in countries of origin. Refugee protection must thus be seen within the framework of advancements in international human rights law.

Allow me to conclude therefore by encouraging all of us - justices, judges, advocates, practitioners and policymakers - not to allow ourselves to be unduly fettered by counterproductive distinctions or excessive focus on certain parts of the law, but instead to draw on the full richness of international human rights and refugee law. Let us combine that very diverse array of legal tools, doctrine and experience to provide the fullest, most meaningful answer to those seeking the safety and protection of States that is their fundamental right.

*Louise Arbour,
United Nations High Commissioner for Human Rights*

EL DERECHO INTERNACIONAL Y SU IMPORTANCIA EN EL DERECHO DE LOS REFUGIADOS.

Lic. Alfonso Sierra Lam

La migración es un fenómeno que en los lustros recientes ha llamado a nuestras puertas con insistencia, hasta ocupar hoy día un lugar preponderante en la agenda de los países desarrollados, receptores en mayor medida de ese flujo, así como de aquellas naciones que participan como actores principales: como expulsores básicamente o, en un lugar secundario, pero no por ello menos fundamental: como territorio de tránsito.

La migración como sabemos, no es algo nuevo en la historia. Lejos de ello, la historia está hecha en buena medida por tales movimientos humanos, individuales y colectivos, más aún en tratándose de emigraciones forzadas, una de las secuelas consideradas naturales en la guerra¹.

El objeto de esta ponencia, es revisar algunos planteamientos sobre el contexto teórico en que se desenvuelve la problemática del Derecho de los Refugiados, de manera que podamos traer a la reflexión jurídica contemporánea, aunque por razones obvias de tiempo, de manera sintética, con elementos teóricos que informan el debate contemporáneo, así como los retos susceptibles de surgir en el ejercicio práctico de tales posturas. Los flujos de circulación humana que atraviesan los límites que circunscriben su lugar de origen o de arraigo, componentes primarios del fenómeno migratorio han cobrado un “abrupto protagonismo” en palabras de Mármora, debido al creciente aumento de tales movimientos, a escala mundial. Sus causas las encontramos en los países de origen, sin duda, por “...el rápido crecimiento demográfico, el constante deterioro del medio ambiente, el descenso del nivel económico y social y la eclosión de conflictos expulsores de población”².

El propio Mármora afirma: “Tanto el hecho como las causas son verificables si se consideran los 150 millones de personas que actualmente viven en un país distinto al de su origen; si se tiene en cuenta la profundización de la brecha entre países ricos y pobres e incluso entre las clases bajas y altas en gran parte de los países en desarrollo; si se presta atención a los 20 millones de personas expulsadas por el deterioro del medio ambiente; si se pasa revista a la multiplicación de conflictos políticos, étnicos y

¹ Aunque es de apuntar que ya Platón recomendaba la expulsión de personas en tiempo de paz, para mantener el equilibrio dentro de la “polis”.

² Mármora, Lelio. “Las políticas de migraciones internacionales” Edición O.I.M.-Paidós. Buenos Aires, 2002. Pag. 29.

religiosos que han determinados que cerca de 12 millones de personas se encuentren en la actualidad en calidad de refugiados...”³

En esta lógica podemos afirmar que si bien es cierto que las migraciones masivas de la mayor parte del siglo XX, tuvieron una motivación en buena parte económica, tendiente al equilibrio de un orden laboral asimétrico entre las economías más desarrolladas y aquellas en vías de desarrollo, también un número importante lo ha sido, por acciones de los Estados en detrimento de los derechos y las libertades de sus propios nacionales, lo que ha dado lugar a las migraciones forzadas. Lamentablemente las tendencias al inicio del Siglo XXI, no muestran un cambio favorable en tales flujos.

Nuevos retos han surgido, evidenciando problemas aparentemente resueltos. La falta de valores que contribuyan al arraigo de las personas en su tierra, representan un aliciente a forjar densas cadenas que atan la carga de la migración forzada o la clandestina, que coadyuva a la consolidación de un orden paralelo, si se me permite el término, en que la trata y el tráfico de personas se vuelven negocios altamente lucrativos, a la sombra de Estados que cierran sus fronteras y hacen del migrante una condición sinónimo de forajido.

Ahora bien, la problemática de los Refugiados se inserta en esta dinámica; es decir, aún cuando éste se estructura a partir de lógicas, conceptos e incluso temporalidades diversas, su ubicación dentro del ámbito de la circulación de flujos humanos lo instala dentro del conjunto mayor de la problemática Migratoria.

Para todos los reunidos aquí, nos es autoevidente el valor superior de la protección de los Derechos Humanos de las personas en condición migrante y desde luego, de los Refugiados, las condiciones y las cifras que revisamos nos dan la razón.

El inicio del siglo XXI nos muestra que no se ha permitido alcanzar con tersura, la idealidad de las normas internacionales en el respeto a los Derechos Humanos. Lejos de ello, ¿Dónde se encuentra entonces el papel del Derecho Internacional?

Un sistema de protección de los derechos de los refugiados ha tenido prelación en la historia en cuanto a su protección, a través de disposiciones sustantivas emanadas de convenciones que desde el inicio y en especial a mediados del siglo pasado, en un afán de imponer un orden racional frente a la barbarie sufrida durante las guerras que poblaron nuestro mundo. Un mecanismo moderno de defensa de tales derechos, aún anterior al de los trabajadores migrantes. Tales medidas se adoptaron en un ejercicio de cooperación y entendimiento internacional, situación que a veces se vio

³ Ibidem. Pp. 29-30.

empañada por la falta de un criterio preciso para delimitar los alcances de diversas vertientes de un fenómeno en sí mismo complejo, en el caso, entre Derecho Humanitario, Derechos Humanos y Derechos de los Refugiados.

En tal sentido es pertinente aquí escuchar la reflexión de uno de los pensadores que nos recuerdan de manera permanente, el compromiso crítico de todo profesional en cualquier rama del conocimiento humano. Y el Derecho en cuanto disciplina, no escapa a esa visión. Me refiero a Jürgen Habermas⁴, quien en un interesante estudio acerca de la posibilidad de constitucionalizar el Derecho Internacional, hace lúcidas observaciones, aplicables a nuestro tema, que es prudente compartir.

Habermas contextualiza su ensayo en dos grandes vertientes, una, en el desarrollo del Derecho Internacional a partir de la mirada atenta de grandes filósofos como Francisco Suárez, Hugo Grocio y Samuel Pufendorf, hasta llegar desde luego a Immanuel Kant, en quien afirma el primero de sus argumentos: la constitucionalización del Derecho Internacional ha progresado en el camino que señaló Kant, un camino en donde el Derecho no únicamente es un instrumento para establecer la paz entre los estados, sino que se entrelaza con la función de asegurar la libertad que cumple una situación jurídica que los ciudadanos pueden reconocer libremente como legítima, y que conduce al derecho cosmopolita, el cual en nuestro tiempo ha adquirido una forma institucional en constituciones, organizaciones y procedimientos internacionales.⁵

La otra vertiente se finca en una visión realista, que surge de la exposición de la emergencia de una potencia mundial hegemónica después del abatimiento de un orden mundial bipolar.

En esta perspectiva, si bien los Estados nacionales se encuentran en tránsito hacia la constelación postnacional de una sociedad global, en ella existe una domesticación normativa del poder político por medio del derecho, lo cual sólo es posible dentro de las fronteras de un Estado soberano que basa su existencia en la capacidad de autoafirmarse por la fuerza.

Habermas reflexiona en este escenario y contrasta ambas vertientes: La disputa entre los idealistas descendientes de Kant y los realistas seguidores de Carl Schmitt, acerca de los límites de la juridificación de las relaciones internacionales se encuentra hoy recubierta por un profundo conflicto, que consiste en si la juridificación de las relaciones internacionales puede sustituirse por una etización, es decir una imposición de una ética, sobre una política internacional determinada por una superpotencia⁶.

4 El texto aquí analizado es el "El Proyecto kantiano y el occidente escindido" en Habermas, Jürgen, "El occidente escindido". Editorial Trotta. Madrid 2006. pp. 113 y ss.

5 Ibidem. Pag. 113.

6 Ibidem. Pag. 114.

Habermas decanta su argumentación a favor de la postura Kantiana; afirma el carácter “débil” del Derecho Internacional en tanto que su eficacia depende en última instancia, de la voluntad soberana de las partes que firman los pactos. La eficacia de los tratados internacionales se encontraría por principio, sujeta a la reserva de que las partes soberanas sustituyan el derecho por la política si las circunstancias lo requieren. Aquí es evidente que la valoración nos muestra una relación asimétrica entre poder y Derecho, en tal sentido, las regulaciones del derecho internacional reflejarían las relaciones de poder que subyacen entre los estados.

Esta última, en cuanto postura del derecho internacional clásico, es rebatida por Kant señalando que el Derecho no es sólo un instrumento adecuado para establecer la paz entre los Estados, concibe la propia paz entre naciones como una paz jurídica. Junto con Hobbes, Kant afirmaría en el nexo entre el Derecho y el aseguramiento de la paz, pero a diferencia de Hobbes, Kant no funda la pacificación jurídica de la sociedad en el intercambio de la obediencia de los sometidos al Derecho, por la garantía de protección que ofrece el Estado, antes bien, la función pacificadora del Derecho se entrelaza con la función de asegurar la libertad, una situación que los ciudadanos pueden reconocer como legítima, por ello, la ampliación en Kant de este valor, “la pacificación universal y duradera no constituye “sólo una parte, sino todo el fin último de la doctrina del Derecho”. En tal sentido Kant señalaba que la “idea de una comunidad pacífica, aunque todavía no amistosa, de todos los pueblos” es un principio del Derecho, no sólo un mandato de la moral.

El punto fino de la litis trasciende la pura teoría y nos toca cercanamente: En el enfrentamiento entre idealistas y realistas la pregunta planteada por Habermas es si el derecho sigue siendo el medio adecuado para realizar los fines proclamados del mantenimiento de la paz y la seguridad internacional, así como la implantación a escala mundial de la democracia y particularmente, de los derechos humanos.

Hay en la conclusión una identidad entre la postura de Habermas respecto a la kantiana, como lo hemos afirmado antes, al reprochar a Schmitt su ceguera, pues pese a la disposición intelectual para revisar sus ideas al final de la Segunda Guerra Mundial, frente a las ideas que dan vida a la modernidad, reformula sus propuestas afirmando muchos de los planteamientos que dieron pie a postulados nazis.

Cabe concluir ¿Porque traer aquí esta tesis en la que Habermas retoma a un filósofo de la Ilustración, para explicar un mundo con trescientos años de evolución?

Consideraciones aparte sobre la deconstrucción del problema de la Paz, el Derecho y la igualdad entre las naciones, deben analizarse sus afirmaciones con toda precisión.

El optimismo por un Derecho Internacional sujeto a la participación de todas las naciones y no de una o unas cuantas, aún en la mejor actitud de estas para adherirse a una política de los Derechos Humanos, responde sin duda a una lógica liberal.

En este sentido, la formulación del Derecho Internacional debe enriquecerse a través de tres segmentos que no pueden deslindarse: la defensa y protección de los Derechos Humanos; el Derecho de los Refugiados y el Derecho Humanitario.

En mi opinión, estas representan algunas de las materias más robustas en el ámbito internacional, prueba de ello es el conjunto de normas convencionales que se han generado, el éxito relativo en la creación de instrumentos que atienden la problemática y la rapidez y eficacia en el despliegue de estrategias que han evitado tragedias de inimaginable magnitud. Dos premios Nobel y una comparación en sus resultados frente a otros mecanismos de protección de las Naciones Unidas, arrojan un saldo altamente favorable, de la ACNUR, sin la menor duda.

No obstante ello, considero que la preocupación de Habermas esencialmente toca a nuestro tema. La falta no de una constitucionalización, sino de una codificación que genere los mecanismos uniformes de atención a los refugiados en los estados receptores, así como estímulos y apoyos previstos para los mismos, en un ámbito de cooperación internacional, son aspectos que contribuirían a racionalizar y dar esa coherencia que inspira el pensamiento kantiano.

Ello desde luego nos lleva a la necesidad de replantear críticamente el papel de algunos de los elementos básicos que nos ocupan, tal y como lo plantea el Dr. Antonio Augusto Cancado Trindade quien algunos años atrás revelaba que una revisión crítica de la visión de las tres grandes vertientes en la protección internacional de la persona humana –Derechos Humanos, Derecho de los Refugiados y Derecho Humanitario-, la cual se manifestaba fragmentada debido al énfasis exagerado en los orígenes históricos distintos de estas tres ramas⁷, problema por lo demás, definitivamente superado, como lo afirma el propio Dr. Cancado en la estrategia de la propia ACNUR al afianzar su acción en tres pilares básicos: la protección, la prevención la solución, ubicado en un universo de derechos humanos.

7 Cfr. "Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario, Aproximaciones y Convergencias", en la obra "Las tres vertientes de la Protección Internacional de los Derechos de la Persona Humana", escrita por el propio Cancado, Perytrignet, Gérard y Ruiz de Santiago, Jaime. Editado por Edit. Porrúa y la Universidad Iberoamericana. México, 2003.

A fines del siglo pasado, la prospectiva indicaba que la madurez de los instrumentos jurídicos internacionales y las instituciones desarrolladas para su aplicación, permitirían una mayor eficacia para la protección de los Derechos Humanos respecto de la sola voluntad de cada Estado, o la autocomplacencia contenida en el argumento de algunos países, cuyo valor argumentativo se arroja en la primacía del Derecho interno, como máxima garantía de un marco adecuado para la protección de los Derechos Humanos, lo cual lamentablemente, se ha desmentido categóricamente con experiencias recientes en las cuales, circunstancias extraordinarias, como la guerra o el terrorismo, ha dado la coartada ideal para la violación de los Derechos Humanos en múltiples formas y modalidades.

Es evidente que las situaciones emergentes en un mundo globalizado, plantean la necesidad de asumir y repensar las condiciones que orillan a las personas a migrar y a procurar asilo o refugio en otras naciones o a desplazarse dentro de las fronteras de cada Estado; igualmente requiere considerar el problema no lejano, de considerar a la emigración por razones económicas o famélicas, como una modalidad más de la migración forzada. Esto sin duda, requerirá cambiar un paradigma.

Las grandes migraciones probablemente estén próximas: los fenómenos climáticos y el agotamiento de las fuentes de agua potable entre otros, pondrá a prueba sin duda, la capacidad de organización de las naciones, pero sobre todo, la fortaleza de las instituciones que hoy diseñamos para el mañana.

En este proceso, el fortalecimiento y la coordinación de los mecanismos normativos e institucionales con los que actualmente el Derecho Internacional tutela a las personas sujetas a la migración forzosa, representa una oportunidad para ampliar la fortaleza y el alcance de los instrumentos de protección de los Derechos Humanos y con ello, una esperanza para quienes depositamos nuestra confianza en el logro de ese anhelo de la positivación del derecho en una sociedad cosmopolita.

THE USE OF FALSE DOCUMENTS BY ASYLUM-SEEKERS

Lord Justice Stephen Sedley

The right of asylum by its nature cuts across immigration control. It is an emergency route to safety. The risk of the abuse of asylum as a short cut to immigration therefore raises difficulties which are not easy to manage either politically or legally. The political imperatives to prevent such abuse are well known. All that I propose to observe here is that these have also led, often with the encouragement of the press, to a public suspicion that most asylum-seekers are disguised immigrants. It is a suspicion which is capable of affecting judicial decision-making, notably in the re-emergence of a 'culture of disbelief' which, in the UK at least, was thought by many until recently to be largely a thing of the past. In other states it has led to artifices such as treating passengers who are still 'airside' as not yet having entered the country and so being liable to removal without consideration of their asylum applications – an artifice which at least two of Europe's constitutional courts have struck down.

The legal issues are not divorced from the political ones, but judges must keep them separate. In England and Wales they were crystallised in an important decision of the High Court in 1999, the case of *Adimi*¹. The court had to consider the fit between art 31(1) of the Geneva Convention, which broadly forbids contracting states to impose penalties for illegal entry on refugees, and the criminal law which since 1996 had, understandably, penalised people who gain entry to the UK with forged documents.

The UK had done nothing to adjust its criminal law to its art 31(1) obligations. Immigration officers could summarily remove entrants with false papers. For those who had managed to gain entry, the state relied on prosecutorial discretion and judicial restraint; but the evidence showed that prosecutions were common and that magistrates were regularly sending asylum-seekers to gaol for entering with false papers. In a leading judgment distinguished by both its humanity and its clarity, Simon Brown LJ held that any honest asylum claimant should be protected by art 31(1) against prosecution for using false documents or entering clandestinely

Governmental response was immediate. In the Immigration and Asylum Act 1999, among many other things, provision was made for a statutory defence to the crime of entering with false papers, but the defence is more limited than the court had proposed in *Adimi*. If at a port interview the en-

¹ [1999] 4 All E.R. 520, Simon Brown LJ and Newman J.

trant does not have a genuine and valid passport or travel document, he or she commits a criminal offence. It remains a defence to show a reasonable excuse for the want of a valid document, or to prove that the false document was used from beginning to end of the journey. But the penalty for being disbelieved can thus be not only refoulement but imprisonment.

It has to be recognised that these provisions, which may be thought to cut back the intended scope of art 31, are in part a response to the expedients adopted by agents who make their living out of assisting both genuine and false asylum-seekers to gain entry to countries of their choice. In many cases the reason why an asylum-seeker had arrived without documents was that the agent had deliberately destroyed them en route. The problems this created for officials processing their claims were immense. It was impossible to know where they had in truth come from or when, and therefore whether their claims were being promptly made and whether they had come through safe third countries. Other questions about entrants' origin and ethnicity, and even their identity, became dependent on sometimes eccentric evidence and assessments of credibility. It is unsurprising that government, through Parliament, has attempted by penal sanctions to reverse this situation. It is a situation, however, which in more recent years has been partly overtaken by the avoidance of public air or sea transport and arrival at ports of entry, in favour of smuggling people into the country in commercial vehicles and leaving them to fend for themselves – an equivalent of the clandestine entry of Mediterranean and Caribbean immigrants by sea. This too has prompted measures, notably the denial of benefits to those who do not seek asylum on arrival, which have created further legal problems, among them the destitution of some asylum-seekers to a point which constitutes inhuman treatment in breach of art. 3 of the ECHR.

The potential criminality of arrival without papers also means, at least in principle, that the asylum interview, instead of being a collaborative effort to establish an individual's status, has to give way to a police interview conducted under caution. More fundamentally, there are concerns as to whether the burden of proof placed on entrants is compatible with art 6 ECHR. The Home Affairs Committee of the House of Commons and the Joint Committee of the Lords and Commons on Human Rights have both expressed concern that the law now in place fails to meet the standard of protection required by art 31 of the Refugee Convention. The underlying problem both for asylum-seekers and for governments is that the rigorous requirements of visas and proper documentation demanded by national immigration control, and the heavy financial sanctions imposed on carriers who bring undocumented people to the UK, drive those who are anxious to reach the UK to adopt illegal methods of getting there. To deal

with these methods, ever-tougher sanctions are deployed. The courts for their part try to temper law with justice, but their options are increasingly limited.

The result is a spiral of prohibitions and penalties which, because of the dangerous state of many parts of the world, drive desperate people to even more desperate measures. Both sides of the process are entirely understandable; but if the Convention is to continue to function as a humanitarian instrument, art 31(1) needs to be respected; and that, one would think, means an immigration system which, however rigorous, permits an asylum-seeker to present his or her claim without risking gaol as the price of reaching safety.

*Lord Justice Stephen Sedley,
Court of Appeal, England and Wales*

INTERDICTION BY TREATY: THE CANADA-USA SAFE THIRD COUNTRY AGREEMENT

Judge John M. Evans¹

I. INTRODUCTION

States have developed a variety of techniques to prevent potential refugee claimants from reaching their territory and, hence, to avoid having to determine their claims to be recognized as refugees. The forms of interdiction include: a requirement that nationals of “refugee producing” countries have a valid visa; the imposition of swingeing fines on carriers who transport passengers without valid travel documents; and the interception of potential refugee claimants on the high seas.

The Safe Third Country Agreement concluded between Canada and the United States in 2002 is another device for achieving the same goal: reducing the number of people who can access the refugee determination system in Canada. It is, in effect, interdiction by treaty.

In this short paper, I describe the principal features of the Agreement from the perspective of Canada, and indicate the legal issues that implementing the Agreement in particular situations may raise for Canadian domestic law. However, since litigation has already commenced in the Federal Court, and may well find its way to the Federal Court of Appeal, I can only describe in a neutral manner the general nature of the issues being raised. I have attached a brief bibliography for those interested in learning more.

This is the first and, so far, only such agreement made by Canada with another state to regulate access to Canada’s refugee determination system. The US-Canada Agreement came into effect on December 29, 2004. Given Canada’s long land border with the US, the significant percentage of those seeking asylum in Canada who claim at that border, and our common legal traditions, it is not surprising that the first safe third country agreement was made with the US.

A country is “safe” in this context if, at a minimum, it does not *refouler* refugee claimants contrary to Article 33 of the *Convention relating to the Status of Refugees*, the 1967 *Protocol relating to the Status of Refugees*, and Article 3 of the 1984 *Convention Against Torture and Other Cruel, Inhuman or Treatment or Punishment* The *Immigration and Refugee Protection Act*, S.C.

¹ I am greatly indebted to my law clerk, Mr Senwung Luk, for his invaluable research assistance in the production of this paper.

2001, c. 27, subsection 102(1) authorizes the making of regulations designating countries that comply with Article 33 and Article 3, for the purpose of sharing responsibility with foreign governments for the determination of refugee claims. Subsection 102(2) sets out the factors to be considered in designating a country as “safe”

The Agreement’s basic principle is that, subject to some important exceptions, nationals of third countries may not claim refugee status when they present themselves at a port of entry on the land border between Canada and the US: Articles 2 and 4(1). Claimants will be turned back, since they are expected to have claimed protection in whichever of the two countries from which they arrive at the land border. The country to which claimants are returned must admit them and determine their refugee claim: Article 3. Claimants covered by the Agreement are thus also effectively limited to making a claim in one of the two countries, but not both.

There are two main assumptions on which the Preamble states that the Agreement is based. First, each country complies with international law relating to refugees, and, in particular, with the international law principle of non-*refoulement* of refugees and those seeking protection from torture. Second, both countries share common traditions of assisting refugees and have generous systems of refugee protection. However, unlike the analogous EU Schengen and Dublin Agreements, the Canada-US Agreement is not seen as the first step in the harmonization of the Parties’ domestic laws on refugee protection.

Canada had been pressing the US during the 1990s for a refugee “burden sharing agreement”. Of the between 35-45,000 people entering the refugee determination process in Canada annually from the mid 1990s to 2002, approximately one-third made their refugee claim at the Canada-US land border. Almost 80% of these land border claims on the Canadian side are made at two ports of entry, both in Ontario. From Canada’s perspective, a safe third country agreement with the US would significantly reduce the number of refugee claims to be processed by summarily turning back to the US those who claimed at the land border to be recognized in Canada as a refugee.

Prior to September 11, 2001, US Administrations had shown no enthusiasm for such an agreement, presumably because diverting refugee claimants from Canada was likely to add to the large backlog of claimants already in the US refugee determination system. However, heightened security concerns after 9/11 seem to have caused a change of heart in Washington. The Agreement is said to be part of the Smart Border Action Plan.

Early statistics suggest that, the Agreement has been successful in reducing the number of refugee claims made at the land border that have to be processed in Canada. While the total number of all claimants entering the refugee determination system declined dramatically from 33,500 in 2002 to just under 20,000 in 2005 (a drop of 23%), the number of land border claims dropped from 8,896 in 2004, to 4,033 in 2005, a decline of by 55%. In 2002-2004, 32% of all refugee claims were made at a land border, whereas in 2005, the percentage had fallen to 20%.

These statistics indicate that enhanced visa requirements, penalties on carriers, and ocean interceptions, are not the only means of interdiction available to states anxious to reduce the numbers of refugee claimants arriving in their territory. However, in the longer term, claimants are likely to attempt to travel to Canada directly or through a country other than the US, or to cross the Canada-US border clandestinely and make an inland claim. A very recent review by the UNHCR and the US and Canadian governments of the operation of the Agreement, *A Partnership for Protection: Year One Review*, was published on November 16, 2006.

Concerns have been expressed about the Agreement by refugee and human rights lawyers, NGOs and commentators in both countries. They stem from a view that the United States' treatment of refugee claimants is in some respects, both substantive and procedural, much less generous and internationalist than Canada's, and may not comply with international legal obligations. The more limited protection afforded to claimants by the US is the basis of litigation launched recently in the Federal Court, in which the applicants allege that the regulations giving statutory effect in Canada to the Agreement violate constitutional rights guaranteed by the *Canadian Charter of Rights and Freedoms*.

II. THE SCOPE OF THE AGREEMENT

(i) Inland and airport claims excluded

The Agreement applies only to claims made at the Canada-US border, not to claims made from within Canada: Article 4(1). The rationale for the exclusion of inland claims is the difficulty of proving whether a refugee claimant arrived in Canada from the US or elsewhere. Visa restrictions and carriers' demands for proper documentation make it more difficult for refugee claimants to reach Canada by air in order to claim refugee protection on arrival.

The majority of all refugee claims in Canada are made by persons already in Canada, either legally or illegally: 51% in 2004 and 62% in 2005. Of the total refugee claims made in 2004, 13.5% were made at an airport, compared with 16.9% in 2005.

Thus, even after the Agreement came into effect, a person who is admitted into Canada at land port of entry as a visitor, or who enters Canada clandestinely somewhere along the largely unregulated 8,000 km border, may subsequently claim the benefit of Canada's refugee determination system. These benefits may include freedom from detention, and access to a legal aid lawyer in making the claim, education, social services, language training, health care and employment pending the disposition of their claim. In addition, the system of adjudication of claims, including access to judicial review, and Canada's interpretation of the Convention, are generally regarded as relatively advantageous for claimants.

The unintended consequences of the Agreement are likely in time to include an increase in the number of illegal migrants who go underground, in both countries, and a boost to the business of people-smuggling and trafficking. However, there is no statistical evidence from the first year of the Agreement's operation to indicate that this is already happening.

(ii) Exceptions to the Agreement

There are four exceptions to the basic principle of the Agreement that the parties will not process a refugee claim made at the US-Canada land border. Thus, Canada will process the refugee claims of claimant who:

1. have relatives in Canada;
2. face capital punishment in the US or elsewhere or are nationals of countries to which the Minister has suspended removals (the "public interest exception");
3. are unaccompanied minors; or
4. hold a Canadian a visa or do not need a visa to enter Canada, but do require a visa to enter the US.

In the first year of the operation of the Agreement, 3,254 of the 4,033 of the land border claims (that is, 80%) were found to be within one of these exceptions. I shall say a little about the tree principal exceptional categories. A person who has unsuccessfully claimed to have their refugee status determined in Canada in one of the exceptional categories has no right to an administrative reconsideration of the refusal. However, such a person may, in theory, seek leave of the Federal Court to make an application for judicial review, on the grounds of an error of law, procedural unfairness, or a patently unreasonable finding of fact.

(a) family connections

While international law does not give refugee claimants a right to select the country where they make their claim, a claimant's connections with a particular country may make that country the most appropriate in which to claim protection. The Agreement reduces claimants' freedom to choose

where to make their refugee claim. It gives priority to protection and the orderly processing of claims over migratory choices.

However, in recognition of the importance of family re-unification, the Agreement exempts from its scope those with close family members in the country where they are making their claim: Article 4(2)(a). Thus, a person may claim protection as a refugee at a Canadian immigration post on the US border by establishing that she or he has, for example, a spouse, child, grandchild, parent or grandparent in Toronto who has been recognized as a refugee, or is a lawful resident in Canada, other than a visitor, or is eligible to claim refugee status in Canada and is awaiting the determination of the claim.

Nonetheless, a claimant could face practical difficulties in satisfying a Canadian immigration officer at the border that he or she has a qualifying family member in Canada. Much will depend on how closely officers scrutinize claims of relatives already resident in Canada.

In 2005, “family connections” category proved to be the statistically largest category of those whose refugee claims were processed in Canada, even though made at the land border: of the of the 3,254 claims accepted for processing under all the exceptions, 1,577, or 48%, were in this category.

(b) unaccompanied minors

Unaccompanied minors are exempted by the Agreement and may claim refugee protection at the land border: Article 4(2)(c). The reason for this exception seems to lie in differences between US and Canadian law respecting the treatment of children. The US routinely detains unaccompanied minors who lack status in the US; Canada does not. As a party to the *Convention on the Rights of the Child*, a decision by the Canadian government must give significant weight to the best interests of any child who may be adversely affected by it.

Regulations implementing the Agreement in the domestic law of Canada define an unaccompanied minor as a person under 18 years of age who is not accompanied by a parent or a legal guardian, and has neither a spouse or a common law partner, nor a parent or legal guardian in Canada or the United States: *Immigration and Refugee Protection Regulations*, SOR/2002-227 (“IRPR”), paragraph 159.5(e). In 2005, 49 land border refugee claimants were accepted for processing in this category, only 21 of whom were girls, a surprisingly low number considering the significance of gender-based persecution.

(c) public interest

The Agreement permits either country to examine any refugee status claim at its discretion, where it would be in that country's public interest to do so, even though the claimant would have been otherwise excluded because he or she claimed at the land border: Article 6. In 2005, 1,218 claims were accepted for processing under this category. To date, Canada has identified two such categories, although these are not necessarily exhaustive.

First, the Regulations permit the entry of nationals of a country on which the Minister has imposed a stay of execution of removal orders, or stateless persons who are habitual residents of such a country: *IRPR*, para. 159.6(c). A country will qualify as one to which Canada does not remove if it is experiencing armed conflict, or be subject to an environmental disaster disrupting living conditions, or a temporary situation that has a generalized effect on a population. Second, the regulations exempt claims made at the land border by persons who have been charged with or convicted of an offence, in the US or elsewhere, for which they may be sentenced to death: *IRPR*, paras. 159.6(a) and (b).

III. LEGAL CONSEQUENCES FOR CANADA OF THE AGREEMENT

As already indicated, concerns about the Agreement arise from a perception that the US refugee determination system is less generous than Canada's and, in some respects, may not comply with international law. In other words, the concern is that the US may not be a safe country for all refugees.

For example, refugee claimants are more likely to be detained in the US than in Canada while waiting for their claim to be determined, which can take a very long time. Refugee claimants in Canada are entitled to a lawyer, paid for by legal aid, whereas the US provision to indigent persons of competent legal representation is much more problematic. Both detention and the unavailability of adequate legal representation increase the likelihood of the wrongful rejection of a claim to be recognized as a refugee.

NGOs and refugee lawyers in the US and Canada have argued that other features of US refugee law, briefly indicated below, may also result in a person who is turned back by a Canadian officer at a land border pursuant to the Agreement being *refouled* by the US in contravention of the Convention. In such a case, Canada would be in breach of its international obligations by indirectly *refouling* a person within the definition of a refugee. In addition, it is argued that refusing to process the refugee claim of a person who would be *refouled* by the US constitutes a breach of the *Canadian Charter of Rights and Freedoms*.

Section 7 of the Charter

Section 7 of the Charter states that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof other than in accordance with the principles of fundamental justice. It was held in an early section 7 case, the genesis of Canada's current refugee determination system, that it was a breach of section 7 for the government to remove a refugee claimant without holding an oral hearing that meets standards of procedural fairness in order to determine whether the person was a refugee: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. This principle may also apply to an indirect *refoulement*. Similarly, removing a person from Canada to a country where there are substantial grounds for believing that the person will be tortured is nearly always unconstitutional as a breach of section 7: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 S.C.R. 7.

US domestic law provides that a person may generally not claim refugee status after being in the US for a year. However, the removal of a person will be suspended if the person can establish *on a balance of probabilities* that he or she will be persecuted on a Convention ground, or tortured, if returned. Since a balance of probabilities is a higher standard of proof than the well-founded fear standard provided for in the Convention, it is argued that Canada would be in breach of its international obligations and, arguably, of section 7 of the Charter, if it returned a person under the Agreement who had been in the US for more than a year without claiming refugee protection there.

Another example of alleged non-compliance is the US's expedited removal program for refugee claimants who arrive in the US without valid travel documents. Refugee claimants are often instructed by those who have helped them to reach a safe country to destroy the documents used to board a plane. The Convention does not authorize a state to refuse entry to refugees on the ground that their travel documents are not in order. Hence, it is argued that it would be unlawful for Canada to return such a person to the US pursuant to the Agreement who claimed refugee status at a Canadian land border post. However, the US has informally undertaken not to subject to the expedited process a refugee claimant returned by Canada under the Agreement.

Section 15 of the Charter

Another objection to refusing to process refugee claims under the Agreement may be based on the fact that returning claimants to the US may also have a disproportionately adverse impact on claimants who belong to particular groups, thereby infringing their right to equality and freedom from discrimination guaranteed by section 15 of the Charter. For example,

the one-year limitation period in US refugee law is said to have a differential adverse impact on those reluctant to come forward to claim recognition as refugees. Adversely affected groups may include women claiming on the ground of a failure of state protection against domestic violence, and gay men and lesbians seeking protection as refugees from persecution at the hands of the state or of non-state actors against whom the state provides no protection.

In addition to the one-year claim rule, women who are fleeing domestic violence face three hurdles to obtaining asylum in the US that they would not face in Canada. First, the United States is reluctant to recognize a nexus where a state fails to protect against privately inflicted harm, committed for a Convention reason. Second, the United States requires asylum claimants to prove that their persecutor's motives relate to one of the Convention grounds. Third, US decision-makers have not adopted a consistent answer to whether gender can form the basis of membership of a particular social group. Nonetheless, in 2005, women claimants at the land border increased to 47% from 44% in 2004, as a percentage of all land border claims made.

Nationals of Colombia are another group for whom the US is said not to be a safe third country. The US currently has a very low acceptance rate of Colombian refugee claims, while Canada's is approximately 80%. Most Colombians have claimed recognition as refugees in Canada at the US-Canada land border. In 2004, Colombia was far and away the single largest source country of refugee claimants at Canada's land border (3,521 or 47%). In 2005, the numbers had dropped to 851 or 21%.

It is suggested that the principal reason for the difference in the US and Canadian acceptance rates is the US's reluctance to recognize as refugees those who fear persecution by non-state actors, such as rebel or terrorist organizations. The individual applicant in the proceeding brought in the Federal Court to test the legality of the operation of the Agreement by Canadian officials is a Colombian national currently living underground in the US. He missed the one-year limitation period and has failed to satisfy the higher "clear probability of persecution" standard.

IV. COMPARISON WITH THE SCHENGEN AND DUBLIN AGREEMENTS

Whereas the EU Schengen and Dublin Agreements are meant as a first step to a harmonized refugee policy within the EU, Canada and the US do not appear to intend to pursue a similar objective. This is reflected in aspects of the Agreements themselves: for instance, much of the langu-

age of the Dublin Convention is directed toward establishing rules for determining what country will adjudicate refugee claims, and ensure their protection.

Without an open border, the Canada-US Agreement is not concerned with such issues. Rather, its purposes are more pragmatic and immediate. As the Government of Canada's *Regulatory Impact Assessment Statement*, issued with the regulations giving effect to the Agreement in domestic law, explains, "the Government seeks to share the responsibility for providing protection to those in need...". On the US side, national security is the driving force.

V. CONCLUSIONS

The Safe Third Country Agreement between Canada and the US is still in its early days. Unforeseen world events, and the ingenuity of the desperate, make it difficult to predict its future impact on the refugee flow into Canada. The recent dramatic drop in the number of refugee claimants is attributable to a range of factors, including the various interdiction devices employed by Canada. If, as some predict, the Agreement encourages people to go underground and boosts human smugglers and traffickers, it may do little to meet US concerns for enhanced national security either.

The discrepancies between the domestic refugee law and practice of Canada and the US obviously raise legal problems for Canada, although there are no moves towards harmonization. It remains to be seen whether these differences are so serious as to infringe the Canadian constitution or to implicate Canada in breach of its international legal obligations.

Judge John M. Evans
Federal Court of Appeal, Canada

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INTERPLAY BETWEEN ASYLUM LAW AND IMMIGRATION LAW

Justice Catherine Branson, Australia

- 1 At the IARLJ Conference 2002 held in New Zealand Dr Mary Crock of the University of Sydney expressed the view that Australia had the harshest detention practices and the least articulated rights regime of the five countries studied by her. The other countries studied by her were New Zealand, the United Kingdom, Canada and the United States of America.
- 2 Nothing that has happened in Australia since 2002 will have provided a basis for a reconsideration by Dr Crock of her view.
- 3 The Australian Government has maintained, and indeed has recently sought to strengthen, measures intended to both control and discourage irregular migration. Those who seek to assert a claim to asylum in Australia are not exempt from these measures.
- 4 The *Migration Act 1958* (Cth) continues to require the detention of 'unlawful non citizens' (s 189); ie persons who are not Australian citizens and who do not hold Australian visas (s 14). Section 196 of the Act provides that an unlawful non-citizen detained under s 189 must be kept in immigration detention until he or she is:
 - (a) removed from Australia;
 - (b) deported; or
 - (c) granted a visa.
- 5 In 2003 the Full Court of the Federal Court of Australia held that the power to detain under s 196, being a power intended to facilitate removal from Australia, was subject to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood in the reasonably foreseeable future of the detained person being removed from Australia (see *Minister for Immigration v Al Masri* (2003) FCR 54). However, in *Al Kateb v Goodwin* (2004) 208 ALR 124 the High Court of Australia, in a majority decision, held that the words of s 196 were so clear that no implied limitation could be read into them. The majority of the Court also held that, so construed, the section did not contravene the Australian Constitution. As a consequence the High Court determined that a stateless person who had unsuccessfully claimed asylum in Australia, and could not be deported from Australia, could be held in immigration detention indefinitely.

- 6 Part 2 Division 12A of the Migration Act, which was inserted into the Act in 1999, permits Australian authorities to board and search ships in Australian waters or in Australia's contiguous zone and where a threatened contravention of the Act is reasonably suspected or the ship is without apparent nationality, on the high seas. Hot pursuit is also authorised. The division also allows foreign aircraft over Australia to be required to land.
- 7 Wide powers to search to compel persons to answer questions, and of arrest, are given to Australian authorities by Division 12A of the Act (s 245A – 245H).
- 8 Section 245F of the Act provides that, to the maximum extent that the Australian Constitution allows, any restraint on the liberty of any person found on the ship or aircraft that results from the detention of the ship or aircraft is not unlawful, and proceedings may not be instituted against the Commonwealth of Australia or the relevant officer, or any person assisting the officer, in detaining the ship or aircraft.
- 9 Section 245F also authorises an officer who detains a ship or aircraft to detain any person found on the ship or aircraft and cause them to be brought to Australia, or alternatively, to be taken to a place outside Australia. The use of necessary and reasonable force is authorised subject to the qualification that the officer must not do anything likely to cause a person grievous bodily harm unless the officer believes that it is necessary to do the thing to protect life or prevent serious injury, or to allow a fleeing person to be arrested.
- 10 In 2001 Australia acted to excise certain of its offshore territories from Australia's migration zone (see the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth)). The effect of this measure is to deem Australian islands to the north and west of the Australian mainland not to be part of Australia for immigration purposes. As a consequence individuals who reach these islands fall outside the scheme established by the Migration Act for the assessment of applications for visas. Australia has not argued that the excise of these island territories relieves Australia of its international obligations under the Refugee Convention. However, the statutory excision prevents asylum seekers who are affected from accessing the procedural protections which are ordinarily available to a person who claims asylum in Australia. Such persons are ordinarily taken to Pacific Islands to have their claim to be refugees assessed by UNHCR or by Australian officials.

- 11 The substantive provisions of the Migration Act do not differentiate between child and adult asylum seekers. In 2004 the Australian Human Rights and Equal Opportunity Commission published a report entitled '*A Last Resort?*' following a national enquiry into children in immigration detention. The report found that Australia's immigration detention policy had failed to protect the mental health of children, failed to provide adequate health care and education to children and failed to protect unaccompanied children and those with disabilities.
- 12 The Australian Government moved in June 2005 to alter the Migration Act and procedures under the Act particularly so far as they impact on children. Section 4AA of the Act now records that the Australian Parliament affirms as a principle that a minor shall only be detained as a measure of last resort. Additionally the Act now gives the Minister, acting personally, a non-compellable power to grant a visa to a person in detention (s 195A). The intention of this amendment was to allow the Minister to specify alternative arrangements which would allow families with children to live in the community under community detention arrangements. It was also intended to allow the conditional release from detention of failed asylum seekers who are unable to be removed to another country.
- 13 A Bill was introduced into the Australian Parliament during the course of 2006 which would have denied all persons arriving in Australia by boat without a visa the right to apply for any visa, including a protection visa, within Australia (see *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*). The proposed law would have applied equally to those apprehended on route to Australia and those who made landfall on mainland Australia. The Bill appeared to be a response to Indonesian anger at the grant of refugee status to 42 people from the Indonesian province of West Papua. It was proposed that the Minister would have a non-reviewable power to admit boat people to the refugee determination system established by the Migration Act. It seemed clear that the underlying policy behind the Bill was to move all unauthorised boat arrivals to offshore centres to have their claims for asylum processed there.
- 14 When it became apparent that a number of Government members of Parliament would not support the Bill, the Bill was withdrawn to prevent its defeat in the Parliament.
- 15 It is beyond dispute that many who have subsequently been found to be entitled to protection under the Refugee Convention have been intercepted and been subject to mandatory detention under the regime

outlined above. The Human Rights Council of Australia reported in December 2002 that 736 of 1515 asylum seekers who had been held in off-shore facilities were ultimately recognised as refugees. Of those 736 individuals, 526 were granted entry to a country of asylum and, as at December 2002, 210 remained in the off-shore facilities with no country willing to accept them.

*Justice Catherine Branson,
Federal Court of Australia*

AMBASSADOR OF CANADA TO MEXICO:

Gaetan Lavertu

Address to participants at Lunch being held at the Mexican Judicial Institute on November 7, 2006

Ladies and gentlemen, good afternoon y muy buenas tardes. It is a great pleasure for me to address such an esteemed and honourable audience, the International Association of Refugee Law Judges. I trust that your 7th Biennial World Conference is meeting what I imagine are some very high expectations.

I note that this year's theme is "Forced Migration and the Advancement of International Protection: the Interplay between Migration, International Human Rights Law, and Refugee Status Determination". You are touching upon many complex themes, and I wish you the best in your discussions.

Despite their complexity, these themes are central to the work you do; for what is refugee status determination if not an exercise in recognizing human rights? When recognizing someone as a refugee, you are committing your respective countries to protecting that person from the threat to their human rights that forced them to leave their home countries. Human rights are at their core an expression of our common humanity, for they are held by all members of our human family, transcending borders and cultures. Human rights are an expression of perhaps the most noble aspirations of humanity: the idea that all persons are worthy of being treated with dignity, that all are entitled to equality before the law.

Canada has a strong record on protecting refugees. I am proud to note that Canada actively cooperates with the Office of the United Nations High Commissioner for Refugees to resettle refugees from abroad to Canada. Last year, Canada accepted over 10,000 refugees from countries around the world. Additionally, Canada's refugee status determination body – the Immigration and Refugee Board or IRB – is seen internationally as a leader in the field, not only for the quality of their decision-making, but for their commitment to fellow decision-making bodies around the world.

Please allow me to commend you for having chosen Mexico as host for this year's conference. Few countries are more familiar with the phenomenon of migration than Mexico, and Mexico is a great promoter of human rights and the rights of migrants. Not only is Mexico a country of origin for millions of migrants – an estimated 25 million Mexicans have

gone north - but Mexico is also a country of transit for millions more from Central and South America. Perhaps less well-known is that Mexico is also a destination country for migrants – and I am not just talking about the thousands of Canadians who flee the winter every year. Mexico is signatory to the International Refugee Convention, and through the Comisión Mexicana de Ayuda a Refugiados (COMAR), it offers protection and assistance to refugees.

Lastly, let me say that the importance of your work here cannot be underestimated. Sound and principled Refugee Status Determination is central to the integrity of any refugee protection regime, because integrity is key to maintaining and fostering public support for refugee protection. We live in an era of heightened concerns over security, an era where people demand that their borders be protected and strong. Without public support and trust in the integrity of its refugee programs, countries and governments will be under increasing pressure to close their doors to those seeking protection.

Your participation in this conference is an important step in ensuring that we all can continue to meet these international obligations. Thank you.

AMERICAS CHAPTER REPORT

Lunch Address to Participants at the Federal Judicial Institute of Mexico

Justice Jean-Guy Fleury

Ambassador Lavertu, thank you for your thoughtful comments and for agreeing to co-host this lunch for us today. I agree that Mexico is an ideal country to hold an IARLJ World Conference. Originally, this conference was planned as a regional meeting only of the IARLJ Americas Chapter. Quickly it became apparent, however, that it would be ideal for the IARLJ's World Conference to be held here as well. Given the success of our conference thus far, it seems to have been a wise choice.

You noted in your comments just a few minutes ago that Canada has always played a proud role in the field of refugee protection, whether through the resettlement of refugees from overseas, assistance to UNCHR or through our own in-land refugee determination body, the Immigration and Refugee Board. Canada has also traditionally played a significant role within the IARLJ. Both IRB decision-makers and Federal Court judges have long been active in the organisation.

Canadian materials have been instrumental in the formation of training for refugee judges around the world, and Canadians have travelled throughout the world to deliver training and provide capacity building when and where needed. It is in this tradition that we called upon the Canadian Embassy in Mexico City to assist us in the planning of our 7th IARLJ World Conference here in Mexico City. I offer my sincerest thanks to you personally, Mr. Ambassador, and to your staff at the Canadian Embassy, for your support of our conference this week.

I am proud of the tradition of cooperation that has always existed between Canada and the IARLJ, and I hope that cooperation will extend far into the future. Thank you again, and please, enjoy your lunch.

*Jean-Guy Fleury,
Chairperson, Immigration and Refugee Board of Canada*

THE USE OF INTERNATIONAL LAW INSTRUMENTS IN CANADIAN IMMIGRATION AND REFUGEE LAW

Justice Luc Martineau

- 1 There are several situations that arise where the Federal Court will be called upon to interpret international law instruments. An understanding of the challenges faced by the Court in interpreting and applying such instruments in these situations requires an explanation of their legal effect within Canada. With that in mind, I will begin with a few observations on Canadian law with respect to treaty ratification and implementation. I will then explain the different contexts in which the Federal Court might be called upon to interpret an international law instrument. I will then turn to consider, by way of illustration, the debate in Canada with regards to the lawfulness of deportation to torture and the use of international law instruments on this issue by the Canadian courts.

I. TREATY IMPLEMENTATION IN CANADA

- 2 Canada has taken a transformationist approach to treaty law. Consequently, the signature or ratification of an international instrument does not have any legal effect within the country itself.¹ This discontinuity reflects the separation of powers between the executive and legislative branches of government in Canada. Indeed, while the executive branch has sole jurisdiction over the negotiation and ratification of international treaties, the law-making branch has sole jurisdiction over the implementation of these treaties domestically. This is further complicated by the fact that Canada is a federal state and that legislative powers are distributed between the federal authority and the provincial authorities. As such, the federal and provincial legislatures have exclusive or concurrent authority over certain subjects. For example, Parliament (the federal authority) has exclusive legislative jurisdiction over “naturalization and aliens” pursuant to subsection 91(25) of the *Constitution Act, 1867*. It also has concurrent legislative authority with provincial authorities over immigration, although the federal legislation will be paramount in situations of conflict.
- 3 Given the distribution of legislative powers in Canada, the subject matter of the treaty will determine which of the legislative authorities – federal or provincial – will have jurisdiction to implement the treaty in question. Therefore, a treaty will only have legal effect within Canada once it has been implemented by the appropriate legislative body.

4 The most forthwith and direct manner of implementing an international instrument is by passing a law that contains an implementing provision referring to the treaty in question and that includes it as a schedule to the implementing statute.² For example, section 3 of the *Foreign Missions and International Organizations Act*³ provides that articles 1, 22 to 24 and 27 to 40 of the *Vienna Convention on Diplomatic Relations* have the force of law in Canada in respect of all foreign states, regardless of whether those states are parties to those conventions. This convention is included as Schedule I of the act. Similarly, section 3 of the *United Nations Foreign Arbitral Awards Convention Act*⁴ provides that the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* is to have the force of law in Canada during such period as, by its terms, the Convention is in force. It also sets out this convention as a schedule.

5 In refugee and human rights matters – unlike trade and commercial agreements – the incorporation of international instruments has been less straightforward. It has mostly been done by adopting various substantive legislative provisions that more or less mirror provisions contained in various treaties or conventions. For example, section 96 of *Immigration and Refugee Protection Act*⁵ incorporates the definition of refugee as found under article 1 of the of the *United Nations Convention Relating to the Status of Refugees*, signed at Geneva on July 28, 1951, and the *1967 Protocol Relating to the Status of Refugees*, signed at New York on January 31, 1967 (Refugee Convention):

96. 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.

6 In sum, unlike in the United States, the ratification of a treaty does not have any legal effect domestically unless it is implemented by an act of Parliament or of the provincial legislature. Therefore, an international instrument cannot be invoked before the Federal Court unless it has first been implemented domestically.

- 7 In contrast, Canada has taken a more adoptionist approach with regards to customary international law, including *jus cogens*, meaning that customary norms do not have to be implemented in order to have domestic legal effect. As discussed hereunder, this Canadian approach to international law has affected the extent to which the Federal Court will take into account international law instruments in their decisions.

II. JURISDICTION OF THE FEDERAL COURT

A. JUDICIAL REVIEW

- 8 The Federal Court is a statutory court without inherent jurisdiction. As such, its jurisdiction must be conferred by a federal statute. Under section 18.1 of the *Federal Courts Act*,⁶ the Court has judicial review jurisdiction over the decisions of federal boards, commissions or tribunals, including those of the Immigration and Refugee Board. This is the context in which the Court will most likely be called upon to interpret an international law instrument. For example, the Court may be called upon to interpret the scope of an international convention, in order to determine whether the tribunal has committed an error of law pursuant to paragraph 18.1(4)(c) of the *Federal Courts Act*.
- 9 To illustrate, section 98 of the *Immigration and Refugee Protection Act* explicitly excludes from the definition of Convention refugee or a person in need of protection persons referred to in section E or F of Article 1 of the Refugee Convention, which read as follows:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of 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.

- 10 The wording of these provisions makes international instruments determinative of what kinds of acts can amount to a crime against peace, a war crime or a crime against humanity. Accordingly, the Federal Court, as well as the Federal Court of Appeal, have had to interpret the meaning of this convention. A case in point is *Harb v. Canada (Minister of Citizenship and Immigration)*.⁷ In that decision, a refugee claimant had been excluded by the Refugee Division from the scope of the Refugee Convention, on the basis of his membership in the Amal movement and his complicity in the South Lebanon Army, two organizations that in its view had been engaged in crimes against humanity. A Federal Court judge affirmed the decision. The claimant appealed to the Federal Court of Appeal. At the hearing, counsel for the Minister of Citizenship and Immigration argued that although the crimes alleged to have been committed by the claimant had occurred between 1986 and 1993, the *Rome Statute of the International Criminal Court*, which had been adopted on July 17, 1998 and had come in effect on July 1, 2002, could still be taken into account in defining “a crime against peace, a war crime or a crime against humanity” for the purposes of the application of Article 1F(a). In coming to its conclusion, the Federal Court of Appeal referred to *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,⁸ in which the Supreme Court of Canada had stated that the words “purposes and principles of the United Nations” in article 1F(c) should be given “a dynamic interpretation of state obligations, which must be adapted to the changing international context”. According to the Federal Court of Appeal, the same approach should be applied to the exclusion described in article 1F(a). By not including a definition of “international instruments” in the Refugee Convention, its authors had ensured that the definitions of crimes would not be fixed at any point in time.
- 11 Under paragraph 18.1(4)(f) of the *Federal Courts Act*, the Federal Court may also review the decision of a federal board, commission or tribunal when it acts in a way that is contrary to law. This may occur when the federal board acts in a way that is contrary to its constituent statute or to the Canadian constitution, which includes the *Canadian Charter of Rights and Freedoms*.⁹ In this regard, it is important to note that under section 52 of the *Constitution Act, 1982*,¹⁰ the Constitution of Canada is the supreme law of Canada. Accordingly, any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.
- 12 Two steps are involved when deciding whether there has been infringement of the *Charter*. The first step is to determine whether there has been a breach of a section of the *Charter*. Sometimes, however, this

breach may be qualified by another requirement. For example, section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, which are illustrated at sections 8 to 14 of the *Charter*.

- 13 The second step is to determine whether the infringement is justified under section 1 of the *Charter*, which reads as follows:
 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- 14 Accordingly, once the infringement of a right or freedom is established, the responding party must justify the limit under section 1.
- 15 Some of the rights enshrined in the *Charter* can be found in certain international conventions. In this regard, other speakers at the conference have referred to the “hierarchy” of rights, a model used by Professor James C. Hathaway to determine the existence of persecution. He proposes that within the *International Bill of Rights*, which comprises the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), four distinct types of obligation exist.¹¹
- 16 Level 1 of the hierarchy consists of rights enshrined in the ICCPR from which no derogation is permitted. These include freedom from arbitrary deprivation of life, protection against torture or cruel, inhuman, or degrading punishment or treatment. The second level of rights comprises those rights from which states may derogate during a public emergency. These include freedom from arbitrary arrest or detention, the right to equal protection for all, the right in criminal proceedings to a fair and public hearing, as well as the right to be presumed innocent. In Canada, Level 1 and Level 2 rights are protected by either the *Charter* or quasi-constitutional statutes such as the *Canadian Bill of Rights*¹² and the *Quebec Charter of Human Rights and Freedoms*.¹³
- 17 The third level of rights comprises those carried forward in the ICESCR. They are not absolute and are essentially economic. They include the right to work, entitlement to food, and protection of the family. They are not necessarily protected under the federal *Charter* and are more likely to fall within provincial jurisdiction.

- 18 The fourth level of rights encompasses property rights, such as the right to own and be free from arbitrary deprivation of property. They are not protected by the *Charter*. However, they are recognized in the *Canadian Bill of Rights*.¹⁴
- 19 In sum, many of the rights found in international conventions are protected in Canada by the *Charter* or quasi-constitutional statutes. As such, the *Charter* will often be invoked along with international instruments before the Federal Court in immigration and refugee matters.

B. SPECIAL JURISDICTION

- 20 Apart from its powers of judicial review under the *Federal Courts Act*, the Federal Court also exercises special jurisdiction under *IRPA* in the matter of “security certificates”. Under section 80 of *IRPA*, the Chief Justice or a judge designated by him must make a determination as to the reasonableness of a security certificate signed by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness rendering a person inadmissible. In such a context, the judge may be called upon to consider Canada’s international obligations.
- 21 Another particular case in which the Court may be called upon to interpret an international instrument is when it must determine whether a stay should be granted pending an application for judicial review. For example, in *Adviento v. Minister of Citizenship and Immigration*,¹⁵ the applicant had applied for a stay of removal pending an application for judicial review of the removal officer’s decision, on the basis that she would be unable to receive proper dialysis treatment in the Philippines. The stay was granted. In that decision, no international instrument was invoked, but this would be an instance where such an instrument might be argued in support of a party’s submissions.
- 22 That being said, as we shall see, even when an international law instrument is invoked, Canadian courts have preferred to use international instruments merely as an interpretive aid.

III. PARAGRAPH 3(3)(f) OF IRPA

- 23 Paragraph 3(3)(f) of *IRPA* provides that the Act “be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory.” To date, no litigant has succeeded in convincing a Canadian court that where an inconsistency arises between a provision found in *IRPA* and a right confer-

red by an international human rights instrument ratified by Canada, the latter should prevail, which would have the effect of rendering the incompatible legislative provision of no force or effect. However, international instruments will still be used as an interpretative aid, as “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”.¹⁶

24 In *Re Charkaoui*,¹⁷ the Federal Court of Appeal affirmed a decision wherein a judge had dismissed an application to have sections 33 and 77 to 85 of *IRPA*, which deal with security certificates, declared unconstitutional and in contravention of Canada’s international obligations, particularly in light of paragraph 3(3)(f) of *IRPA*. It was also argued that these provisions contravened *Charter* rights with respect to a fair and public hearing before an independent and impartial tribunal. The Federal Court of Appeal noted that the *Charter* provided rights and guarantees that were for all practical purposes identical to those guaranteed under article 14 of the ICCPR, article 6(1) of the *European Convention on Human Rights* (European Convention) and article 10 of the *Universal Declaration of Human Rights* (Universal Declaration). Accordingly, only the ICCPR was directly relevant, as Canada was one of its signatories. On the other hand, the Universal Declaration, which is a resolution of the General Assembly of the United Nations, was of no binding effect (although it played an important role in international customary law). With regards to the European Convention, its role was limited in Canada’s domestic law and would only be useful insofar as its provisions were similar to those of the ICCPR and the *Charter*. In any event, according to the Federal Court of Appeal, the *Charter* was not outdone by any of those instruments in terms of equality before the courts and tribunals, procedural fairness, judicial independence and the impartiality of the courts.¹⁸

25 Recently, in *De Guzman v. Canada (Minister of Citizenship and Immigration)*,¹⁹ the Federal Court of Appeal held that paragraph 3(3)(f) does not incorporate international human rights instruments to which Canada is signatory into Canadian law, but merely directs that *IRPA* be construed and applied in a manner that complies with them.²⁰ Nevertheless, they must be given more than a persuasive or contextual significance in the interpretation of *IRPA*.²¹ Indeed, the Federal Court of Appeal observed that the wording of this paragraph makes this approach mandatory and if interpreted literally, makes international human rights instruments determinative of the meaning of the Act, in the absence of a clear legislative intent to the contrary. Furthermore, in its view, paragraph 3(3)(f) of *IRPA* did not require that each and every

provision of the Act and the *Immigration and Refugee Protection Regulations*,²² considered in isolation, comply with international human rights instruments. As the Federal Court of Appeal stated, at paragraph 81:

Rather, the question is whether an impugned statutory provision, when considered together with others, renders IRPA non-compliant with an international human rights instrument to which Canada is signatory.

- 26 Therefore, the “international human rights instruments to which Canada is signatory” have more than mere ambiguity-resolving, contextual significance. On its face, paragraph 3(3)(f) is clear: “*IRPA* must be interpreted and applied consistently with an instrument to which paragraph 3(3)(f) applies, unless, on the modern approach to statutory interpretation, this is impossible”.²³ However, the Federal Court of Appeal drew a distinction between “binding” and “non-binding” international human rights instruments, stating that a legally binding international human rights instrument to which Canada is a signatory is determinative of how the Act must be interpreted and applied, in the absence of a contrary legislative intention.²⁴ It refrained from deciding the effect of paragraph 3(3)(f) with respect to non-binding international human rights instruments, as the only international instruments relevant at issue in that case were legally binding on Canada.
- 27 As seen above, due to Canada’s dualistic approach to international law, the Canadian courts have preferred to use international law instruments as a context rather than as the determining factor in a decision. The debate in Canada over the lawfulness of deportation to torture is a case in point.

IV. LAWFULNESS OF DEPORTATION TO TORTURE

- 28 Subsection 97(1) of *IRPA* provides that a person in need of protection is a person whose removal would subject them personally to a danger of torture, as defined by Article 1 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT):

IRPA

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
 - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Convention Against Torture

Article 1

1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

- 29 Subsection 115(1) of *IRPA* recognizes the principle of *non-refoulement* by prohibiting the removal of a protected person to a country where they would be at risk of persecution or at risk of torture.

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

- 30 However, subsection 115(2) creates an exception to this rule, by providing that the non-*refoulement* principle does not apply in the case of a person who has been deemed inadmissible on grounds of serious criminality, security, violating human or international rights or organized criminality or who constitutes a danger to the public in Canada:

115. (2) Subsection (1) does not apply in the case of a person

- (a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or
- (b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

- 31 Recently, in *Almrei v. Canada (Minister of Citizenship and Immigration) (F.C.A.)*,²⁵ the Federal Court of Appeal examined section 115 of *IRPA* in light of paragraph 3(3)(f) of *IRPA*. In doing so, in the name of the Court, Justice Gilles Létourneau observed that there was a contradiction between paragraph 3(3)(f) and paragraph 115(2)(b), as Canada was signatory to both the ICCPR and to the CAT, which both prohibit deportation to torture, without any possibility of derogation. In particular, Article 3 of the CAT explicitly prohibits deportation to torture:

Article 3

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account

all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

32 Justice Létourneau noted that the Refugee Convention seems to conflict with both the ICCPR and the CAT, as Article 33(2) allows the *refoulement* of a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted of a serious crime, constitutes a danger to the community of that country. It observed, however, that following the decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*,²⁶ the Canadian position on the issue of deportation to torture was still uncertain.

33 Indeed, in *Suresh*, the Supreme Court of Canada acknowledged that there were indicia that the prohibition on torture had reached the status of a peremptory norm of customary international law, or *jus cogens*, from which no derogation was acceptable. Nevertheless, it did not completely close the door on deportation to torture. It held that “barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*.”²⁷ Accordingly, deportation to torture might be saved by the balancing process mandated under section 7 of the *Charter* or under section 1 of same.

34 What is important to note here is that in coming to its conclusion, the Supreme Court remained faithful to Canada’s dualistic treatment of international law:

Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis.

35 Interestingly, although Article 3 of the CAT has not been explicitly incorporated into *IRPA*, the Federal Court of Appeal recently held that paragraph 97(1)(a) of *IRPA* was adopted in order to give effect to Article 3 of the CAT. Indeed, in *Li v. Canada (Minister of Citizenship and Immigration)*²⁸, the Court of Appeal observed that the wording of paragraph 97(1)(a) of *IRPA* closely mirrored the words in Article 3 of the CAT.

The Court stated:

It is apparent that the words in paragraph 97(1)(a):

would subject them personally

(a) to a danger, believed on substantial grounds to exist,
of torture ... [Emphasis added.]

mirror closely the words in Article 3 of the Convention Against
Torture:

...where there are substantial grounds for believing that he
would be in danger of being subjected to torture.

Because the words used in Article 3 and paragraph 97(1)(a) are
almost identical and because paragraph 97(1)(a) was adopted
by Parliament to give effect to Article 3, the jurisprudence that
interprets Article 3 is of assistance in interpreting paragraph
97(1)(a).

36 On this basis, the Federal Court of Appeal held that the jurisprudence
that interprets Article 3 of the CAT is of assistance in interpreting
paragraph 97(1)(a), even though *IRPA* does not explicitly incorporate
Article 3 of the CAT. Therefore, the issue of whether Article 3 of the
CAT is incorporated into *IRPA* seems somewhat unclear.

37 A series of recent decisions with regards to security certificates have
also addressed the issue of the lawfulness of deportation to torture. I
have already mentioned the Federal Court of Appeal decision in *Re
Charkaoui*.²⁹ In another *Charkaoui* decision,³⁰ the same applicant argued
before the Federal Court that *Suresh* was not applicable, as it had been
decided under the former Act, which did not contain paragraph 3(3)
(f). In this regard, he argued that return to a country where there is
a risk of torture is contrary to Article 3 of the CAT and accordingly,
provisions relating to protection applications were invalid.

38 Justice Simon Noël disagreed. He upheld the approach set out in
Suresh and held that paragraph 3(3)(f) of *IRPA* is a general, interpreta-
tive provision that does not operate to incorporate international law
into domestic law. He stated at paragraph 40:

In my opinion, Parliament has chosen to give special treatment
to persons who are named in a security certificate, and the clari-
ty of the provisions challenged by Mr. Charkaoui illustrates that

intention. I find it hard to see why Parliament would have been at pains to enact very specific and precise provisions relating to persons named in a security certificate if it intended to neutralize or cancel them out by paragraph 3(3)(f) of the IRPA.

39 Further on, he stated:

Mr. Charkaoui further submits that in addition to its interpretive role, paragraph 3(3)(f) must also guide the application of the IRPA. Even if Mr. Charkaoui is correct on this point, I do not believe that it is impossible to reconcile article 3 of the Convention against Torture with the “application” of the weighing process provided for in the IRPA. On this point, I believe that we must apply what the Supreme Court said in *Suresh*, supra, in which it clearly upheld the weighing exercise set out in the IRPA, taking into account the Convention against Torture on which Mr. Charkaoui relies. In this case, the “application” of the IRPA could not operate in such a way as to violate article 3 of the Convention against Torture, even if that Convention were incorporated in domestic law, because to date, no action has been taken against Mr. Charkaoui that might violate article 3 of the Convention against Torture. The applicable Canadian law (the impugned provisions of the IRPA and *Suresh*, supra) is in complete harmony with the Convention against Torture, as long as no decision has been made to remove to a country where there is a risk of torture. Only then could a violation occur.

40 Recently, in *Re Jaballah*,³¹ Justice W. Andrew Mackay determined that the certificate at issue was reasonable and accordingly, the order setting out that determination became a removal order. Given the finding that Mr. Jaballah faced a serious risk of torture if he were removed to Egypt, Justice Mackay held that it was time to decide whether Mr. Jaballah could be removed from Canada. In order to resolve the issue, he based himself on the *Charter*, stating that “[deporting Mr. Jaballah] to Egypt or to any country where and so long as there is a substantial risk that he would be tortured or worse would violate his rights as a human being, guaranteed by s. 7 of the *Charter*”.³² He also concluded that his finding was consistent “not merely with the decision in *Suresh* but also with Canada’s international obligations...”³³

41 Further developments on the application of paragraph 3(3)(f) of IRPA may be coming in the near future. In June 2006, the Supreme Court of Canada heard appeals in a trilogy of cases. The first was an appeal of the aforementioned 2004 Federal Court of Appeal decision in

*Charkaoui*³⁴, the second, its decision in *Almrei*³⁵, above, and the third, its decision in *Harkat*³⁶. All three cases related to non-citizens named in security certificates. In their written submissions, both the appellants Charkaoui and Almrei raised the possible application of paragraph 3(3)(f) in support of their respective arguments. In particular, in his appeal, Mr. Almrei has pointed out the contradiction between *IRPA* and the *CAT* and the possible application of paragraph 3(3)(f), which came into force after the *Suresh* decision. Decisions have not yet been rendered in these cases. Therefore, further developments in this area may be on the horizon.

Luc Martineau,
Judge of the Federal Court

Endnotes

- 1 John H. Currie, *Public International Law* (Toronto: Irwin Law, 2001) at 205.
- 2 J.-Maurice Arbour & Geneviève Parent, *Droit international public*, 5th ed. (Cowansville, Qc : Yvon Blais, 2006) at 179.
- 3 S.C. 1991, c. 41.
- 4 R.S.C. 1985 (2nd Supp.), c. 16.
- 5 S.C. 2001, c. 27 [IRPA].
- 6 R.S.C. 1985, c. F-7.
- 7 2003 FCA 39. This decision was decided under the *Immigration Act*, R.S.C., 1985, c. 1-2, the predecessor of the *IRPA*.
- 8 [1998] 1 S.C.R. 982 at para. 62.
- 9 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
- 10 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
- 11 James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 108.
- 12 S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.
- 13 R.S.Q. c. C-12.
- 14 *Supra* note xii.
- 15 2002 FCT 543.
- 16 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70.
- 17 *Re Charkaoui*, 2004 FCA 421, aff'g 2003 FC 1418.
- 18 *Ibid.* at para. 142.
- 19 2005 FCA 436, leave to appeal to S.C.C. refused.
- 20 *Ibid.* at para. 73.
- 21 *Ibid.* at para. 75.
- 22 SOR/2002-227.
- 23 *Ibid.* at para. 83.
- 24 *Ibid.* at para. 87.
- 25 2005 FCA 54.
- 26 2002 SCC 1, [2002] 1 S.C.R. 3.
- 27 *Ibid.* at para. 76.
- 28 2005 FCA 1 at para. 18.
- 29 *Supra* note xvii.
- 30 2005 FC 1670 at para. 44, Noël J.
- 31 2006 FC 1230.
- 32 *Ibid.* at para. 84.
- 33 *Ibid.* at para. 86.
- 34 *Supra* note xvii.
- 35 *Supra* note xxv.
- 36 2005 FCA 285.

INTERNATIONAL LAW INSTRUMENTS AND REFUGEE LAW: “THE NEW KID ON THE BLOCK”.

Dr Hugo Storey

1. One of the most remarkable decisions by a human rights court in modern times is the Inter-American Court of Human Rights' 18th Advisory Opinion of September 2003: "Juridical conditions and rights of undocumented migrant workers under international human rights law"¹. This opinion was requested by Mexico who had profound concerns about the inferior conditions faced by some 5 million of its citizens working in other American countries as undocumented workers. In the course of this highly impressive Opinion, the Court traversed over 20 international human rights instruments and drew on decisions by a number of other international tribunals including the International Court of Justice (ICJ), the International Criminal Tribunal on Yugoslavia (ICTY), the UN Human Rights Committee (HRC), the UN Committee on the Elimination of Racial Discrimination, the European Court of Human Rights (ECtHR) and the African Commission on Human and People's Rights. What is particularly striking is the approach taken by the Inter-American Court to the case law emanating from these other bodies: as far as possible it strives to adopt and apply the same principles and the same reasoning. That this is no accident has been confirmed by the President of the Court, Judge Cancado Trindade (Brasil), who, in an address to the ECtHR in Strasbourg in 2004, spoke about the success of both courts in "setting forth approximations and convergences in their respective case laws"².
2. I shall return to the significance of this principle of convergence at the end of my paper.

I

3. There are two main ways in which international instruments (apart from the Refugee Convention itself) impact on refugee law.
4. The first is indirect: by providing interpretive tools. Lori Disenhouse's paper gives eloquent examples of this type of impact, for example: the way in which, increasingly, judges have given a human rights reading to key terms contained in the Refugee Convention's Article 1A defini-

1 Advisory Opinion OC-18/93, HRLJ [2004] vol 25

2 HRLJ [2004] pp.157-160.

tion of refugee – in particular, persecution, protection and particular social group; the way in which they have approached interpretation of the Art 1F exclusion clauses by reference to the formidable case law developed under the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and the way in which judges have been better able to evaluate risk to vulnerable groups by considering their situation in the light of international human rights law guarantees afforded to such groups.

5. The second is direct: by international instruments providing their own guarantees of protection. A good example is the recent case decided by the European Court of Human Rights in Strasbourg: *D v Turkey*³. The applicants were three Iranian nationals: a couple and their child. The husband was a Sunni Muslim, the wife a Shia Muslim. They had met in 1996 and decided to marry. The wife's family, which included members of the Iranian intelligence service, strongly objected. The couple went ahead and married without the consent of the wife's family. Two days later they were arrested. They were fined and each was sentenced to 100 lashes for fornication. The sentence was carried out on the husband in April 1997. It was postponed in respect of the wife once because she was pregnant and then again, because of her fragile physical health after the birth of her child. The couple fled to Turkey in November 1999. Turkey is a country which delegates refugee status determination (RSD) to UNHCR. So the couple applied to the local UNHCR office. UNHCR gave them temporary status as "asylum seekers" but eventually made a decision to refuse them permanent asylum status. When the Turkish authorities told them they had to leave, the couple applied to the Strasbourg Court alleging a breach of their human rights. The Court found that the couple had no effective remedy in the Turkish courts and so were entitled to have the Strasbourg Court decide whether the threat to remove them from Turkey back to Iran violated 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 ECHR for threatening to remove the couple.
6. What makes the *D v Turkey* case such a powerful example of how international instruments can complement existing systems of protection is that the Strasbourg Court effectively overturned a refugee status determination (RSD) made by UNHCR. That is not something that could have happened in the great majority of the countries in which refugee status determination is done by UNHCR, acting as a proxy

³ Appln no. 2425/03, judgment of June 22, 2006.

for the national government. There are currently some 87 countries in which UNHCR is involved in refugee decision-making, in the great majority of which there is no right of individual petition or appeal to regional human rights machinery such as was available to the applicants in *D v Turkey*. In most of these countries UNHCR acts as both primary decision-maker and appeal-decider. The 1999 study by Alexander⁴ found that, so far as appeals against initial UNHCR rejections of refugee status were concerned, in almost all places they were decided by staff of the field office where the original decision was made, often the procedure is on the papers only and there was no right to legal representation. Despite responding to criticism of its RSD work by producing in 2004 a detailed Handbook, Procedural Standards for Refugee Status Determination under UNHCR's Mandate, UNHCR has still not taken steps to introduce any independent appeal machinery in any of the countries concerned⁵. In an open letter dated 1 September 2006, a number of NGOs⁶, writing on the anniversary of the publication of Procedural Standards, urged UNHCR to take immediate steps to fully implement basic standards of fairness in refugee status determination at all UNHCR field offices. They stated:

“...the Standards themselves contain gaps when compared to the guarantees of due process that UNHCR has advocated for governments. Most critically, they did not establish an independent appeals system, and did not end the widespread withholding of essential evidence from refugee applicants.”⁷

7. In addition to the Strasbourg ECHR machinery (which now binds nearly 50 European states) we have two other regional systems of human rights protection: the 1969 Inter-American Court of Human Rights (ACHR) (which now has article 62 declarations under Article 21) and the 1981 African Charter on Human Rights and People's Rights (and the 1998 Protocol on the establishment of an African Court on Human and People's Rights, which entered into force on 25 January 2004). So far it has only been the Strasbourg machinery which has dealt with a very significant number of asylum-related cases. We also have bodies at the international level which do deal with asylum-related cases from time to time, in particular, the UN Human Rights Committee

4 M Alexander, "Refugee Status Determination Conducted by UNHCR", 11 IJRL, 251 (1999).

5 See further M Kagan, "The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination", 18 IJRL 1 (2006) pp.1-29.

6 Africa Middle East Refugee Assistance (AMERA), Asylum Access, Christian Action, Frontiers (Ruwad) Association, Helsinki Citizens Assembly Refugee Legal Aid Programme, International Refugee Rights Initiative, Jesuit Refugee Service, Legal Resources Foundation, Refugee Consortium of Kenya, Refugee Law Project, West African Refugees and IDPs Network (WARIPNET). This letter was printed in full in 19 IJRL 1, p.161.

7 The letter urged UNHCR to take the following immediate steps: "1. Make all provisions of the Procedural Standards binding on UNHCR field offices, including issuing specific, individualised reasons for rejection. 2. Revise the sections of the Standards dealing with withholding of evidence, in order to bring them into compliance with the advice that UNHCR has given to the Council of Europe in January 2003 and March 2005. 3. Set a rapid timetable and a plan of action to establish an RSD appeals mechanism that is institutionally independent from first instance decision-making".

(HRC) operating under the International Covenant on Civil and Political Rights (ICCPR) (and its first optional protocol) and the Committee against Torture (CAT) operating under the Convention Against Torture (which now has 57 declarations under Article 22).

8. It cannot be said that these mechanisms on their own deliver comprehensive protection, but it must be borne in mind that states that have ratified these instruments are placed by them under a duty to incorporate their guarantees into domestic law: Lori Disenhouse's paper gives the example of Canada's recent incorporation into its national law of the Convention Against Torture guarantees. Indeed, it is unquestionably at the national level of delivery that human rights guarantees are most important.

II

9. Despite the growing ability of international instruments to augment and enhance refugee protection, there have been persistent calls for reform and improvement of the refugee protection system. One major trigger for these has been the recognition that the Refugee Convention does not cover all categories of persons who need international protection. From the very beginning in 1951 it has been recognised that there were "persons of concern", i.e. persons who fall outside the scope of the Article 1A(2) Refugee Convention definition of refugee but who otherwise need international protection⁸.
10. In the 1980's and 1990s there were calls for a revised Refugee Convention or Additional Protocol, The hope then was that such a new instrument could expand the definition of refugee so as to cover a wider group of people and so in this way bring most "persons of concern" in from the cold⁹. Held up as trend-setting exemplars were the two main regional instruments which had adopted an expanded definition of refugee, so as to cover persons fleeing armed conflict: the 1969 OAU Convention¹⁰ and the 1984 Cartagena Declaration¹¹.
11. But soaring numbers of asylum-seekers heading for Western countries and other factors gave rise to an era of restrictionism. It was

8 See UNHCR ExCom Conclusion No 103 (LVI) "The Provision of International Protection including through Complementary Forms of Protection" (2005); J McAdam, "The Refugee Convention as a rights blueprint for persons in need of international protection", *New Issues in Refugee Research*, UNHCR paper no. 125, July 2006.

9 G. Goodwin Gill and J McAdam, *The Refugee in International Law*, 3rd ed OUP 2007, pp.291-296.

10 Art 1(2) states that "The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality"., OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969

11 *Refugees under the Cartagena Declaration of 22 November 1984 include "person who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order"*.

realised that if any new UN instrument was put before nation states, many adopting a restrictionist stance, it would, if anything, result in a tougher legal regime and fewer people being eligible. Both the Millennium and the Refugee Convention's 50th birthday came and went without any new treaty-making activity.

12. So, in the spirit of realism, 21st century calls for reform have so far taken on a different hue.
13. The main call¹² surrounding the Refugee Convention itself has been for an independent expert supervisory body charged with the review of periodic reports from states and the consideration of individual communications from those aggrieved. In other words, what is being mooted is a new treaty-monitoring body along similar lines to those that now supervise most of the other major international human rights treaties: e.g., on an international level, the ICCPR has the Human Rights Committee, the Convention Against Torture has the Committee Against Torture; on a regional level the European Convention on Human Rights (ECHR) has the European Court of Human Rights (ECtHR), the American Convention on Human Rights (ACHR) has the Inter-American Court of Human Rights and now the African Charter of Human and People's Rights (ACHPR) has the African Court of Human and People's Rights - all bodies which are able to receive individual communications. The point has been forcibly made by Hathaway¹³ and others that it was really only a historical accident, arising by virtue of the Refugee Convention being only the second UN human rights treaty to be passed, that this Convention has missed out on being given a supervisory body unlike most subsequent human rights treaties that have such a body. It would be open to UNHCR to undertake that its own RSD could be made subject to this supervisory body, thereby rectifying the current lack of any independent appeal body to whom those rejected by UNHCR can appeal.
14. The other main type of call for reform (reflecting retreat from the idea of a revised Refugee Convention), has been for a new international instrument dealing with complementary protection. This has been seen as a realistic option notwithstanding the climate of restrictionism because it would not necessarily lead to a more generous overall system but only to a fairer one in which there would be more international burden-sharing. In one form or another, most Western states already operate a system of complementary protection, but usually on a discretionary, ad hoc basis. Yet, those same states have signed up to international human rights treaties which afford protection and which

¹² See e.g. J Hathaway, *The Rights of Refugees Under International Law*, C.U.P. 2005, pp.992-998.

¹³ J Hathaway, *supra*, pp.992-998.

are invoked by individuals, sometimes to the acute international embarrassment of those governments. A new international instrument would give states a treaty basis for introducing domestic reforms to put complementary protection on a legal footing. Such an instrument would also prevent secondary movements and asylum-shopping. It would bring more cohesion and effectiveness to international responses to “persons of concern”¹⁴.

III

15. What are the chances of these two main calls for reform being successful?
16. Were it not for one factor I think we would have to say that the prospects of success for either were dim.
17. That factor consists in the fact that we now have a “new kid on the block”. October 2006 saw the coming into force of the EU Refugee Qualification Directive¹⁵ within 24 out of 25 EU Member States¹⁶. This Directive is only one of a series of pieces of EU asylum legislation, but it is the first which really touches on the substantive contents of refugee law and of complementary protection law¹⁷.
18. In relation to refugee law, this Directive does not seek to modify the Refugee Convention definition at Article 1A(2): it does not follow the OAU/AU or OAS examples of seeking to carve out a broader definition. It leaves the definition of refugee contained in Article 1 of the Refugee Convention untouched¹⁸. However, what it does is add a number of (secondary) definitions of key elements of this refugee definition (which was always minimalist). It defines acts of persecution, actors of persecution, actors of protection, sur place claims and internal relocation. It requires a particular approach to past persecution. Furthermore, it also creates a harmonised set of complementary protection criteria: making it the first supranational instrument to attempt this. It defines beneficiaries of subsidiary protection as those facing a real risk of the death penalty, or execution, torture or inhuman or degrading treatment or punishment in the country of origin, or a serious and individual threat to their life or person by reason of indiscriminate violence in

14 J McAdam, *Complementary Protection in International Refugee Law*, O.U.P. 2007, pp.40-52.

15 EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304/12 of 30.9.2004 The QD implements point (1)(c), 2(a) and 3(a) of the first paragraph of Article 63 of the Treaty, paragraph 38(b) (I and ii) of the Vienna Action Plan, Conclusion 14 of the Tampere European Council and relevant references in the Scoreboard. The Directive was adopted by unanimity in accordance with Article 67 TEC on 29 April 2004.

16 The Accession to the EU of Bulgaria and Romania, as from 1 January 2007, means that as from this date the Directive binds 26 Member States. Denmark is the only existing Member State who has chosen not to ratify it.

17 This article takes for granted that key provisions of the Directive have mandatory effect; this assumption, however, is not beyond controversy.

18 Save in respect of the exclusion clauses, where, arguably parts of Article 12 are more restrictive than Article 1F.

situations of international or internal armed conflict.

19. It must not be thought, however, that the EU Directive eliminates all protection gaps. In particular, its definition of subsidiary protection (which is based on the concept of “serious harm”) is hedged around with significant restrictions¹⁹. We must wait and see how it is interpreted, but it plainly does not cover persons fleeing armed conflict or civil war as such. Nevertheless, it should be borne in mind that there is another piece of EU asylum legislation setting out a legal regime of temporary protection. This ensures that in situations of mass influx EU Member States will protect, albeit only on a temporary basis, those who, even if not refugees, are fleeing civil war or armed conflict in great numbers²⁰.
20. It must not be thought that the new EU Directive is without flaws²¹, although it is generally recognised, including by UNHCR²², that it has codified many of the major advances in refugee jurisprudence over the past 20-30 years. By virtue of Article 37 Member States will have to review its workings by October 2007, so as to assess whether there is a need for revision or amendment.
21. To those whose countries are EU Member States the impact of this Directive is major. But why do I suggest its impact is more extensive? Surely one valid response on the part of non-EU countries of the world would be to say, “this is just a regional treaty and it does not settle anything about the contents of international refugee law or international protection law”.
22. Well, yes and no. Albeit a regional instrument, it is still an international treaty and is as much part of the corpus of public international law as global treaties.

19 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”.

20 There is a wider definition given to protection to persons fleeing armed conflict or endemic violence in the Temporary Protection Directive of 2001 (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 on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] IJ L212/12). Article 2(c) of this Directive protects persons:

“who have had to leave their country or region of origin or have been evacuated...and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular: (i) persons who have fled areas of armed conflict or endemic violence; (ii) persons at serious risk of, or who been the victims of, systematic or generalised violations of their human rights”.

21 J McAdam, for example, has criticised the failure to accord the same level of rights and benefits to beneficiaries of subsidiary protection status as it accords to persons granted refugee status: see Jane McAdam, “The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime”, [2005] IJRL, vol 17 No 3, 461-516; Jane McAdam, Complementary Protection in International Refugee Law, O.U.P. 2007, ch 2; G Goodwin Gill and J McAdam, The Refugee in International Law, 3rd ed O.U.P. 2007, 325ff.

22 UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004, January 2005.

23. Furthermore, there are a number of important features to bear in mind.
24. Firstly, the number of signatory states is not insignificant: standing, at the beginning of 2007, at 26. As and when the EU takes in new members from the remaining European states, this number will rise. (In terms of potential membership one must recall that the separate European organisation, the Council of Europe, now has nearly 50 members).
25. Secondly, the states concerned include several, which have helped shape and produce much of modern refugee jurisprudence: one has only to mention as examples, Germany, the UK, France and The Netherlands. The sheer volume of case law alone is huge and it is accepted generally by scholars that in terms of quality as well, European cases have played a significant role.
26. Thirdly, they include countries with diverse legal cultures, including ones which have had wider global influence: continental as well as common law legal traditions; Anglo-Saxon, French, German, Roman-Dutch – effectively all of the world’s legal traditions save for religious-based systems and Chinese law.
27. Fourthly, the objects and purposes of the treaty commit themselves to adherence to international human rights law obligations. They not only say that the Refugee Convention is “the cornerstone of the international legal regime for the protection of refugees” and specify the role of UNHCR in providing “valuable guidance” on the application of the Article 1 definition; they also emphasise in a number of places the need for Member States to adhere to their obligations under instruments of international law²³. Put another way, the Directive is a regional treaty based on modern internationalist principles.
28. Fifthly, within a matter of years there will be a new jurisprudence which has been built up around this Directive. There will be leading decisions from national courts interpreting (for the first time) the same provisions²⁴. And, there will be judgments from the EU court: the European Court of Justice (ECJ) in Luxembourg. So, for the first time we will see jurisprudence emanating from a supranational court whose judgments will have binding effect in 26 Member States.
29. Sixthly, one must bear in mind general patterns of international law: it has often been state practice adopted by a cluster of states which has given the impetus for a new development in treaty law or cus-

²³ See e.g. recitals 3,15,10,11,22.

²⁴ Assuming correct transposition in national law.

tomary law. Regional consensus is often the nucleus around which global legal principles crystallise. Think also of how greatly modern international human rights law, as developed by the HRC and by the Inter-American Court of Human Rights has been influenced by the ECHR system, by virtue of the fact that the latter got in first, developing jurisprudence arising out of acceptance of the right of individual petition as long ago as the late 1950s/early 1960s.

30. This brings me back to my starting point concerning the Inter-American Court's Advisory Opinion on undocumented migrant workers. From the approach taken by that court, and indeed by their sister courts and supervisory bodies across the globe, the approach will always be to seek to approximate case laws and to make them converge, in the interests of creating a modern *ius gentium*. Put another way, the international judicial response will be to respect it and to avoid, wherever possible, diverging from it.

IV

31. Next one has to bear in mind the new global dynamics which the new Common European Asylum System (CEAS), with the Qualification Directive as its flagship, has created. I appreciate that I am here shifting to a much more speculative mode, but that is in the nature of the task which confronts all of us.
32. Previously each signatory state was left to run the Refugee Convention "car" with its own national engine. Whilst through the auspices of UNHCR and the efforts of the IARLJ there has been a growing convergence of approaches to interpretation and definition, ultimately, no one could say that any one signatory state's definition was more important or right than anyone else's. We have all been striving to achieve an autonomous international meaning, but there has been no authoritative body to say we had got that right or wrong. However, we now have a "euro-engine" - or (more accurately) an engine with important euro parts - which all 26 Member States have in common. Within much of Europe, therefore, certain questions of definition have now been legislatively settled by this Directive and, in relation to interpretation of these new definitions, we will soon have courts in many of these 26 countries having to apply and interpret the same basic provisions. There will also be the European Court of Justice with jurisdiction to give finality of judgment as to interpretation of such matters as the definition of persecution, protection, internal relocation, *sur place* claims, etc.

33. UNHCR will of course seek to influence the way in which the ECJ and the national EU Member State legislatures and judiciaries interpret and apply the Directive, but it can have no guarantee that its advice will be taken. Already, in the drafting of the Directive, for example, their advice was not heeded on matters such as the definition of persecution.
34. Governments and judiciaries in non-EU Member States, at least those which are part of the developed world, will have to think differently about maintaining or taking approaches which are different from those taken in the Directive. If, for example, they decide to take a more restrictive approach (e.g., some signatory states outside the EU still do not recognise non-state actors), then it will be much more difficult than before to resist the argument that they are out of step with international standards, usage and state practice. If conversely they decide to take a more generous approach, then they must expect that it will soon become known by prospective asylum-seekers and those who facilitate their travel that it is best to avoid the territories of European Union Member States and head for such non-European countries instead²⁵. (For third world countries, it does not appear that having more generous provision is necessarily a “pull” factor: many Africans, for example, have chosen not to seek refuge within other third-world African states, if they can find of way of getting to Western Europe to claim asylum there. I would imagine the same is true of South America vis a vis the USA, although that is not to say there have not been very significant numbers of people seeking asylum in other South-American states outside their own.)
35. Inevitably we are brought back to the intractable problem of uneven burden-sharing.
36. Similar considerations arise in respect of complementary protection. Now that the EU Directive has created a distinct legal status of subsidiary protection with its own specific basket of rights and benefits, all non-EU states will have to do some stocktaking and to think carefully about the implications of maintaining or introducing differing minimum standards²⁶. UNHCR once again will properly seek to influence the way in which the new legal criteria governing subsidiary protection are interpreted and applied, but will have no guarantee that its own viewpoint will prevail.
37. If one runs the film on some 2-3-5-10 years, it seems to me that there

²⁵ Counterbalancing this, however, is the fact that the Qualification Directive is only a “minimum standards” Directive and it does permit Member States to make more generous provisions so long as those are compatible with the purposes of the Directive: see Article 3 and Recitals 8 and 9.

²⁶ A point developed by J McAdam in her recent book, *Complementary Protection in International Law*, O.U.P. 2007, ch.6.

will be two specific responses that are likely to arise.

38. On the part of UNHCR, I think it is likely to fear that the original role envisaged by Article 38 of the Refugee Convention for definitive rulings on interpretation coming from the International Court of Justice is likely to be inherited (some may say usurped) by default, by the ECJ. It will rightly and understandably feel the need for some counterbalance. Short of persuading signatory states to activate Article 38 – unlikely given the history of inter-state litigation in treaty subject areas of this type – the next best option for UNHCR, in order to create a counterbalance, is to take steps within the UN for a new protocol designed to establish an independent supervisory body akin to other treaty-monitoring bodies. I think it likely that if they do this they will have the support of non-EU governments who will dislike the emergence of a Eurocentric refugee jurisprudence with its own supranational court. Further, I think, paradoxical though it may seem, that EU national judiciaries (possibly EU governments too) will favour such a move since they will recognise such a reform as a necessary building bloc towards a more coherent international system. If the views of IARLJ members are anything to go by, there is a strong desire to avoid the creation of a Eurocentric jurisprudence; our interest is and has always been in a truly international jurisprudence, for nothing short of that matches the reality that this is a treaty to which virtually all the states of the world have signed up.
39. Likewise, I think there will be considerable pressure to further the idea of a new international instrument on complementary protection.
40. In other words, I think that the two main calls for reform which have been made so far in the first decade of the new Millennium have a real chance of bearing fruit.
41. We are, therefore, at the beginning of a new dynamic, a new dialectic. At first there is a risk of a rupture between the European and non-European. However, once non-European governments and judiciaries start to grapple with the implications for them of the new EU Directive, there will be a reaction which may well spur greater efforts aimed at generating new treaty-making activity at the UN and, in the longer run, a more coherent body of international law in the field of refugee protection.

*Dr. Hugo Storey,
Senior Immigration Judge, Asylum and Immigration Tribunal, UK,*

STATUS DETERMINATION AND THE PROTECTION OF REFUGEES IN AFRICA

Judge B. M. Ngoepe

The United Nations High Commission for Refugees estimates that there are over three million cross-border refugees in Africa. To these can be added millions of internally displaced persons. Though the number of refugees has declined somewhat over the last decade, the protection of these vulnerable persons still poses one of the major challenges for the continent.

The OAU Convention Governing Specific Aspects of Refugee Problems in Africa, commonly known as the OAU Refugee Convention, was adopted in September 1969 by the assembly of the Organization of African Unity. The OAU Refugee Convention, which entered into force in 1974, is the only binding regional treaty to complement the global 1951 Refugee Convention and its Protocol. It has been ratified by 45 of the 53 members of the African Union, the new regional organisation which in 2002 replaced the OAU.

The institutional machinery for dealing with the rights of refugees in Africa is dominated by the UNHCR. However, it is worth mentioning some African institutions with relevance for refugees. The Commission on Refugees, set up by the OAU already in 1964, is not mentioned in the OAU Refugee Convention. It now falls under the Humanitarian Division of the Political Affairs Directorate of the AU Commission. The Commission on Refugees has failed to make a significant impact, but AU resolutions from recent years indicate a renewed political interest for the plight of refugees and internally displaced persons. Many of these initiatives are undertaken in cooperation with the UNHCR. A Sub-Committee on Refugees has been established in the AU Permanent Representative Committee.

The African human rights system, with the African Commission on Human and Peoples' Rights and the newly established African Court on Human and Peoples' Rights, could have a role to play in ensuring the rights of refugees on the continent. To some extent this is already the case. The African Commission on Human and Peoples' Rights has established a Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa. The case law of the African Commission also reflects the violations of refugee rights that have occurred across the continent. Mass expulsion of refugees is forbidden in the African Charter on Human and Peoples' Rights and the African Commission in the 1990's held Angola,¹ Rwanda²

¹ *Union Inter africaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997).
² *Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996).

and Zambia³ accountable to this standard. Furthermore, in 2004 the African Commission found that the massive violations of the rights of Sierra Leonean refugees by the Guinean government were in violation of the African Charter and the OAU Refugee Convention.⁴ The Commission recommended the establishment of a joint Sierra Leonean-Guinean Commission to assess losses and compensate the victims.

The definition of a refugee in article 1 paragraph 1 of the OAU Refugee Convention is the same as the definition in the 1951 UN Convention read together with its Protocol. However, article 1 paragraph 2 of the OAU Convention extends the definition of refugee to

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Thus the OAU Refugee Convention has a wider definition of refugee than the UN Convention/Protocol. Article 2 of the OAU Convention has the heading 'asylum' and provides that member states

shall use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well founded reasons, are unable or unwilling to return to their country of origin or nationality.

This provision is reinforced by article 12(3) of the African Charter on Human and Peoples' Rights, ratified by all AU member states, that provides that '[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.' Article 2 of the OAU Refugee Convention provides for the sharing of the burden for states that receive many refugees 'in the spirit of African solidarity'. In addition the OAU Refugee Convention recognises in its preamble the 'common standards' for refugee treatment set out in the UN Convention and its Protocol. This is important as the UN Convention provides for a larger number of benefits from recognition of refugee status than does the OAU Convention. Status determination is undertaken by the government, as is the case for example in South Africa, or by the UNHCR, for example in Kenya. The definition in the OAU Refugee Convention is used in determining who is a refugee, in the countries that have ratified this Convention. For example

³ *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996).

⁴ Communication 249/02, *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, 20th Activity Report of the African Commission on Human and Peoples' Rights.

the South African Refugee Act incorporates the definition of the OAU Refugee Convention as to who should be considered to be a refugee. It is the view of others, in this respect, that South Africa should not find it difficult to finalise status determination of asylum applicants from the Democratic Republic of the Congo, Zimbabwe and other countries where it is thought that there have been 'events seriously disturbing public order'. There are of course other views, namely, that the situation in those countries has not reached that level. In this context some countries with a large number of refugees from neighbouring countries with on going conflict consider refugees from these countries as prima facie refugees and therefore do not undertake individual status determination of refugees from these countries.

At the time of the adoption of the OAU Refugee Convention most African countries had a generous policy towards refugees. Since the early 1990's the situation has deteriorated and rejection of refugees at the borders or expulsion of existing refugee populations has become more common.

The reasons may be many. It may be because of plain xenophobia; it could also be because the economy of the host country is fragile. Many countries are themselves plagued by a very high level of unemployment and poverty. Security is also an issue. Many refugees attempt to maintain contact and political influence with their countries of origin, sometimes causing tension between the countries.

The problem facing South Africa in particular is the backlog in status determination. By the end of 2004 South Africa had 115,224 pending cases.⁵ Thus South Africa had the second biggest backlog in the world. Only the United States had more undetermined asylum applications at the end of 2004. By July 2005 the South African backlog had gone down to 103,410 applications and hopefully the government will succeed in its ambition in eradicating the backlog by June next year. The problem has been compounded by a number of judgments in the High Court, some of which have caused confusion on the part of the government. Certain aspects of the regime applied in the process of status determination have been said to be unconstitutional. The situation is in a state of flux. Some judgments are not informed by practicalities on the ground. There are likely to be more delays. As South Africa is sometimes seen as offering the potential for a better life economically, there are bound to be more applicants, and challenges.

*Judge B. M. Ngoepe, Judge President,
High Court Of South Africa And Judge Of The African Court On Human
And People's Rights.*

⁵ 2004 UNHCR Statistical Yearbook.

“THE SALIENT ASPECTS OF THE OAU CONVENTION AND ITS SIGNIFICANCE AND RELEVANCE AS A REGIONAL REMEDY IN THE AFRICAN CONTINENT”

Ahmed Arbee

The Chairperson of the Plenary Session, Judge Emma Aitken, Fellow Panelists, Distinguished Judges, Ladies and Gentlemen,

I am indeed profoundly honored to address such a distinguished gathering, although I must concede at the very outset that I consider it to be an arduous task to step into the shoes of Judge President Bernard Ngoepe of South Africa who was scheduled to address you in this session but could not attend due to circumstances beyond his control. I convey on his behalf his sincere greetings to you.

The prepared presentation of Judge President Bernard Ngoepe will not only form part of the record but copies of his presentation will be made available to Delegates for convenient perusal.

I am also extremely pleased to see such a large contingent of Delegates representing Africa in this Conference. I wish to place on record my deepest sense of appreciation to our President, Justice Tony North for his effort in this regard. I would like to also commend the Nigerian Ministry who funded so many Delegates from the Nigerian judiciary.

I have been requested by the Chairperson to cover salient aspects of the OAU Convention, its significance and relevance as a Regional remedy in the African Continent. In the limited time at my disposal, I will endeavor to do justice to the topic.

It is important to recall that Africa hosts almost a third of the world's refugee population with millions of other categories of displaced people. In order to understand the relevance of specific provisions of the Convention, it is necessary to refer to the historical circumstances prevailing in Africa. The two important factors worthy of mentioning are based on the fact that the refugee problem in Africa was linked to the liberation struggles initially and countries which were not liberated during the independence wave of the 60s. The unilateral demarcation of colonial borders also served to compound the problem.

Given the magnitude and seriousness of the situation, it was crucial at the

time to have an adequate legal instrument for the protection of vulnerable groups. Consequently, the OAU Convention Governing the Specific Aspects of the Refugee Problems was signed in Addis Ababa on 10 December 1969 by OAU Member states.

The 1969 OAU Convention is particularly generous as it broadens the scope and definition given by the 1951 Geneva Convention by including any person who is forced by an act of aggression, foreign occupation, foreign domination or public disorder in either a part or the whole of his/her Country of Origin or Country of which he/she is a National, to leave his/her place of normal residence to seek refuge elsewhere outside his/her Country of origin or Country of which he/she is a National. The Convention also contains specific provisions that respect the right of the principles of non-refoulement *and even allows for group determinations in the event of a massive influx of “ refugees” considered to be prima facie refugees.*

Despite the introduction of progressive legislation in some countries in Africa, the OAU Convention represents not only a living and relevant regional instrument but remains a beacon of hope for the vulnerable victims in the continent as a regional remedy. The issue of refugees and other displaced persons remains a priority of the now African Union (AU) decision making organs which have adopted numerous resolutions and decisions reinforcing the normative base of the 1969 OAU Convention.

Whereas many developed countries in the West are narrowing the scope of admission in terms of the 1951 Convention by introducing in their respective regional conventions a revised definition of certain categories of refugees, other measures aimed at tightening border control and other restrictive practices giving a generally perceived notion of a fortress mentality. Any limitations and adaptations of such a nature clearly compromise the spirit of the Geneva Convention and are tantamount to a betrayal of the protection standards enshrined in the Convention. We must at all times endeavor to uphold the standards of protection and this represents a challenge to all delegates present here. This challenge will not be won by pointing fingers – it will be won by action. By each one of us committing our every resource of mind and body in upholding the noble provisions enshrined in the 1951 Geneva Convention.

Africa with its scarce resources and pressing domestic agenda has not limited the scope of the OAU Convention in the past 37 years and this represents a strong signal to the rest of the world that we should not allow our respective regional conventions to be watered down or in any way compromise the principles of protection. Thank you.

Ahmed Arbee, Chairperson, Africa Chapter Steering Committee and the former Chairperson of the South African Refugee Appeal Board

IARLJ INTER-CONFERENCE WORKING PARTIES PROCESS

Dr. James C. Simeon

Co-Ordinator's Report

This is a brief report on the IARLJ Inter-Conference Working Parties Process since our last IARLJ World Conference that was held in Stockholm, Sweden. For the substantive issues addressed by each of the IARLJ Working Parties, please consult their individual Conference Research Papers and Reports that are included in the 7th IARLJ World Conference binders and will be posted on the IARLJ website at www.iarlj.org.

The Active IARLJ Working Parties

Following the Stockholm IARLJ World Conference in April 2005, the IARLJ Executive and Council approved the establishment of a new IARLJ Working Party, the Supervising the 1951 Convention, including an International Refugee Court, and the winding down of another, the Non-State Agents of Persecution Working Party. The Non-State Agents of Persecution Working Party was, in fact, folded into the IFA/IRA/IPA Working Party.

At the Budapest, Hungary, Europe Chapter Conference in November 2005, the IARLJ Executive and Council approved the establishment of two new IARLJ Working Parties: the Convention Refugee Status and Subsidiary Protection Working Party and the Country of Origin Information and Country Guidance Working Party.

For the last year, the IARLJ Inter-Conference Working Parties Process has had nine IARLJ Working Parties:

- Asylum Procedures;
- Country of Origin Information and Country Guidance;
- Convention Refugee Status and Subsidiary Protection;
- Expert Evidence;
- Human Rights Nexus;
- Internal Flight Alternative/ Internal Relocation Alternative/ Internal Protection Alternative;
- Membership in a Particular Social Group;
- Supervising the 1951 Convention, including an International Refugee Court;
- Vulnerable Categories.

Several of the new IARLJ Working Parties had difficulties getting organized. This was primarily due to the unavailability of IARLJ members to serve as Rapporteurs or Associate Rapporteurs for these Working Parties. Unfortunately, we were unable to recruit either a Rapporteur or Associate Rapporteur for the Supervising the 1951 Convention Working Party. With the loss of Kim Rosser, Australia, and Roland Bruin, The Netherlands, as Rapporteur and Associate Rapporteur for the IFA/IRA/IPA Working Party, this IARLJ Working Party was not able to remain active. Out of the nine IARLJ Working Parties, during this period, seven were actively working on Conference Research Papers for the Mexico City IARLJ World Conference.

IARLJ Working Party Rapporteurs Teleconference Calls

Since the Stockholm IARLJ World Conference last year, as the coordinator of the Inter-Conference Working Party Process, I have held seven international teleconference calls for the IARLJ Working Party Rapporteurs and Associate Rapporteurs. These teleconference calls dealt with a number of issues regarding individual IARLJ Working Parties as well as preparing and coordinating the activities of the IARLJ Working Parties for the 7th IARLJ World Conference in Mexico City. I believe that these teleconference calls were helpful particularly for the new IARLJ Working Party Rapporteurs and Associate Rapporteurs.

The teleconference calls always included a formal draft agenda and the draft notes of the previous teleconference calls, along with any other accompanying attachments. Most teleconference calls took about one hour to cover all items on the agenda for the calls. These teleconference calls were the principal means of staying in contact with the Rapporteurs and the Associate Rapporteurs and monitoring the activities and progress of the IARLJ Working Parties.

A number of other IARLJ Working Parties held their own teleconference calls. For instance, I participated in the Human Rights Nexus Working Party, as an ex-officio member, and I was also included on all their teleconference calls. Other IARLJ Working Parties held their own special and/or regular meetings. The Country of Origin Information and Country Guidance Working Party held a Round Table in London on June 27, 2006. The Expert Evidence Working Party held regular meetings in London. However, most IARLJ Working Parties conducted their communications by e-mail and telephone.

Inter-Conference Working Parties Process Meetings at IARLJ World Conferences

The IARLJ Inter-Conference Working Parties Process holds a meeting at every IARLJ World Conference. The 7th IARLJ World Conference in Mexico City is no exception. These meetings afford an opportunity for IARLJ Working Party Rapporteurs and Associate Rapporteurs to meet face-to-face and to consider how the IARLJ Inter-Conference Working Parties Process is operating and whether any changes are required in either the IARLJ Working Parties, individually, or the Inter-Conference Working Party Process as a whole.

I am very pleased to report that for this year's IARLJ World Conference in Mexico City, seven of the nine IARLJ Working Parties will be presenting their Conference Research Papers and Reports to the IARLJ World Conference. I should like to thank the following IARLJ Working Party participants and their Rapporteurs and Associate Rapporteurs for their dedicated efforts during the past year and for producing their Conference Research Papers and Reports for the Mexico City IARLJ World Conference.

Asylum Procedures - Steve Karas, Australia, Rapporteur, Jacek Chlebny, Poland, Associate Rapporteur;

Country of Origin Information and Country Guidance - Hugo Storey, Great Britain and Northern Ireland, Rapporteur, Boštjan Zalar, Slovenia, Associate Rapporteur;

Convention Refugee Status and Subsidiary Protection – François Bernard, France, Rapporteur, Jane McAdam, Australia, Associate Rapporteur;

Expert Evidence – Geoffrey Care, United Kingdom, Rapporteur, John Barnes, Malta, Associate Rapporteur;

Human Rights Nexus – Paulah Dauns, Canada, Rapporteur, Roderick Madgwick, Australia, Associate Rapporteur;

Membership in a Particular Social Group – Michael Ross, Canada, Rapporteur, Patricia Milligan-Baldwin, Great Britain and Northern Ireland;

Vulnerable Categories – Catriona Jarvis, United Kingdom, Rapporteur, Joulekhan Pirbay, Canada, Associate Rapporteur.

IARLJ members and other participants on the IARLJ Working Parties have

conducted a great deal of legal research activity over the past year. This is evident by the quality of the legal research found in the conference papers and reports that they have presented for this 7th IARLJ World Conference. I am confident that the members of our Association will find the IARLJ Working Parties' Conference Research Papers and Reports to be of immediate practical value in their daily work involving asylum and refugee law. I am also confident that these papers and reports will contribute to the advance of knowledge and understanding in the fields of international, regional and national asylum and refugee law and practice.

The Inter-Conference Working Parties Process's Contribution to the Association

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.

I would encourage all of our members to get involved or to stay actively involved with our IARLJ Working Parties. Participating in an IARLJ Working Party is professionally stimulating because it allows one to stay abreast of the latest legal developments in asylum and refugee law. But, at the same time, it is also personally rewarding because it allows one to make a contribution, no matter how small, in helping to resolve some of the most problematic areas of asylum and refugee law.

The Inter-Conference Working Party Process has proven itself to be one of the most dynamic and valuable aspects of our Association. I am confident that it will continue to develop and to evolve to be one of the most vital and important activities of our Association.

*Dr. James C. Simeon,
IARLJ Executive Director*

REPORT ON INTER-CONFERENCE ACTIVITIES 2005-2006

Justice Steve Karas

1. Overview

This report covers the activities of the IARLJ Asylum Procedures Working Party between December 2005 and November 2006. A series of appendices containing material produced by the Working Party members and other documents referenced in the report are available on the IARLJ website. The Rapporteur thanks the members of the Working Party who supplied information and provided their comments for this paper.

2. Asylum Procedures Working Party Background

Under the direction of Michel Creppy, the former Rapporteur, the Asylum Procedures Working Party produced a number of substantive conference papers and reports, including its work on the Africa Project.

In 2005, Michael Creppy and Philip Williams resigned from their roles as Rapporteur and Associate Rapporteur, respectively. I note that Michael Creppy has been instrumental in the founding of the IARLJ Americas Chapters and the promotion of the Working Parties process with regional chapters. On 3 December 2005 I was officially appointed by the IARLJ Executive Council as Rapporteur of the Asylum Procedures Working Party at its meeting in Brussels, Belgium.

Since I assumed this role I have participated in several IARLJ Working Parties Rapporteurs international teleconferences discussing the Working Parties and matters relevant for the Mexico City IARLJ World Conference this year. Together with the newly appointed Associate Rapporteur Jacek Chlebny, the past work of the Working Party was reviewed and a fresh research agenda for the group was set in preparation for the upcoming November 2006 IARLJ World Conference.

As a result, each member was encouraged to offer information about his or her country's refugee/asylum review determination practices. In particular Working Party members were asked to specify whether the refugee/asylum review procedures and processes in their respective countries were inquisitorial/non-adversarial or adversarial and whether there is any judicial review of administrative decisions in this field.

3. Outline of subject

The adversarial system of conducting proceedings has been described as a system in which the parties, and not an adjudicator, have the primary responsibility for defining the issues in dispute and for carrying the dispute forward to a hearing. Hearing procedures tend to be highly structured and formal. The system is based not only on substantive and procedural law but also on an associated legal culture and ethical base. Strict formal rules exist to ensure a fair and evenly balanced contest. These rules comprise, on the one hand rules of procedure and evidence, and on the other hand, rules of ethics which govern the behaviour of counsel in an attempt to avoid a win at any cost attitude which is engaged by the highly competitive nature of adversary proceedings. The Asylum and Immigration Tribunal in the United Kingdom represents a good example of such an adversarial system in refugee determination.

Throughout history the adversarial system has been principally contrasted with the nonadversarial or inquisitorial system in which matters proceed more as a continuous series of meetings, hearings and written communications during which evidence is introduced, witnesses heard and the role of the decision maker is pro-active, directorial and 'inquisitive'. The rules relating to hearing procedure tend to be minimal and uncomplicated as there is an emphasis on the collection of all of the relevant and significant evidence irrespective of whether it is in favour of or against either party. The Australian Refugee Review Tribunal and the New Zealand Refugee Status Appeals Authority are prime bodies which exhibit these features.

In Australia, judicial review of refugee matters entails a court re-examining a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures. On review, if a court finds that a decision has been made unlawfully, the powers of the court will generally be confined to setting the decision aside and remitting the matter to the decision-maker for reconsideration according to law.

The grounds of judicial review are concerned either with the processes by which a decision was made or the scope of the power of the decision-maker. That is when a person challenges a decision in court, they can do so on the basis of legal errors in the terms of the decision itself or on the basis of errors in the process by which the decision was made. Results or outcomes of the decision-making process are not primary concerns of judicial review. As such, in the Australian context judicial review is not the re-hearing of the merits of a particular case, it is confined to *points of law* as opposed to *points of fact*.

In other jurisdictions, courts have the power to go further, for instance they can reexamine facts of a particular case and may strike down a decision simply because it ignored relevant and material facts.

This Report will endeavour to identify country by country the inquisitorial or nonadversarial and adversarial review processes in the refugee/asylum review determination area and whether there is any judicial review of those decisions by a court of law.

4. Information from IARLJ members

The reporting members provided information on the following countries: Albania, Australia, Belgium, Canada, Cyprus, Denmark, Finland, France, Germany, Hungary, India, Ireland, Japan, Malta, Mexico, New Zealand, Poland, Slovak Republic, Turkey, Ukraine, United Kingdom and United States of America.

In addition, the Refugee Review Tribunal's dedicated Country Research and Library Services Section gathered information and provided insight into the positions of the following countries: Armenia, Austria, Belarus, Brazil, Bulgaria, Burundi, Colombia, Costa Rica, Fiji, Russian Federation, Scotland, Slovenia, Switzerland. To access information on these countries' procedures follow the web site links included in Appendix A.

Prepared responses received from Working Party members and the research undertaken by the Australian Refugee Review Tribunal's Country Research and Library Services Section are summarised below and/or attached as appendices, or sighted respectively. For any copies of the material prepared by the Working Party members contact the IARLJ Secretariat.

5. Examples of responses

Albania

Dr Xhezair Zaganjori from the Constitutional Court of Tirana responded by fax indicating that the Directory for Refugees serves as a collegial decision-making body in the first instance. Rejected asylum seekers have the right to appeal to the National Commission for Refugees, an eight-member committee bringing together government agencies and representatives of two non-government organisations (NGOs). Decisions of the National Commission for Refugees may be challenged before the District Court of Tirana.

Australia

A summary of Australia's refugee determination system was prepared by the Legal Section of the Refugee Review Tribunal. The outline indicates that Australia has a two tier refugee determination system with three key players, namely, the Department of Immigration and Multicultural Affairs, the Refugee Review Tribunal, and the Courts.

The Refugee Review Tribunal (RRT) provides a final, independent, merits review of decisions made by officers of the Department of Immigration and Multicultural Affairs (the Department) acting as delegates of the Minister for Immigration and Multicultural Affairs. The Tribunal is not bound by technicalities, legal forms or rules of evidence and is required to act according to substantial justice and the merits of the case.

The proceedings before the RRT are inquisitorial in nature, non-adversarial and informal.

Markers of the Tribunal's inquisitorial nature include:

- the power of the Tribunal to initiate investigations or inquiries of its own motion in order to supplement the evidence provided by the applicant and the Department;
- the power of the Tribunal to ensure that procedural momentum is maintained;
- the absence of an obligation to abide by the rules of evidence;
- the applicant being the only party to the proceedings before the Tribunal;
- the ability to make decisions on the papers;
- the absence of burden of proof on the parties;
- the requirement for the standard of proof that the tribunal be 'satisfied' as to its decision; and
- the absence of legal representation for parties and their right to self-represent.

An applicant may choose to be assisted by an adviser or a friend or relative but the Tribunal's procedures are designed so that an applicant does not need to have an adviser to obtain a fair decision. The Minister is not represented at proceedings before the Tribunal. Assistants are not permitted to address the Tribunal at a hearing except in exceptional circumstances. Applicants are entitled to an interpreter free of charge, if not sufficiently proficient in English. A decision of the RRT may be challenged in a court of law such as the Federal Magistrates Court of Australia, the Federal Court of Australia, or the High Court of Australia on a point of law.

Belgium

Serge Bodart President of the Permanent Refugee Appeals Commission provided a detailed report on the asylum determination system in Belgium. His report indicates that the Belgian Aliens Office is the administrative body which carries responsibility for assessing refugee claims in the first instance.

Where claims are found to be inadmissible, the applicants have the right to a review procedure before the Belgian Commissioner General for Refugees and Stateless persons (CGRS). The CGRS reviews both the asylum seeker's application and the Aliens Office decision. Where the decision of the Aliens Office is confirmed by the CGRS applicants have an opportunity to introduce an appeal on procedural grounds only before the Council of State, the Supreme Administrative Court. Where the Aliens Office or the CGRS determine that a claim is admissible, the CGRS examines whether or not it is well founded. If the claim is well founded, the applicant is granted refugee status. On the contrary, where the CGRS determines that an application is unfounded, refugee status is refused. The asylum seeker has 15 days from the day the decision was notified to introduce an appeal with the Permanent Refugee Appeals Commission (PRAC).

The PRAC is an administrative court, its' function is to review the entire procedure from the beginning by considering all of the relevant facts and points of law. The procedure is oral and adversarial.

The PRAC process includes the following characteristics:

- Individuals appearing before the court have the right to be represented by counsel and to be assisted by an interpreter;
- Individuals have the right to be heard and to present their cases fully. This is done by way of an oral hearing;
- Applicants have the right to access their personal administrative files;
- Hearings are held in public, unless special circumstances apply;
- The PRAC has the power to request any information available with any Belgian authority;
- The PRAC makes a decision on the admissibility and on the merits of the case.

A decision of the PRAC may be challenged on procedural grounds only before the Council of State. Where the Council of State quashes the PRAC decision, the matter is returned to the PRAC for reconsideration.

Canada

A comprehensive discussion of the Canadian refugee determination system is provided in Justice Konrad von Finckenstein's paper presented at the Regional Latin American Course on International Refugee Law in September 2005, entitled *'The role of the Federal Court in the Canadian System of Refugee determination'*.

The paper indicates that Canada has an elaborate multi-stage refugee determination system with three key players, namely, the Department of Citizenship and Immigration (CIC), the Immigration and Refugee Board (IRB), and the Federal Court. The IRB follows a quasi-judicial tribunal process which is usually non-adversarial in nature. However, the process can become adversarial when a representative of CIC participates in a case and argues against the claims made by the applicant.

The IRB process includes the following characteristics:

- Individuals appearing before the tribunal have the right to be represented by counsel, who does not need to be a lawyer, but who could be an immigration consultant or a trusted advisor;
- Individuals have the right to be heard and to present their cases fully. This is usually done by way of an oral hearing;
- All testimony is given under oath or by affirmation;
- The persons who make decisions on cases are called members;
- Most cases are heard by one member, although occasionally in the Refugee Protection Division and Immigration Appeal Division, panels of three members will hear cases;
- Hearings concerning refugee claimants are generally held in private, while other hearings are usually open to the public.

Judicial review of the IRB decisions is available on points of law only to the Federal Court of Canada by leave of the Court.

Cyprus

Popi Nicolaou Member of Reviewing Authority for Refugees provided a summary of the Authority's procedural framework, powers and jurisdiction, indicating that the Reviewing Authority's decisions are subject to judicial review before the Supreme Court of Cyprus.

In relation to the proceedings before the Reviewing Authority, the summary indicates that during the examination of the administrative recourse the Authority may, where this is deemed appropriate, decide on calling a

hearing, to which it has the power to summon:

- (a) The applicant;
- (b) Any expert it may decide;
- (c) The competent officer of the Reviewing Authority;
- (d) A representative of the Asylum Service.

Normally, hearings before the Reviewing Authority are conducted in private. In the course of the proceedings before the Reviewing Authority, applicants are provided with the services of qualified interpreters, free-of-charge. Furthermore, applicants throughout the proceedings have the right to be represented by a lawyer or a legal advisor.

Denmark

A comprehensive review of the Danish refugee determination system is provided in Justice B.O. Jespersen's contribution. The summary indicates that the Danish asylum system is two-tiered, with the Danish Immigration Service having responsibility for assessing asylum claims in the first instance and the Refugee Appeals Board, an independent quasi-judicial body, processing appeal cases after the Danish Immigration Service has refused to grant asylum.

Decisions made by the Refugee Board are final, which means that Board decisions are not subject to judicial review. The Board's form of legal procedure is basically oral and very similar to that of a court.

The Board process includes the following characteristics:

- The persons who make decisions on cases are called members and most cases are heard before 3 Board members;
- The Board can initiate investigations or inquiries of its own motion in order to supplement the evidence provided by the applicant and the Danish Immigration Service;
- The Board has full control of the proceedings and may postpone consideration of cases where it finds it necessary to do so, for example to obtain further information;
- The Board normally summons the applicant to appear before it, however, only in quite extraordinary cases are other witnesses summonsed to appear before the Board;
- Individuals appearing before the Board have the right to be represented by an attorney;
- Individuals have the right to be heard and to present their cases fully. This is usually done by way of an oral hearing;

- A representative of the Danish Immigration Service and an interpreter are also present during hearings;
- The asylum seeker must plausibly establish his identity and his asylum motive;
- The principle of benefit of the doubt is applied in Danish asylum practice;
- Hearings concerning refugee claimants are generally held in private.

Finland

Justice Juha Rautiainen of the Helsinki Administrative Court and Justice Ilkka Pere of the Supreme Administrative Court responded by email indicating that the Helsinki Administrative Court reviews decisions made by officers of the Directorate of Immigration, who make refugee status determination in the first instance.

The proceedings before the Helsinki Administrative Court are inquisitorial in nature.

Both the facts and the law are examined. An appeal may only be made with leave from a decision of the Helsinki Administrative Court to the appellate jurisdiction of the Supreme Administrative Court. A panel of three justices determine whether leave should be granted. Where leave is granted, the matter is determined by a panel of five justices who have the jurisdiction re-examine the relevant facts and the points of law.

Appellants before the courts are provided with free legal aid through out the proceedings.

France

Vera Zederman, Chief of the Law Department of Commission des recours des réfugiés provided a detailed summary of the asylum determination system in France, with a focus on the proceedings before the Refugee Appeals Board.

The summary indicates that the key players in the process are: the French Office for the Protection of Refugees and Stateless Persons (OFPRA), Refugee Appeals Board, and the Council of State.

The Appeals Board does not rule on the legality of OFPRA's decision, but rather on whether or not the person has the right to be granted refugee status based on all the information it has received on the day it adjudicates the case, including information which OFPRA did not have when it made its decision.

The Refugee Appeals Board's appeal process is adversarial, exhibiting the following characteristics:

- The Appeals Board can request the Director of OFPRA to produce written observations on the appeal at hand;
- When OFPRA produces observations, the Appeals Board is under an obligation to communicate them to the petitioner if he/she requests them;
- The Appeals Board has full control of the proceedings and may postpone consideration of cases where it finds it necessary to do so;
- Individuals appearing before the Appeals Board have the right to be represented by a lawyer and to be assisted by an interpreter;
- The Appeals Board normally summons the applicant to appear before it in order to present oral submissions;
- Hearings are open to the public, however at a petitioner's request or for reasons related to maintaining public order they can be held in private.

The Appeals Board is subject to having its decisions set aside for errors of law or procedure by the Council of State. Such an application to the Council of State does not suspend the effects of the Appeals Board's decision, which is final and conclusive upon the party.

Germany

Dr. Paul Tiedemann, Judge of the Administrative Court Frankfurt provided a comprehensive report on the refugee determination system in Germany. His report indicates that the Federal Office is the administrative body which carries responsibility for assessing refugee claims in the first instance.

Decisions made by officers of the Federal Office can be challenged before the administrative courts. Both the facts and the law are examined. Individuals have the right to be heard and to present their cases fully. This is usually done by way of an oral hearing.

The first and second instance administrative courts determine cases in accordance with the inquisitorial principle. Individuals appearing before the courts have the right to be represented by a lawyer. Where legal action is successful, the court obliges the Federal Office to recognize the appellant as a person entitled to political asylum and/or to recognize that the prerequisite of refugee status are given and/or that the appellant has access to subsidiary protection.

An appeal may be made from a decision of the administrative court to the

appellate jurisdiction of the Higher Administrative Court. From the Higher Administrative Court an appeal may only be made with special leave to the Federal Administrative Court and must be confined to points of law.

Hungary

Dr Judit Pápai, Head of COI Documentation Centre Metropolitan Court of Budapest provided a general description of the Hungarian asylum system, indicating that in the first instance procedure is conducted by the regional directorate of the Office of Immigration and Nationality (OIN).

Decisions made by officers of OIN can be challenged before the Administrative Board of the Budapest Municipal Court. The decisions of the Budapest Municipal Court are final and conclusive and may not be challenged.

India

Dr. M.K. Sinha, Assistant Professor of Indian Society of International Law indicated in his response that India is neither a signatory to the 1951 Refugee Convention nor its 1967 Protocol. However, he explained that the United Nations High Commissioner for Refugees (UNHCR), in India has been given some role to exercise its mandate in respect to some categories of refugees. His response also noted that the Indian judiciary recognises refugees and refugee law to a certain extent.

Ireland

Individuals who seek asylum in Ireland may be recognised as refugees at either the first instance by the independent Office of the Refugee Applications Commissioner (ORAC) or on appeal by the Refugee Appeals Tribunal (RAT).

A decision made by the Tribunal may be reviewed by the High Court on points of law only. Where the High Court quashes the RAT decision, the matter is returned to the Tribunal for reconsideration.

The RAT process includes the following characteristics:

- The persons who make decisions on cases are called members and most cases are heard by one member;
- Individuals appearing before the Tribunal have the right to be represented by counsel;
- The Commissioner is represented by a Presenting Officer in all proceedings;

- The applicant has the right to call witnesses and to cross examine witnesses presented by the government;
- Individuals have the right to be heard and to present their cases fully. This is usually done by way of an oral hearing;
- Hearings are held in private with exception of UNHCR and other observers allowed at the discretion of the Tribunal;
- The burden of proof is shared between the applicant and the Tribunal.

Japan

Professor Osamu Arakaki of Shigakukan University provided a brief outline of the refugee status determination procedures in Japan, indicating that a two-tier system has been in place since 1981.

Both the initial and review stages are undertaken by the same administrative body, namely the Immigration Bureau of the Ministry of Justice. Consideration of internal appeals from first instance decisions is given to another section of the Immigration Bureau - the Adjudication Division. Legal and international affairs experts are involved in the review stage of the procedure as Refugee Adjudication Counselors. The role of Refugee Adjudication Counselors is advisory only, the final authority for determination at the administrative stage remains with the Immigration Bureau of the Ministry of Justice.

Decisions regarding refugee status made by the Immigration Bureau may be appealed to the District Court and then to the High Court and the Supreme Court, the highest judicial institution in Japan.

Allan Mackey, Senior Immigration Judge of the UK Asylum and Immigration Tribunal, in his research paper entitled '*Observations on Refugee Status Determination in Japan, and some New Zealand, United Kingdom, and European Union comparisons*' examines the limitations of the relatively new Japanese refugee determination system and practice.

Malta

Professor Henry Frendo, the Chairman of Refugee Appeals Board provided an article from the local newspaper discussing Malta's changing immigration and asylum system. There are two agencies involved in the determination of refugee status in Malta, the Office of the Refugee Commissioner, whose role it is to assess applications at first instance and the Refugee Appeals Board which offers review of the decisions made by the Commissioner. The proceedings before the Board are inquisitorial in nature, with a board of adjudicators sitting together and determining

appeals. Open hearings, with lawyers and summoned witnesses, may be held if and when that is deemed appropriate by the Board. The decisions of the Board are final and conclusive. However, they can be challenged on a point of law before the Constitutional Court (Civil Court, First Hall). Professor Frendo also noted that most appeals before the Board are manifestly unfounded and that the views of the members of the Board are normally unanimous.

Mexico

Cynthia Cardenas, Protection Deputy Director of Mexican Commission for Refugees, provided a summary of the refugee status determination process in Mexico. The summary indicates that the key players in the process are: Commission for Refugee Aid (COMAR), the National Institute of Migration (NIM), and the Judicial Courts.

COMAR was created in July 1980 by Presidential agreement, following the arrival in Mexico of thousands of Central Americans in need of protection. COMAR serves as the Executive Secretariat for Mexico's Eligibility Committee.

On 7 June 2000, Mexico became a State party to the 1951 Convention and its 1967 Protocol, but with reservations with respect to the right to work, free transit and the nonexpulsion of asylum seekers.

Applications for refugee status may be presented to the Mexican Institute of Migration. Once an application is received, the principles of non-refoulement, confidentiality and non-discrimination are applied. Applications for refugee status are then sent to COMAR. Applicants for refugee status are interviewed by COMAR's Protection Officers who are also responsible for conducting the necessary research on country of origin information.

The applicant's case is then presented to the Working Group of the Eligibility Committee, presided by COMAR's Coordinator, a representative of the National Institute of Migration, a representative of the Unit for the Promotion and Protection of Human Rights, a representative of the Ministry of Foreign Affairs, Human Rights Direction, a representative of the United Nations High Commissioner for Refugees (UNHCR) and a representative of the organized civil society, with the right to speak and vote. A representative of the Sub-Secretary of Population, Migration and Religious Affairs also participates in the Working Group but has no vote in the proceedings.

The Working Group of experts meets once a week to assess and analyse

each case in detail, according to the national and international legal frameworks in terms of refugee and human rights. The Working Group gives an opinion, either positive or negative, to the Eligibility Committee and generates precedents to use in future analysis.

If the Working Group's opinion is negative, the applicant is given another opportunity to present new evidence in support of his or her case. If the applicant avails himself or herself of this opportunity, then a different Protection Officer in COMAR will conduct another interview and the case is studied and analysed again by the Working Group. A final opinion is then presented to the Eligibility Committee.

Article 167 of the *Reglamento de la Ley General de Población*, regulates the Eligibility Committee and its authority. The Eligibility Committee meets periodically and reviews and analyses the cases presented based on the Working Group's opinion. Following international practice, the Eligibility Committee makes a recommendation to the National Institute of Migration whether an applicant ought to be recognised as a refugee or whether humanitarian exceptions should be applied for those applicants who do not qualify as refugees. The Eligibility Committee makes its recommendations based on its application of international instruments.

Rejected applicants have the right to present their requests for revision before the National Institute of Migration and they may also present their case before the Judicial Courts in Mexico.

Turkey

An overview of the Turkish asylum procedures was provided by Justice Ceyda Umit, indicating that the Ministry of Interior and the Administrative Courts are the key players in the Turkish refugee determination process.

New Zealand

The response from New Zealand was provided by Ema Aitken, Chair of Refugee Status Appeals Authority (RSAA). Her paper indicated that New Zealand operates a two tier system for determining whether an asylum-seeker falls within Article 1A(2) of the Refugee Convention and may be recognised as a refugee.

At first instance, applications for refugee status are processed by Refugee Status Officers of the Refugee Status Branch (RSB) of the NZ Immigration Service. Where an application for refugee status has been declined at first instance, the applicant has a right of appeal to the RSAA - an independent body composed of practising lawyers drawn entirely from outside gover-

nment. It is an inquisitorial tribunal with wide powers to enquire and to admit evidence. It regulates its own procedure and the rules of evidence have only limited application.

Where the RSAA declines an appeal, the appellant may make an application for the judicial review of that decision to the High Court. This review may be sought only on a point of law, including procedural fairness. Where the High Court allows a judicial review, the case will be remitted back to the Authority for re-hearing before a differently constituted panel. Where the High Court dismisses a judicial review, an applicant may seek leave to appeal to the Court of Appeal. Further, the Court of Appeal may grant leave to appeal to the newly established Supreme Court.

The RSAA process includes the following characteristics:

- appeals proceed by way of a confidential *de novo* hearing - that is, the Authority ignores the decision of the RSB and the appellant is not required to prove that that decision was wrong;
- the Authority conducts a fresh enquiry into each aspect of the appellant's claim;
- Member or Members of the panel then make their own independent findings as to the credibility and merits of a particular case;
- the proceedings and decisions are governed by strict confidentiality obligations;
- Members can seek and obtain further relevant information which they consider appropriate;
- While the burden of proof, that is, the responsibility to establish the claim, rests on the appellant, the enquiry into the facts is shared between the appellant and the Authority.

Poland

Associate Rapporteur Justice Jacek Chlebny provided a comprehensive paper on the Polish refugee determination system, indicating that the Polish model consists of two administrative and two judicial authorities. The two administrative bodies involved are the President of the Office for Repatriation and Aliens and the Refugee Board. Judicial review is carried out by the Regional Administrative Court in Warsaw and the Supreme Administrative Court. The administrative appellate measures have to be exhausted before an asylum seeker can lodge a complaint with the Courts.

Russian Federation

Russia acceded to both the UN Convention and its Protocol on 2 February 1993. The refugee determination process is covered in Russia by the 1993 Law on Refugees, which was revised in 1997, 1998 and 2000. The Federal Migration Service (FMS) is responsible for the receipt and determination of asylum claims at first instance.

Sources indicate that there was a second tier of review up to the year 2000, called the FMS Appeals Commission, but that its activities were suspended. No references have been found to indicate that this suspension was ever lifted. The only appeal mechanism which appears to be available currently is through the courts of law. From research it is apparent that the judicial review process in refugee cases does not always confine itself to points of law, but can also re-examine the facts of the case.

Slovak Republic

Justice Igor Belko of the Supreme Court of the Slovak Republic provided an overview of the asylum procedures before the Regional Courts in the Republic. The overview indicates that the Migration Office is the first instance refugee determination body and its decisions can be appealed to the Regional Courts. The proceedings before the Regional Courts are formal and adversarial in nature. There are eight Regional Courts in the Slovak Republic, however only two of these are involved in determining asylum matters. The Courts jurisdiction is limited to determining whether procedural fairness was afforded by the Migration Office. Decisions of the Regional Courts are binding on the Migration Office, however they can be appealed to the Supreme Court of the Slovak Republic in Bratislava.

Ukraine

Justice Oleksandr Stepashko of the High Administrative Court of Ukraine responded by fax, indicating that the State Committee of Ukraine for Nationalities and Migration bears the responsibility for determining asylum claims in the first instance.

The decisions of the Committee can be challenged before administrative courts of the first instance and second instance. From the administrative courts an appeal may be made to the High Administrative Court of Ukraine.

United Kingdom

The United Kingdom (UK) has a two tier refugee determination system with three key players, namely, the Home Office, the Asylum and Immigration Tribunal (AIT), and the Courts.

The purpose of the Asylum and Immigration Tribunal is to hear and decide appeals against decisions made by the Home Office in matters of asylum, immigration and nationality. Appeals are heard by one or more immigration judges, who sometimes are accompanied by non legal members of the tribunal.

The proceedings before the AIT are adversarial in nature with an emphasis on a single determinative hearing concluding the process. Markers of the AIT's adversarial nature include:

- Individuals have the right to be represented by counsel, including barristers, solicitors, and other advocates registered with the Office of the Immigration Service Commissioner;
- The UK government is represented by Home Office Presenting Officers
- ("HOPOs"); specially trained civil servants;
- The parties have the primary responsibility for defining the issues in dispute;
- During hearings there is an emphasis on the presentation of oral argument by counsel;
- Procedure is governed by the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230).

Ordinarily, there is no right to appeal a decision of the AIT as such. The AIT makes most initial decisions through a single immigration judge. Such decisions can be "reconsidered". An order for reconsideration is sought by making a written request to the High Court in England and Wales or the Court of Session (Outer House) in Scotland. For an indefinite period requests for reconsideration orders will be considered initially by Immigration judges of the AIT ("the filter"); should the request be refused a party can "opt-in" to the High Court or Court of Session.

If that request is successful, the case will return to the AIT for a re-hearing. After a rehearing, or if the AIT which hears a case for the first time has 3 or more members, the decision may only be challenged by an appeal to the Court of Appeal (Civil Division) in England and Wales, or the Court of Session (Inner House) in Scotland. Permission is required for such an appeal either from the Tribunal itself or the relevant court.

United States of America

Lori Scialabba Chairman of the Board of Immigration Appeals submitted a comprehensive paper entitled '*Obtaining Asylum in the United States*' which indicated that there are several key actors in the American refugee determination system. They include: the Department of Homeland Security (DHS), the Immigration Courts, the Board of Immigration Appeals (Board), and the Federal Courts. Seeking asylum in the United States can be accomplished in two ways, (1) through an inquisitorial process initiated by filing an asylum application prior to removal proceedings with the Asylum Division, a component of the United States Citizenship and Immigration Services (CIS), which is part of the Department of Homeland Security (DHS), and (2) through an adversarial process before an Immigration Judge once an alien has been placed in removal proceedings. The summary below addresses the adversarial process before an Immigration Judge.

Immigration Judges are responsible for conducting formal court proceedings, and act independently in deciding the matters before them. Their decisions are administratively final unless appealed or certified to the Board of Immigration Appeals. Generally, the Board does not conduct courtroom proceedings - it decides appeals by conducting a "paper review" of cases. On rare occasions, however, the Board does hear oral arguments of appealed cases.

The proceedings before the Immigration Courts are formal and adversarial in nature. They exhibit the following characteristics:

- The parties are bound by the rules of evidence;
- The parties define the issues in dispute and decide what factual material is considered by the Immigration Judge;
- DHS is represented by a trial attorney in every proceeding;
- The applicant has a right to call witnesses and to cross examine witnesses presented by the government;
- there is an emphasis on winning the contested issues with the objective of each party to secure a favourable outcome; and
- There is an emphasis on a single determinative hearing with oral argument and case presentation.

Decisions of the Board are binding on all DHS officers and Immigration Judges unless modified or overruled by the Attorney General or a Federal Court. All Board decisions are subject to judicial review in the Federal Courts.

6. Refugee Practice and Procedure: County by Country snapshot

To provide a snapshot of the 19 countries included in this Report, a comparative table was prepared based upon the information provided by IARLJ Working Party members and researched by the Australian Refugee Review Tribunal's Country Research Section.

Country	First tier		Second tier		Judicial review	
	Subsidiary protection	Convention Protection	Adversarial system	Inquisitorial system	Appeal on points of law	Appeal on points of fact
Australia		√		√	√	
Belgium	√	√	√		√	√
Canada	√	√	√	√	√	
Cyprus		√		√	√	
Denmark	√	√		√	√	
Finland	√	√		√*	√	√
France	√	√	√		√	
Germany	√	√		√*	√	√
Ireland		√	√	√	√	
Japan	√	√		√	√	
Malta	√	√		√	√	
Mexico	√	√		√	√	
New Zealand		√		√	√	
Poland	√	√		√	√	
Russia		√	suspended since 2000		√	√
Slovakia	√	√	√*		√	
Ukraine	√	√		√*	√	
UK	√	√	√		√	
USA	√	√	√*	√**	√	√

* Second tier review offered at an Administrative Court level

** Applies to applications filed prior to removal proceedings with the Asylum Division in the Department of Homeland Security

7. Conclusion and Analysis

From the research undertaken it is apparent that a pure adversarial or a pure inquisitorial system in refugee determination does not appear to exist. Nonetheless, it is true to say that the majority of the nations examined appear to follow a procedure inspired by the inquisitorial tradition.

Undoubtedly, both systems have their advantages and defects, yet they must equally hinge on the inescapable necessity for discretionary power and decision making in the wider public interest.

As such, it follows that the Working party is not in a position to recommend one system over the other as 'the model' for the countries with relatively new refugee determination systems, however what we can do is to better equip them to secure procedural fairness or the fundamental rights of the asylum seekers in their respective refugee determination processes and procedures.

Steve Karas,

Rapporteur, Steve Karas, is the Principal Member and the Chief Executive Officer of the Refugee Review Tribunal and the Migration Review Tribunal, Australia.

JUDICIAL CRITERIA FOR ASSESSING COUNTRY OF ORIGIN INFORMATION (COI): A CHECKLIST

Dr. Hugo Storey

Paper by members of the COI-CG Working Party

The COI-CG¹ Working Party wishes to commend to all members of the Association the following “COI Judicial Checklist”: see page 3. Although we hope this checklist and accompanying Explanatory Memorandum (see pp.4-21) will be of general interest, its primary aim is to furnish a guide to judges² in cases where they face having to assess Country of Origin Information (COI) in the context of deciding asylum or asylum-related appeals.

The Checklist is the result of 18 months of deliberations involving the efforts of a considerable number of people with knowledge in this area. The following are current members of the COI-CG Working Party: Hugo Storey (Rapporteur, UK), Bostjan Zalar (Deputy Rapporteur, Slovenia), Graham Davies (UK), Bernard Dawson (UK), Nigel Osborne (UK), John Barnes (UK), Dallal Stevens (UK), Anna Bengtsson (Sweden), Patrick Hurley (Ireland), Rory McCabe (Ireland), Vaclav Novotny (Czech Republic), Manoj Kumar Sinha (India), James Simeon (Canada), and Hannah Lily (Assistant to the Rapporteur, UK). The following are those who attended the June 2006 London Roundtable, which was devoted to debate on earlier versions: Mark Ockelton (Senior Immigration Judge and Deputy President, Asylum and Immigration Tribunal, UK (Chair)), Oldrich Andrysek (Department of International Protection, UNHCR), Chris Attwood (Country of Origin Information Service, Home Office, UK), John Barnes (Former Senior Immigration Judge, UK), Chantal Bostock (Legal and Research Unit, Asylum and Immigration Tribunal, UK), John Bouwman (Judge, Holland), Eamonn Cahill (Judge, Refugee Appeals Tribunal, Ireland), Jane Coker (Immigration Judge, UK), Heaven Crawley (Senior Lecturer, Swansea University, UK), Steve Crawshaw (Human Rights Watch, UK), Alice Edwards (Amnesty International), Mark van Elzaker (Immigration Service, Holland), Jonathan Ensor (Immigration Advisory Service, UK), Professor Anthony Good (Edinburgh University), Mark Henderson (Barrister and representative of Immigration Law Practitioners Association, UK), Catriona Jarvis (Senior Immigration Judge, UK), Andrew Jordan (Senior Immigration Judge, UK), Hannah Lily (IARLJ Working Party Assistant and British Refugee Council,

¹ The Country of Origin-Country Guidance Working Party.

² The term “judges” or “refugee law judges” is used here to cover all types and levels of judicial or quasi-judicial decision-makers regardless of whether they deal with asylum or asylum-related cases regularly or only occasionally.

UK), Nigel Osborne (Immigration Judge, UK), Ilkka Pere (Justice, Supreme Administrative Court, Finland), Professor Terence Ranger (St Antony's College, Oxford University), John Ryan (Judge, Refugee Appeals Tribunal, Ireland), Hugo Storey (Senior Immigration Judge, UK), Nick Swift (Advisory Panel on Country Information (Secretary), UK), Mark Symes (Barrister, UK), Patrice Wellesley-Cole (Immigration Judge, UK) and Bostjan Zalar (Judge, Slovenia). The Working Party wishes to pay particular thanks to Allan Mackey (immediate Past President of the IARLJ) who co-wrote the original version of the paper and presented it to the November 2005 IARLJ European Chapter Budapest Conference, Alice Edwards of Amnesty International whose paper, "Amnesty International's Comments on Hugo Storey & Allan Mackey, 'In Search of Judicial Criteria for Assessing Country of Origin Information'", was also presented to the same Budapest Conference and Barbara Svec of ACCORD who wrote specific a commentary on a revised draft of the Storey/Mackey paper, "ACCORD Comments on Hugo Storey & Allan Mackey, 'In Search of Judicial Criteria for Assessing Country of Origin Information'", for the June 2006 London Roundtable.

A particular debt is also owed to Hannah Lily, Bostjan Zalar, Andrew Grubb and Andrew Jordan for their assistance with the final stages of revision, albeit ultimate responsibility for any shortcomings is mine. Thanks are also due to Geoffrey Care, Bernard Dawson and John Barnes who contributed their ideas at various stages.

COI Judicial checklist

When assessing Country of Origin Information (COI) in the context of deciding asylum or asylum-related cases judges may find the following 9 questions useful:

Relevance and adequacy of the Information

- I How relevant is the COI to the case in hand?
- II Does the COI source adequately cover the relevant issue(s)?
- III How current or temporally relevant is the COI?

Source of the Information

- IV Is the COI material satisfactorily sourced?
- V Is the COI based on publicly available and accessible sources?
- VI Has the COI been prepared on an empirical basis using sound methodology?

Nature/Type of the Information

VII Does the COI exhibit impartiality and independence?

VIII Is the COI balanced and not overly selective?

Prior Judicial Scrutiny

IX Has there been judicial scrutiny by other national courts of the COI in question?

COI Judicial Checklist: Explanatory Memorandum

1. In the course of dealing with asylum appeals judges³ will depend to a great extent for their ability to make sound judgments on having before them up-to-date and reliable country background information or “Country of Origin Information” (COI)⁴. The probative value of an asylum seeker’s evidence has to be evaluated in the light of what is known about the conditions in the country of origin⁵. The demands on the judge are huge. Sometimes within a very short period he⁶ may be called on to decide cases of claimants from several different countries. He may be expected to decide at one moment on whether an asylum seeker is a member of a sub-clan of a minority clan based in Mogadishu, Somalia and also to determine whether that clan is without effective protection. At another moment he may be asked to assess whether a member of the former communist government of Afghanistan would be at risk from the current Northern-Alliance-based regime. He may have to decide whether a Chaldean Christian from Northern Iraq would be at risk from Muslim extremists. In a rapidly changing world he may need to decide whether a Tamil member of the LTTE from Northern Sri Lanka would today face a risk of persecutory harm from the authorities in the light of renewed clashes between government troops and LTTE militias. Faced with diverse cases and shifting political scenarios, judges desperately need accurate and reliable information in order to determine justly who is in need of international protection.

2. COI is evidence the judge should take into account. It is a crucial aid. But it will rarely be determinative. How much it will help the judge determine the individual case will vary depending among other factors on the extent to which the claimant’s case is based on personal characteristics or

3 The term “judges” or “refugee law judges” is used here to cover all types and levels of judicial or quasi-judicial decision-makers regardless of whether they deal with asylum or asylum-related cases regularly or only occasionally.

4 COI has been defined as “[a]ny information that should help to answer questions about the situation in the country of nationality or former habitual residence of a person seeking asylum or another form of international protection”. See Barbara Svec of the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), Vienna, in presentation to the IARLJ November 2005 Budapest Conference.

5 1979 UNHCR Handbook para 42: “...The applicant’s statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant’s country of origin - while not a primary objective - is an important element in assessing the applicant’s credibility”.

6 “He” is used throughout to cover both the masculine and the feminine gender.

circumstances which he shares with others similarly situated. COI may not be relevant to the same degree in every case⁷.

3. For a judge making findings on country conditions is not an end in itself: indeed it is not his function to pass judgment on the human rights performance of other countries⁸. He is only required to make a finding on a particular case. Nevertheless, within that context sometimes general findings as to country conditions must of necessity be made.

4. Conversely, it is not an end in itself for most bodies who produce COI to assist refugee decision-makers: usually their aim is to provide an analysis for general circulation of a country's human rights performance or some related aspects. That has perhaps the advantage from the point of view of the judge that it cannot be suggested the COI has been "tailored" for use in supporting asylum appeals.

5. In recent years a number of states who are signatory to the Refugee Convention have written in to their national law specific provisions as to how decision-makers (including judicial decision-makers) are to approach assessment of a person's asylum claim⁹. There has also been a major regional initiative within the European Union (EU) designed to harmonise national approaches in this and other respects. From 9 October 2006 all EU Member States except Denmark are bound by the provisions of (and should have transposed into national law) the "Qualifications Directive" i.e. Council Directive 2004/83/EC 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. Article 4 of this Directive deals with assessment of facts and circumstances relating to a claim for international protection. Article 4(3) states:

"The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:..."

6 matters are then mentioned. The first specifies:

"(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied".

⁷ See paper by Alice Edwards, op.cit.: "AI also reiterates that country of origin information alone cannot foresee the range or types of abuses that a particular individual may suffer in a given context and so cannot be relied upon to the same degree in every case".

⁸ 1979 UNHCR Handbook, para 42.

⁹ See e.g. s.8 of the Immigration and Asylum Act (Treatment of claimants, etc) Act 2004 (UK).

7. This provision highlights the importance of COI to all refugee decision-makers.

8. Background country materials or COI (Country of Origin Information) will derive from diverse sources, including reference works (maps, encyclopaedia, yearbooks), reports or papers by international bodies (e.g. UNHCR, UN Human Rights Committee), international NGOs (e.g. Amnesty International reports, Human Rights Watch reports, International Crisis Group (ICG) reports), national bodies (e.g. the US State Department Reports, the Danish Immigration Service reports, the United Kingdom Country of Origin Reports (COIR¹⁰), news and media clippings and databases, legal materials (laws, jurisprudence, etc) and cross-checking of other refugee claims¹¹. Reports can be generic (e.g. US State Department reports), event or group specific (e.g. reports from trials, minority profiles) or claimant specific (e.g. embassy checks). There are a number of databases which are specific to asylum-related work: e.g. UNHCR's Refworld and ACCORD¹².

9. Practices vary as to how COI comes to be placed before judges in asylum and asylum-related cases. Adversarial systems often depend on the parties submitting such materials. Judges in inquisitorial systems may obtain COI by their own initiative, usually with the help of dedicated staff/research units/trained documentalists¹³. Other systems mix the two approaches and are sometimes able in important cases to hold a preliminary hearing at which the parties are notified of relevant country materials known to the judge(s) and are asked to cover them in their submissions.

10. Another source of COI comes in the form of reports written by country experts who are typically academics, researchers or journalists with considerable experience in the field.

11. Despite the fact that judges are not country experts, they are often faced with having to evaluate country materials in order to make findings, where relevant, on general country conditions, e.g. on whether draft evaders in Eritrea are a risk category or whether ordinary Christian converts are at risk on return to Iran. The judicial focus is always on the individual case, but individual cases can sometimes involve generally occurring

10 Formerly CIPU (Country Information and Policy Unit) reports. CIPU was formerly part of the Home Office Asylum and Appeals Policy Directorate, but in May 2005 was moved to the government's Research Development and Statistics (RDS) section. Reports produced by this section are now called Country of Origin Reports (COIR).

11 See "Country of Origin Information: Towards Enhanced International Cooperation", UNHCR Feb 2004 (hereafter "2004 UNHCR COI Report"), para 13(iii).

12 Austrian Centre for Country of Origin and Asylum Research and Documentation. For a helpful list, see Elisa Mason, "Guide to Country Research for Refugee Status Determination", Jan 2002, LLRX.com/features/rsd2.htm at para 38 gives a useful list of asylum and refugee resources.

13 In Canada the Immigration and Refugee Board (IRB) has a research programme that makes available current, public and reliable information to all parties in the refugee protection determination system.

facts¹⁴. Although he must at all times avoid stereotyping¹⁵, the judge may sometimes have to make a finding on what is generally the case in respect of one or more specific “risk categories”.

12. The question arises, by reference to what criteria should judges evaluate background country materials?

13. In approaching this question we must seek to build on the very considerable work which has been done, particularly over the past 15 years on developing reliable COI databases. UNHCR together with many other bodies have been in the forefront of efforts to develop proper systems and criteria for COI¹⁶. UNHCR sees scope for considerably enhanced international cooperation in the field of COI, particularly at the regional level and is actively co-operating with the European Commission on a number of COI initiatives¹⁷. Major country report-writing bodies both at governmental level (e.g. the US State Department reports) and at NGO level (e.g. Amnesty International) have developed their own methodologies for compiling and evaluating COI. But there are particular features of the judicial decision-making role which require us to develop and identify our own criteria. Below we offer a nine-point COI “judicial checklist” which lists in the form of questions, a number of (non-exhaustive), criteria which reflect current best international judicial practice adopted when assessing how much weight can be attached to a particular COI source or reference. There then follows an explanation for each inclusion. It will be obvious that some of these criteria overlap. No single criterion should be treated as decisive. They are grouped under three main sub-headings. Whilst the ordering given is not to be seen as fixed, it is intended to reflect the usual order in which questions relating to the evaluation of COI will normally be raised.

I. Relevance and adequacy of the Information

I. How relevant is the COI to the case in hand?

14. Relevancy is an obvious criterion; for the judicial decision maker the primary concern is with information that is legally relevant in the sense of helping to answer case-related questions.

14 See UK case of Manzeke [1997] Imm AR 524 (Lord Woolf): “It will be beneficial to the general administration of asylum appeals for Special Adjudicators to have the benefit of the views of a Tribunal in other cases on the general situation in a particular part of the world, as long as that situation has not changed in the meantime. Consistency in the treatment of asylum-seekers is important in so far as objective considerations, not directly affected by the circumstances of the individual asylum-seeker, are involved.” See further 2004 UNHCR COI Report para 9: “The information needed to assess a claim for asylum is both general and case-specific”.

15 See High Court of Australia case, *Applicant NABD of 2002*, Case Ref.: [2005] HCA 29 S70/2004.

16 See “Country of Origin Information: Towards Enhanced International Cooperation”, UNHCR Feb 2004 (hereafter “2004 UNHCR COI Report”). The European Council on Refugees and Exiles (ECRE) in the 4th paper in its Way Forward series entitled “Towards Fair and Efficient Asylum Systems in Europe” suggests as one of the areas of cooperation for EU Member States: sharing of existing country of origin information and coordinated use of joint fact-finding missions.

17 See 2004 UNHCR COI Report, para 7f.

15. Obviously there is little value in background materials that do not bear on the principal country issues that have to be determined. As trite an observation as this may sound, it is remarkable how often judicial decision-makers find nothing in background country materials directly on the point about country conditions with which they have to grapple. That does not mean that COI found by the judge to be of no or little relevance is not extremely salient in other cases or in other contexts. Relevance of the material is a judgement about the case, rather than the COI.

16. Generally speaking preference will be given to reports whose content relates to asylum-related issues, e.g. which deals with human rights violations and the situation of minorities and displaced persons. The pioneering Evian Report 1990 identified as a key criterion: "Scope – the main scope of the database would be material describing the human rights situation in countries from where there are refugees coming or likely to come".

II. Does the COI source adequately cover the relevant issue(s)?

17. One obvious criterion for evaluating the worth of certain types of COI sources is whether or not they give a full or adequate treatment of relevant country conditions/issues. If, for example, there is an issue about the fairness of a country's judicial system, then it is obviously important that the judge should be able to learn from the evidence before him about all relevant factors, relating for example to the national justice system.

18. Given the duty on a judge normally to consider a person's asylum claim in the context of the evidence relating to conditions in the country of origin as a whole, considerable value may be placed on reports that furnish both a detailed overview of conditions in a particular country and particulars about relevant groups and categories (e.g. the position of different ethnic minorities or of vulnerable categories). Thus within the EU judges dealing with cases from Somalia have increasingly begun to have regard to periodic Joint reports drawn up by officials from several EU countries who have conducted a fact-finding mission¹⁸. The 2004 Joint report contains sections dealing in detail with diverse aspects of Somali affairs: its history, political institutions, legal system, clan structure, the position of vulnerable categories etc.

¹⁸ For example, the joint British, Danish and Dutch fact-finding Mission (17-24 September 2000); The joint British and Danish fact-finding mission to Nairobi (Kenya) and Baidoa and Belet Wayne, Somalia, "Report on political, security and human rights developments in southern and central Somalia, including South West State of Somalia and Puntland State of Somalia", 20 May to 1 June 2002; the joint Danish, Finnish, Norwegian and British Fact finding mission to Nairobi, Kenya 7-12 January 2004 published 17 March 2004 entitled "Human Rights and Security in Central and Southern Somalia".

19. However, the extent to which COI that is both general and particular is required will vary from case to case and over time.

20. Comprehensiveness will obviously not be an appropriate feature to expect of sources that only seek to deal with a specific incident or situation, e.g. a press cutting describing recent arrests of dissidents. But it will be appropriate for reports which purport to give a detailed overview of the general country situation or to deal fully with specific issues. However, just because a report which purports to be comprehensive does not mention a particular event or fact does not necessarily mean it did not happen/is not true.¹⁹

III. How current or temporally relevant is the COI presented?

21. Most national refugee determination systems require (or allow in certain circumstances for) the judicial decision maker to decide the issue of whether someone is a refugee or is at risk of human rights violations if returned according to the up-to-date situation²⁰. What is normally being assessed is “future risk” by reference to the prevailing circumstances as at the date of hearing. This requirement is not an easy one for judges to apply, since the reports placed before them will by definition be dealing with events that by then are past. But in order to maintain the integrity of the decision-making it is vital, when our national legislation requires us to assess current risk²¹, that we make our assessments in the light of the latest evidence and that we avoid reliance on obsolete or out-of-date COI. That can be a tall order in some cases, since even some very well-established country reports, when examined closely, can be seen to rely on sources that are no longer recent. The 2004 UNHCR COI Report highlights problems of this type²².

22. It is largely because of the importance of basing decision on current information that particular value is often attached to reports which are produced on a regular or periodic basis. UNHCR Position Papers, the US State Department reports, Amnesty International reports and Human Rights Watch reports are produced annually, the latter two bodies sometimes producing additional interim or periodic reports. In the UK the Home Office Country of Origin Services reports (COIR) reports (formerly

19 In this regard it must not be overlooked that bodies involved in the production of COI are often working under pressure and may be under-resourced.

20 In systems which confine assessment to an error of law or judicial review approach, it may be that all that can be examined is whether the evaluation made by the original decision-maker was within the range of reasonable responses, i.e. not perverse or irrational. However, where a material error of law is found, some countries then allow at that stage for the appeal to be considered on its merits, in the light of the latest country information: see e.g. the position in the UK of the Asylum and Immigration Tribunal as analysed by the Court of Appeal in *R (Iran)* [2005] EWCA Civ 982.

21 In the US it is apparently risk at the date of the application.

22 Para 19: “One general problem is that certain types of information age quickly and lose relevance when country situations can change rapidly. Collections, unless regularly up-dated, become retrospective rather than forward-looking. Another widely recognised problem is “round-tripping” when secondary sources begin to cite each other”.

CIPU reports) on a number of countries (currently 20) are produced bi-annually in April and October. Sometimes it may be important to know about events from reliable media sources only a day or two old (e.g. if there has just been a coup).

23. Of course, COI can also be vitally relevant in testing or establishing matters relating to historical aspects of the appellant's experiences. As Alice Edwards put it in her paper to the November 2005 IARLJ Budapest Conference:

“While `future risk` of persecution is a key question in any asylum determination, it is almost always necessary to review the individual's past experience and past practices in order to determine the likelihood of harm in the future. An individual who fled in 2000 due to serious abuses at the hands of government officials arising out of their political activities should have this information taken into account. It would produce a distorted picture of his or her claim if a decision-maker only considered the practices of the government in 2005. Historical evidence and patterns of behaviour and practices are important indicators of potential future risks.”

24. Having to decide questions about current risk categories by reference to COI which is not up-to-date may not be an easy situation for judicial decision-makers in some countries, since their legal system can still require an answer on the basis of whatever evidence that is before the judge. However, as a general rule judicial decision-makers will try in such cases to avoid anything which could be taken as country guidance for other cases.

Sources of the Information

IV. Is the COI material satisfactorily sourced?

25. Depending on the context sourcing may be about accurate referencing (e.g. footnoting) or about corroborating statements or reports.

26. Attribution where possible increases judicial confidence in a report. A report which simply sets out its account and conclusions without making clear from where or from whom it has obtained its own information can rarely be given credence. Judges may well regard such reports as being of uncertain or unknown provenance. On the other hand, judges have to be aware that sometimes sources are anxious not to be identified.

27. In a world in which there are often vested interests in how a country's human rights performance is presented, judges are understandably wary of COI or reports which depend wholly or mainly on just one or two sources. For this reason they tend to place more reliance on reports which are multi-sourced and demonstrate cross-referencing or corroboration for what they describe²³. Where there is more than one source for any particular observation contained in a country report the judge may be able to consider that that observation has been corroborated. Sometimes a judge may be able to seek corroboration in the fact that there is more than one report confirming the same point.

28. The independent research unit within the Immigration and Refugee Board of Canada (IRB) employs what it refers to as a "Triple 'C' Methodology": compare, contrast and corroborate²⁴. This captures very well the need for COI from which one can see that its contents are the result of cross-checking.

29. In certain cases, e.g. reports which purport to be definitive on a particular issue, it may be appropriate to expect them to annex all the background materials on which they have relied, so that readers can know precisely the data on which their principal conclusions were based²⁵.

30. Much will depend on the quality of the sources cited. Judges will be wary of too ready acceptance of accounts based on obscure, unrepresentative or inaccessible sources. In Ireland, it is seen as a helpful rule of thumb for judicial decision makers to corroborate information by taking examples from at least three strata in a "hierarchy" starting with (1) intergovernmental sources, then governmental sources and international NGOs, (2) then international news reports, national NGOs, national news, then local governmental sources, local news, then (3) ordinary witnesses. Whether or not one agrees with the notion of a hierarchy – perhaps better would be the notion of perspectives from different vantage-points - recourse to different types of sources as indicated would appear to be useful.

31. What the judge needs to be assured of is whether the COI is accurate, but he can only do that by reference to multi-sourced information²⁶. Otherwise there is no proper basis of comparison for deciding whether information given is accurate. At the same time it may be important on occasions to make allowances for the fact that the source has tried to

23 To similar effect the 2004 UNHCR COI Report states at para 24: "Experience shows that a coherent body of information requires multiple sources and that no particular source can generally be ruled out."

24 We are grateful to the IRB for its presentation to the IARLJ November 2005 Budapest Conference in which this point, among others, was explained.

25 In the UK it is now routine that decisions by the Asylum and Immigration Tribunal (AIT) which are designated as "country guidance" cases, contain an appendix listing all the sources considered: see AIT website under "Country Guidance".

26 Care must always be taken to ascertain whether sources are genuinely different and are not in fact based on the same primary source: this is the well-known problem of information "round-tripping".

give vital information quickly without knowing the full story, so that the outside world will begin to take an interest. Sometimes having one source will be better than none.

32. It may be that on occasions information will emerge that is not or cannot easily be corroborated, yet which may be said to be highly indicative of the real situation²⁷.

Clearly judges must always be astute to the possible value of all kinds of sources, but it remains that they are obliged to decide cases in accordance with the evidence, not hunches or inspired guesses.

33. The judge also needs to assess accuracy within the context of the facts of the individual appeal.

34. When considering accuracy it will always be important to keep a sense of proportion. A source may be found to contain several errors but not necessarily ones which undermine the reliability of the rest of the report. In this regard it may be necessary to consider how well-established the source is, and whether, over time, it seeks to correct and remedy inaccuracies in later reports²⁸.

35. Because we do not live in an ideal world where all COI meets rigorous standards, it is inevitable that to some degree judges will tend to attach weight to materials that have achieved an international reputation and are frequently-used: e.g. reports of the UN Human Rights Committee, UNHCR Position Papers, US State Department reports, Human Rights Watch reports, Amnesty International reports²⁹.

They will do so in part because of their need for digested information: even in inquisitorial systems, judges do not have the time to go hunting for uncollated / unassimilated country information or conducting their own statistical analyses. The rationale for considering reputation is that such sources have earned respect from many quarters for having been shown to provide a relatively reliable picture of country conditions over a significant period of time³⁰. The reputation may attach to the organisation or body producing the report and / or to the report itself³¹.

²⁷ Alice Edwards, *op.cit.* p 5.

²⁸ Alice Edwards in her paper for the IARLJ November 2005 Budapest Conference stated: "For AI (Amnesty International), accuracy means that researchers always seek to verify or corroborate information; that information is gathered from different sources, wherever possible; all sides of the story are to be pursued; testimonies are to be collected from different witnesses; and the information must be carefully distinguished (e.g. rumours versus allegations versus confirmed reports). AI analyses the information, identifies patterns, and chooses its language carefully, to avoid misleading or inaccurate reports."

²⁹ In a UK Court of Appeal case, *R v Special Adjudicator, ex p K* (FC3 1999/5888/4. 4 August 1999 Amnesty International was recognised as "a responsible, important and well-informed body" and judges were exhorted to "always give consideration to their reports".

³⁰ This is similar to UNHCR criteria: see 2004 UNHCR COI Report para 19: "Given finite resources and the need to enhance productivity, preference is naturally given to information and / or assessments already "digested" (evaluated from a reputable source (another government, an intergovernmental agency, or an NGO)."

³¹ See Alice Edwards, *op.cit.* p.3.

36. Judges are aware, however, that even reputable sources are criticised from time to time and that it may be necessary on occasions to examine whether such criticisms are valid in relation to a particular issue and/or whether those writing the reports have acted to improve the standards of their reports³². We have also to be aware of new bodies in the field with emerging reputations as providing reliable country data, not necessarily known to the judicial decision-maker³³.

37. Furthermore, reliance on a source because it has an established reputation may not always assist, e.g. when two well-established sources adopt opposite or conflicting views or where an eminent expert disputes for cogent reasons what is said in an established source.

39. For these reasons, although considering the reputation of a source may be justified on pragmatic grounds, it is not itself a criterion going to the merits of the COI directly.

V. Is the COI based on publicly available and accessible sources?

40. The pioneering 1990 Evian Report identified as a basic criterion:

“Public Material – the database would contain only public material, including non-conventional and unpublished material provided it is from a named and traceable source”.

41. This criterion remains of enduring importance³⁴. The Report closely related it to the requirement of access to databases containing only public material. Part of the thinking behind the requirement that material be public is that it should be clear to the asylum-seeker what evidence is available and where it can be found and that he should be able to make use of it in support of his asylum claim and/or appeal. This helps achieve

32 See e.g. critique of US State Department reports by Lawyers Committee for Human Rights, 30 April 2003, ‘A Review of the State Department Country Reports on Human Rights Practices’, before the Committee on International Relations, Subcommittee on International Terrorism, Non-Proliferation and Human Rights; ‘Critique of State Department’s Human Rights reports’, by Human Rights Watch (4 April 2003); *Gramatikov v INS*, 128 F.3d 620 (7th Cir.1997); *Kasvari v INS*, 400 F 2d 675, 677 n.1 (9th Cir 1968). In *Gramatikov* it was said: “[T]here is perennial concern that the State Department softpedals human rights violations by countries that the United States wants to have good relations with”. In a recent judgement of the European Court of Human Rights in the case of *Said v The Netherlands* (Application no. 2345/02) 5 July 2005, Judge Loucaides in a Separate Opinion disagreed with the opinion of the majority who had viewed the US State Department report as a reliable source of information on the human rights situation in Eritrea: “They are not prepared by an independent and impartial institution but by a purely political government agency, which promotes and expresses the foreign policy of the United States. Therefore, they cannot by definition be relied on as a neutral and impartial exposition of the facts mentioned therein. There is always an element of suspicion that such Reports are influenced by political expediency based on US foreign policy with reference to the situation in the country concerned and that they serve a political agenda. ... Therefore I do not see how any judgment of the European Court of Human Rights can rely in any way or to any extent on any US Department of State Country Reports on Human Rights Practices in respect of any country”. We are indebted for some of these references to the IAS publication, Country guideline cases: benign and practical? Ed Colin Yeo, January 2005, Immigration Advisory Service (IAS) London.

33 Alice Edwards, *op.cit.*: “It is also important to be aware of a judge’s or a jurisdiction’s own limitations in knowing ‘the field’ or knowing what organisations exist and the types of work they are doing. Sometimes smaller or national organisations may not be known to the judge or decision-maker, but may be well-known outside of judicial circles as having a very solid reputation”.

34 See 2004 UNHCR COI Report and Elisa Mason, “Guide to Country Research for Refugee Status Determination”, Jan 2002 LLRX.com/features/rsd2.htm.

an “equality of arms” between the decision-maker and the claimant. A further factor here is user-friendliness: qualities such as appropriate formatting, divisions into appropriate headings and clear tables of contents will assist here.

42. Obviously there will from time to time be a need to consider confidential data, e.g. testimonies of human rights researchers in a country of origin who cannot disclose their identities directly without placing themselves at risk³⁵, reports whose authors are bound by professional ethics not to disclose the identity of a particular source. Whilst this may raise difficulties about the accuracy of the informant’s material, the weight to be attached to the information may be greater if the reason for anonymity is explained or if it possible to assume that the publisher of the report is an organisation of sufficient probity to ensure the source will have been checked insofar as it is possible to do so. But, subject to exceptions of this kind, COI may only be viewed as generally reliable if it is in the public domain and transparent as to its authorship.

VI. Has the COI been prepared on an empirical basis using sound methodology?

43. Just as judges are not country experts, neither are they social scientists. Nevertheless, they will naturally attach more weight to sources that demonstrate in transparent fashion a sound empirical basis for their principal findings. There is a premium on objectively verifiable facts. Sometimes even methods of obtaining statistical information will need to be scrutinised. It will ordinarily be apt to ask of a document, two particular questions, “How does the source know what it says it knows?” and “To what extent is it based on opinion and to what extent is it based on observable or established facts”?

44. One aspect here is to what extent a source is based on reports from persons “on the ground” in a particular country. One of the reasons why UNHCR Position Papers are often accorded considerable weight is because it is known that in relation to many countries UNHCR relies for its evaluation, not only on background sources, but also on reports from UNHCR staff that are posted in the particular country concerned³⁶.

35 Alice Edwards, op.cit: “...for security reasons and personal safety reasons of both the source and the [Amnesty International] staff member, the sources relied upon in the report may not be named. AI is an organisation dedicated to researching human rights violations, commonly involving governments that do not live up to their international obligations. AI has a responsibility to its sources not to disclose their names where appropriate, but this does not and should not detract from the truth or accuracy of the information contained in a given report”.

36 See 2004 UNHCR COI Report Annex 1: “Information systems within UNHCR para 4: UNHCR papers are a result of a collaborative effort between the Regional Bureaux concerned and the Department of International Protection (DIP). This means that as a rule information is not only corroborated but also incorporates comments from experienced staff and up-to-date assessment directly from the field”. However, courts and tribunals have not always found it possible to accept the evaluation of risk categories contained in UNHCR Position Papers: see below n.

45. Credit is also seen to accrue to reports identifying in explicit fashion what their own data-gathering methods and processes are. For example, the Preface to the US State Department reports³⁷ for 2004 stated that:

“Throughout the year, our embassies collect the data contained in it through their contacts with human rights organisations, public advocates for victims, and others fighting for human freedom in every country and every region in the world. Investigating and verifying the information requires additional contacts, particularly with governmental authorities. Such inquiries reinforce the high priority we place on raising the profile of human rights in our bilateral relationships and putting governments on notice that we take such matters seriously. Compiling the data into a single, unified document allows us to gauge the progress that is being made. The public release of the Country Reports sharpens our ability to publicise violations and advocate on behalf of victims. And submission of the reports to the Congress caps our year-round sharing of information and collaboration on strategies and programs remedy human rights abuses – and puts us on the path to future progress³⁸.”

46. The wording of this Preface has been criticised for disclosing a US foreign policy bias³⁹ and one can certainly see that it does contain several value-judgments. Equally it does this in a way which lays bare the principal focus of its concerns and it is arguable that transparent statements of this kind permit the reader to take account of any bias that results. But it should not be ruled out that in particular instances, despite reports being transparent in this way, their stated agenda or value judgments may get in the way of objectivity, e.g. by being too heavily influenced by that country’s foreign policy concerns. In relation to US State Department reports, for example, it could possibly be argued, especially in relation to countries in which the US is presently involved in the internal affairs of a country (e.g. Afghanistan, Iraq) that its reports lacked independence. Having said that, the clear primacy US State Department reports place on the monitoring and gauging of the human rights performance of particular countries (by reference to international human rights norms) may be thought to render such reports of particular assistance to judges. That is because by and large judges, when determining whether a state of affairs is persecutory under the Refugee Convention or contrary to international human rights guarantees, likewise seek to base their decisions

³⁷ These reports are prepared pursuant to ss.116 (d) and 502(b) of the Foreign Assistance Act of 1961 (FAA) as amended and Section 504 of the Trade Act of 1974 as amended. This legislation requires the Secretary of State to report to the Speaker of the House of Representatives and the Committee on Foreign Affairs of the Senate.

³⁸ Country Reports on Human Rights Practices 2003, US Department of State (25 February 2004) Preface. We have taken this quotation from the IAS publication *Country Guideline cases: benign and practical?* Ed C Yeo, January 2005, London.

³⁹ See above n.32.

on internationally accepted standards as enshrined in public international law. Much the same can be said of reports by international NGOs such as Amnesty International which clearly pursue a number of political goals (e.g. trying to shift world opinion against capital punishment) but try as far as possible to assess country conditions by reference to methods of analysis⁴⁰ and evaluations based on international human rights norms.

47. Another aspect has to do with methodology. It may not be easy to place great reliance on a source which states, without giving any relevant background facts and figures, that there are “reports” or “incidents” or “cases” of detainees being tortured in custody. Obvious questions arise in respect of such statements. How many cases? In which prisons (all or just some)? Involving what type of prisoners (political/ordinary)? If a report gives specific figures of persons reported to have suffered human rights abuses in detention, they will generally carry more weight if they include relevant comparators: e.g. what is the prison population in the relevant country? If a report refers to certain human rights abuses being widespread or routine or frequent, but elsewhere indicates small numbers of persons are affected, that will tend to detract from the weight such evidence may be given. Questions of scale and frequency can be vital in assessing risk. In the UK, for example, in *Harari* [2003] EWCA Civ 807 the Court of Appeal has held that for prison conditions in general in a particular country to be considered as giving rise to a “real risk” of persecution or treatment contrary to Art 3 of the ECHR, there has to be shown “a consistent pattern of gross, frequent or mass violations of fundamental human rights”⁴¹. On the other hand, judicial decision-makers must always be astute to real constraints that may affect data-gathering in certain countries, e.g. the authorities might deliberately prevent journalists or others from learning anything about certain detention centres, or official statements may significantly downplay the real numbers of detainees involved, etc.

48. The excellent reputation of particular sources (whether they be governmental, e.g. the US State Department Reports, or non-governmental, e.g. Amnesty International and Human Rights Watch) should not deter the judicial decision-maker from scrutinising their methodology and data-gathering research methods as much as that of any other source. Nor can

40 Alice Edwards in her paper to the November 2005 IARLJ Budapest Conference paper giving Amnesty International’s views stated that: “AI carries out on-site or field missions to many parts of the world, so the majority of the reports include first-hand knowledge and experience. AI spends considerable efforts in building networks with regional, national, local and community organisations, professional bodies, associations such as trade unions, academics, and individuals. Prime responsibility for global monitoring of the human rights situation rests with the International Secretariat with offices in 10 countries (London, New York, Geneva, Hong Kong, Kampala, Senegal, Moscow, Costa Rica, Beirut and Paris). AI also has national representation through Amnesty International Sections/structures in 75 countries. ...research reports are prepared according to internal research policy that endorses four main principles, namely: accuracy, impartiality, respect for confidentiality and collaborative approaches.” Her report highlights, however, that in certain instances the methodology used varies with the type of report and so the reader must check what is said about methodology in the report in question: see her p.7.

41 See further *Batayay* [2003] EWCA Civ 1489. The “consistent pattern...” terminology is borrowed from Article 3 of the 1983 UN Convention Against Torture.

it be automatically assumed that because past reports from a particular body have normally been of a high standard that the specific report before the judge presently measures up to the norm.

III. Nature/Type of the Information

VII. Does the COI exhibit impartiality and independence?

49. For credence to be placed on COI it is essential for the judicial decision-maker to be satisfied that it is not partisan or affected by bias. Although this is an elusive criterion to state with any precision, it is clearly a very important one. It is elusive because of the recognition that there is no such thing as “value-free” assessment of country conditions. Arguably every report adopts a particular vantage point. As can be seen from their Preface⁴², US State Department reports are an example. However, it remains that perceptible bias or partisanship or having an “axe to grind” may be seen as reducing the value of a particular report.

50. To this end judges need always to pose a number of critical questions of any source so as to evaluate its purpose, scope and authority⁴³. It may add value to a report that it is known to emanate from an independent source, e.g. a report prepared by a reputable research body dedicated to compiling reliable data for use by international agencies.

51. Nevertheless judges should be cautious of being too judgmental about such matters. For example, it may be that the only recognised country expert on a particular country is an émigré who has aligned himself (or herself) to a particular political group in exile. One of the reasons why he may have come to be regarded as an expert is that he has “frontline”, on-the-ground knowledge of recent events. If a report from such a person nevertheless exemplifies an objective and balanced treatment of relevant issues, it may be given as much (if not sometimes more) weight as if it came from an academic body or source with no apparent political colouring.

52. In respect of reports from governmental agencies, or from joint government fact-finding missions, it may be necessary to consider whether there is any governmental bias. Factors of some importance are the extent to which the agency or agencies in question can be said to be shielded from political pressures by having a separate budget coupled with admi-

⁴² See above para 46.

⁴³ These are similar to those used by bona fide researchers: see Eliza Mason, “Guide to Country Research for Refugee Status Determination” op.cit. who at D suggests the following questions: “Who has produced the information and why? Answer this question by asking additional questions: “If it is an NGO, what is its philosophy? If an international organisation, what is its mandate? If a newspaper, what are its politics? If a government, what is its record in the area of human rights and the rule of law? If a report by a UN Rapporteur, who wrote it and under what restrictions? How independent or impartial is the producer? Essentially “objectivity” can be established by learning something about the organisation itself, i.e. where its funding comes from, who makes the management decisions and does she have anything to gain or lose by the outcome of a case etc...”

nistrative independence from the decision-making authority⁴⁴. A further safeguard may be an independent monitoring body able to check on the quality and accuracy of ongoing reports⁴⁵.

53. The language and tone in which COI reports are written is also of some importance. Reports which frequently resort to hyperbole or employ emotive terminology or which contain rhetorical and prejudicial phrases, risk not being taken seriously⁴⁶.

54. In respect of country experts it is important to establish what material has been provided to that expert (other than that relating to the claimant's individual history). Has he referred to the most recent COI? If he takes a different view as to risk than that taken by established sources such as UNHCR, what are his reasons for doing so? Has he taken an empirical approach to the evidence? Do the facts he identifies logically support the inferences he draws from them? Does he provide sources for his various statements? Is he bringing direct knowledge of relevant political events or political actors to bear or is he simply relying on (and making inferences from) very much the same body of evidence which is before the judicial decision maker? Has he noted evidence or opinions which are contrary to his? What are his credentials?

55. Judicial experience of country expert reports may count for a lot here. For example if judicial decision-makers see over time that a particular expert constantly seeks to paint a worse (sometimes rosier) picture than do other recognised sources, this may lead to a conclusion that the expert has lost the right to be considered impartial and has become an advocate. As was said by Collins J in the UK Tribunal case of Slimani⁴⁷:

“In all cases, we have to distil the facts from the various reports and documents. Bodies responsible for producing reports may have their own agenda and sources are not always reliable. People will sometimes believe what they want to believe and, aware of that, those with axes to grind may feed willing recipients. Many reports do their best to be objective. Often and inevitably they will recount what is said to have happened to individuals.

44 See 2004 UNHCR COI Report para 49. The 1990 Evian report identified as a key criterion: “Control body – control over the content of the database should be left in the hands of a relatively independent centre with a professional information staff, responsive to the needs of the users”. In the UK the Advisory Panel on Country Information (APCI) is an independent body established under the Nationality, Asylum and Immigration Act 2002, “to consider and make recommendations to the Secretary of State about the content of country information”. For further background, see Andrew Jordan, paper for November 2005 IARLJ Budapest Conference, “Country Information: The United Kingdom and the Search for Objectivity”.

45 On the UK experience, see paper for IARLJ November 2005 Budapest conference by Andrew Jordan, copy on IARLJ website.

46 See Elisa Mason, “Guide to Country Research for Refugee Status Determination”, op.cit. para 41: “What is the tone of the report? What kind of language and definitions does it employ? Given the nature of the subject-matter of many human rights reports, it is understandable that a bitter tone might resonate throughout the text. However, reputable human rights organisations are normally careful about overstating a case, and will attempt to characterize abuses according to defined categories without resorting to superlatives and angry verbiage”.

47 *SSHD v S* (01/TH/00632) 1 May 2001, para 19.

They will select the incidents they wish to highlight. Such incidents may be wholly accurately reported, but not always. This means that there will almost always be differences of emphasis in various reports and sometimes contradictions. It is always helpful to know what sources have been used, but that may be impossible since, for obvious reasons, sources are frequently anxious not to be identified. We are well aware of criticisms that can be and have been levelled at some reports and are able to evaluate all the material which is put before us in this way”.

56. It is particularly important to assess the impartiality of so called “expert witnesses”. If their evidence is sound academically, demonstrably objective and the expert is not acting as an advocate for the applicant’s case, strong weight can, and should rightly, often be given to such reports⁴⁸.

57. Such country experts are not usually legally trained. Nor can they be expected to have a firm understanding of the skills or concepts judicial decision-makers have to deploy when making a credibility assessment. They may not even know that their reports will end up being used in a judicial process. Matters relating to standards and burdens of proof must be matters for the judge. Consequently what country experts describe as a serious risk or danger cannot be taken as determinative of that question. This does not mean their reports are to be given no weight, or to be treated as devalued or irrelevant simply because they are unaware of the precise legal criteria.

58. Even when country expert reports fail to exhibit all the characteristics of a good report, and so only limited weight can be attached to them, that does not necessarily mean they are to be entirely discarded. Such “expert” reports are still part of the totality of the applicant’s case which the judge has to evaluate and then apply the correct legal principles to before reaching his own conclusions.

59. The independence of experts must also be considered. It may be relevant in certain cases, for example, to consider whether an expert who derives a significant level of income from preparing country reports for claimants can be regarded as independent.

VIII. Is the COI balanced and not overly selective?

60. Closely allied to the impartiality and independence criteria is that of non-selectivity⁴⁹. The judicial decision-maker expects a report to present a

⁴⁸ See Report from Expert Evidence Working Party, paper by John Barnes, in *The Asylum Process and the Rule of Law*, IARLJ Netherlands, 2006 (Manak Publications) pp.263-293.

⁴⁹ Meaning here failure to mention all relevant facts.

balanced account noting items of evidence that go one way and the other⁵⁰. COI which was found for example to ignore consistently or overlook reports of acts of impunity by police and security forces would be deeply suspect. Conversely, a report which highlighted human rights abuses exclusively, without noting evident and significant improvements in a government's human rights record, would be received with scepticism. What judges want to learn is the real picture. However, a report is not necessarily lacking in balance simply because it comes down on one side of the argument about conditions in a particular country: the balancing required here is only to take account of all relevant considerations for and against.

V. Prior Judicial Scrutiny

IX. Has there been judicial scrutiny by other national courts of the COI in question?

61. It is widely recognised by those involved in data-gathering in the asylum field that sources should cover case law emanating from different courts and tribunals⁵¹. That is a valid requirement for at least two reasons. A judge's decision on a particular case may sometimes necessitate a forensic analysis of, and conclusions about, conflicting sources of evidence. Such analyses and conclusions may be of value to all. Secondly, much of the skill of judicial decision-makers in dealing with COI consists in correlating what it says about risk and dangers for particular categories with the legal concepts arising under the Refugee Convention and international human rights treaties. For example, a country report or expert may state that the risk to a particular category is "serious" or "real" etc. But whether such assertions are accepted as demonstrating a "well founded fear of being persecuted" under Art 1A(2) of the Refugee Convention or substantial grounds for believing that there is a "real risk" of treatment contrary to basic international human rights is a matter for judges to decide in particular cases. Thus the judicial decision-maker may have before him a UNHCR Position Paper which frames its evaluation of risk categories more broadly than is justified under the terms of the Refugee Convention (or even under international human rights law). It may for example base itself on a concept of international protection which embraces, for example, humanitarian categories such as persons fleeing from the ordinary incidents of civil war or famine⁵².

50 See 2004 UNHCR Report on COI para 5: "By comparing and contrasting information from a variety of different sources, decision-makers are assisted in forming an unbiased picture of prevailing conditions in countries of concern".

51 Elisa Mason, "Guide to Country Research for Refugee Status Determination" op.cit. p.2: "Typical categories of sources include international instruments...national legislation in the country of origin...case law (decisions from administrative and judicial bodies which granted asylum or other forms of protection to an individual with a claim similar to the one you are researching)...guidelines... etc issued by UNHCR and other international bodies as well as governmental agencies...human rights reports...news reports and newswire services...background materials...experts".

52 See UK case of NM (*Lone women-Ashraf*) CG Somalia [2005] UKIAT 00076 and its comments as follows: "This is illustrated by UNHCR position papers, such as the January 2004 one dealing with Somalia. In Somalia UNHCR has responsibility for voluntary repatriation programmes, currently confined to northern Somalia, and has evident consequential concerns referred to in paragraph 3 of this report about "over-stretched absorption capacity" even in the relatively stable northern part of Somalia. Reasons of this kind lead UNHCR to discourage signatory states from going ahead with enforced returns of rejected asylum

62. For this reason judicial decision-makers benefit from sight of decisions reached in different countries. They are aware that just as refugee law judges pursue a single universal or autonomous meaning of key concepts under the Refugee Convention, so they should strive to reach common views on the same or broadly similar country data.

63. We would accept, however, that reliance should only be placed on decisions from judges in other countries in limited circumstances and subject to careful review. There a number of reasons for this. Country conditions are mutable and in any event the primary focus must always be on the individual claimant's particular circumstances. It will sometimes be difficult to know the status of a decision from another jurisdiction (whether, for example, there has been a further appeal reversing the case). It may be unclear whether the court of tribunal in question has employed different standards of proof or different legal principles. However, at least within the EU, this difficulty will greatly reduce as a result of the partial harmonisation of standards brought into effect by the Refugee Qualification Directive as from 9 October 2006.

64. A further difficulty is that, as the theme of our paper highlights, we are a long way away from a stage where we can be confident that judges always have to hand COI meeting all of the standards we have identified.

seekers. However, the only issue arising on statutory appeals on asylum or asylum-related grounds before Adjudicators and the Tribunal is whether the claimant is a refugee and *if so*, whether to return a person to Somalia would breach the Geneva Convention or constitute treatment contrary to Article 3 ECHR or any other Article, where engaged. The question of absorption problems that might flow from any United Kingdom government decision to enforce returns in numbers is not of itself the basis for showing that return would breach either Convention". The Tribunal went on to say:

"111. The UNHCR, in such circumstances and they arise very frequently, is pursuing what it sees as its wider remit in respect of humanitarian and related practical considerations for the return of people, particularly on a large scale. This is a common problem where the country of refuge borders the country of past persecution or strife. What it has to say about the practical problems on the ground will be important where it has staff on the ground or familiar with the conditions which a returnee would face.

112. But the assessment of whether someone can be returned in those circumstances is one which has to be treated with real care, if it is sought to apply it to non Refugee Convention international obligations, especially ECHR. The measure which the UNHCR uses is unclear; indeed, realistically, it may be using no particular measure. Instead, it is using its own language to convey its own sense of the severity of the problem, the degree of risk faced and the quality of the evidence which it has to underpin its assessment. It is often guarded and cautious rather than assertive because of the frailties of its knowledge and the variability of the circumstances.

113. This is not to advocate an unduly nuanced reading of its material, let alone an unduly legalistic reading. It is to require that the material be read for what it actually conveys about the level of risk, of what treatment and of what severity and with what certainty as to the available evidence. But there may be times when a lack of information or evidence permits or requires inferences to be drawn as to its significance, which is for the decision-maker to draw. There is often other relevant material as well.

114. UNHCR's language is not framed by reference to the ECHR and to the high threshold of Article 3 as elaborated in the jurisprudence of the Strasbourg Court and of the United Kingdom. That is not a criticism – it is not an expert legal adviser to the United Kingdom courts and couches its papers in its own language. So its more general humanitarian assessments of international protection needs should to be read with care, so as to avoid giving them an authority in relation to the United Kingdom's obligations under the ECHR which they do not claim. They may give part of the picture, but the language and threshold of their assessments show that the UNHCR quite often adopts a standard which is not that of the United Kingdom's ECHR obligations.

115. UNHCR papers are often not the only ones which Adjudicators or the Tribunal has to consider. Other organisations may have first-hand sources and differ from UNHCR; experts may bring a further perspective. A considered UNHCR paper is therefore entitled to weight but may well not be decisive".

Conclusion

65. The above Judicial Checklist and Explanatory Memorandum are the product of considerable discussion and exchange involving judges as well as those active in the refugee law and policy field. Whilst they seek to reflect the views of judges generally – i.e. to furnish a specifically judicial perspective – it must not be thought that they necessarily achieve that; they are only a work in progress. The COI-CG Working Party will endeavour to keep them under review and from time to time post revised versions on the IARLJ website taking into account the latest developments.

*Dr. Hugo Storey,
Rapporteur on behalf of the COI-CG Working Party.*

IARLJ INTER-CONFERENCE WORKING PARTY PROCESS

(Country of Origin Information and Country Guidance Working Party)

Prof. Boštjan Zalar

Results Of A Survey Of Country Guidance Models

1. Introduction: Methodology of the Survey

In March 2006, the Rapporteur of the *Country of Origin Information and Country Guidance Working Party*, Dr Hugo Storey and his assistant Hannah Lily from the British Refugee Council, prepared a preliminary questionnaire for members of the IARLJ regarding experiences of judges or members of quasi-judicial bodies with the system of country guidance cases. The preliminary questionnaire was sent to members of the *Country of Origin Information and Country Guidance Working Party* in order to collect suggestions or corrections to the proposed questionnaire. In April 2006, the revised questionnaire was sent to the network of members of the IARLJ.

The results of the survey are based on 21 completed questionnaires from 17 countries. The completed questionnaires cover countries with common law systems (Australia, Canada, New Zealand, United Kingdom, USA), Continental Europe (Belgium, Czech Republic, Finland, France, Germany, Liechtenstein, Netherlands, Poland, Slovak Republic, Slovenia), Africa (Uganda) and India. Eighteen respondents were judges, mostly from the second independent instance of asylum procedure, and several were Supreme Court judges, while the remaining three respondents were experts, civil servants or decision makers.

The questionnaire contained 26 questions, of which 21 were directly related to different mechanisms which aim to ensure reliability and consistency in adjudication on similar country issues or conditions. These 21 questions were phrased in such a manner that respondents could give answers no matter whether the given country has special mechanisms for country guidance cases or whether it develops standardised rules and principles of respecting jurisprudence in similar cases. Nevertheless, there were nine respondents who did not answer several questions, probably because they thought that certain questions related only to respondents who have had actual experiences with special mechanisms of country guidance cases. The core questions dealt with the process of forming country guidance cases and their legal consequences, including the possibility for parties to challenge country guidance cases before a higher court. One question was

related to the use of assessment criteria for country of origin information. The only question which was not clear enough for some respondents was: "How is the country issue upon which guidance is given, and its exact ambit, identified?"¹ Beyond this last question, respondents did not offer any specific comments or suggestions concerning the questionnaire.

2. Two basic models of Country Guidance Cases

The results show that there are two main groups of countries from the standpoint of experiences of country guidance cases. One group of countries has developed a specific and formal structure for country guidance cases, which will be further referred to as the Special Country Guidance Model.² The other group of countries did not develop a specific and formal structure for country guidance cases, but it rather managed these issues through the rules, principles or standards of respecting the principle of equality before the law and the judgments of higher courts. This model will be further referred to as the Standard Jurisprudence Model.

2.1. SPECIAL COUNTRY GUIDANCE MODEL

The Special Country Guidance model has been developed by two countries with a common law system (United Kingdom, Canada) and by the Netherlands. According to the questionnaires, Canada has an inquisitorial system, while the United Kingdom and the Netherlands have an adversarial system. It is possible to include within this model also the case of the USA, since both answers from the USA indicated some specific and formal structures which are very close to the Special Country Guidance Model. Answers from judges in the United Kingdom show that senior judges of the Asylum and Immigration Tribunal select specific cases in order to formally establish a country guidance decision. "The first steps in the development of a system in the United Kingdom were judgments from the higher courts calling for guidance cases from the Tribunal in order to ensure consistency. From 2004 the system was formalised when the President of the Tribunal was given power under statute to designate certain cases as authoritative. Since April 2005, with the commencement of the new Asylum and Immigration Tribunal (AIT), there have been Tribunal practice Directions stating that country guidance cases are to be followed unless there is compelling fresh evidence".³ It is an error of law not to follow country guidance decisions unless the case can be properly distinguished on the basis of compelling country of origin evidence.

1 Under the model of country guidance in the United Kingdom, this identification is established by case headings incorporating "CG" in the title.

2 In the questionnaire, the Country Guidance phenomenon is defined as a formal or informal system of judicial decisions giving guidance on country conditions or particular country issues – for example, whether a member of a particular group or religious minority is at risk or not on return to his/her country of origin.

3 Hugo Storey, 2006, Comments to the draft of the paper Results of Survey of Country Guidance Models", 11. 10. 2006.

Although the purpose of the questionnaire was not to thoroughly examine the whole structure and all procedural details of formal approaches to country guidance decisions, it is worth presenting one example here of the design of country guidance cases. This is an example of a country guidance case at the AIT in the United Kingdom:

- a regular small group meeting within the senior judiciary of the AIT in order to define the relevant refugee-producing countries and specific issues that should be chosen to become a country guidance case;
- a preliminary hearing where the AIT informs the parties of all the country materials it knows of and clarifies all issues to be dealt with in the proposed country guidance case are agreed by representatives and the Home Office;
- a substantive hearing (material provided by the counsel and experts, hearings of the experts);
- a judicial analysis of the materials and testimonies provided;
- the case is placed in the database of the AIT.⁴

In Canada, there are three formal mechanisms that aim to ensure consistency in adjudication: *National Country Documentation Packages*, *Lead Cases and Persuasive Decisions*. Although judges are technically not bound by these decisions, there is a powerful culture of conformity unless one can distinguish the circumstances of a particular claim. From a formal point of view, *Quality Issues Sessions* are also very important. In these sessions, judges, decision makers, researchers and refugee protection officers meet to discuss issues relating to country conditions. They identify the reasons for discrepancies between regions. Discrepancies are formally tracked. There are also regular *Professional Development Days* to discuss legal issues. Overall quality and consistency issues are overseen by the Office of the Deputy Chair, who is also responsible for deciding on what matters guidance is required. Three Member Panels are convened for persuasive decisions. For example, if there are many similar claim types for young Tamil males from Sri Lanka who are receiving positive decisions, then that particular profile along with the country condition documents may form the basis of a persuasive decision. In a substantive sense, there are different types of guidance: guidance on procedural and legal questions and guidance on country conditions.

According to the results of the questionnaire, the system in the Netherlands can be included as a Special Country Guidance Model. The country guidance model in the Netherlands is specific and formalised. There is governmental guidance prepared by policy makers from the Ministry of Aliens Affairs and Integration. Decisions are based on country of origin

⁴ Storey, Hugo, Mackey, Allan, 2005, *Criteria for Assessing Country of Origin Information and the Use of Country Guidance Cases in UK*, (IARLJ) European Chapter Conference, Budapest, November 2005.

reports prepared by diplomats from the Ministry of Foreign Affairs in the countries concerned. A further possibility is guidance (agreement) within the *Vreemdelingenberaad* (the immigration chambers of the district courts) or an agreement between judges of a particular district court. Guidance by the *Vreemdelingenberaad* is prepared by the chairpersons of the immigration chambers of the district courts and their legal associates.

The third sort of guidance is guidance of the Council of State, which is the highest administrative court in the State. This guidance is prepared by State Councillors and their legal staff. State Councillors are selected on the basis of their expertise and experience in legislative, administrative and judicial matters. They represent a cross-section of political and social opinion in the Netherlands. They are drawn from the ranks of politicians, top officials, judges and academics.

From the above-mentioned answers in these five questionnaires and from the papers on country guidance presented at the IARLJ conference,⁵ it follows that for the development of a country guidance case four component parts need to be presented:

- there should be a significant amount of country of origin information (hereinafter referred to as COI);
- it is only on the basis of such COI that guidance can be given for other judges in future similar cases;
- a country guidance case needs to be handled in a formal or informal manner, but in any case it should be clearly stated in a judgment that the case furnishes country guidance and the country guidance should be publicly made known;
- a party must have an opportunity to effectively challenge a country guidance case before a court (the right to effective legal remedy), although there may be limits to how this can be done, e.g. by requiring the production of compelling fresh evidence.

The USA has two systems, one inquisitorial and one adversarial. An individual who is not in removal proceedings may apply for asylum before the U. S. Department of Homeland Security, U.S. Citizenship and Immigration Services (hereinafter referred to as the USCIS). USCIS officers conduct inquisitorial interviews. An individual who is in removal proceedings may apply for asylum before an Immigration Judge. Hearing before immigration judges are adversarial. An individual who applies unsuccessfully for asylum before USCIS is placed into removal proceedings, where he/she has a right to have his/her asylum application heard again by an immigration judge. The immigration judge makes findings con-

⁵ See footnotes 5 and 7.

cerning country conditions or risks faced in particular countries on a case-by-case basis. The Board of Immigration Appeals (hereinafter referred to as the BIA) and U. S. Circuit Courts of Appeal (hereinafter referred to as the Circuit Courts) may affirm such findings or reverse them as “clearly erroneous”.

The specific structures that can be linked to Special Country Guidance model include the following.

Firstly, the BIA and Circuit Courts may decide on a case-by case basis when to issue the so called “precedent decision” (in case of the BIA) or the so called “published decision” (in case of Circuit Courts). A holding in a BIA precedent decision or Circuit Court published decision remain binding until superseded by a more recent holding addressing the same issue and reaching a different conclusion. Findings of Immigration Judges and officers of the USCIS regarding country conditions must comport with precedent decisions and published decisions. In general, binding BIA and Circuit Court decisions address previously unresolved legal issues or novel factual scenarios. BIA and Circuit Court decisions are prepared by board members and judges who are randomly assigned to rule on these matters. The BIA, by majority vote of its permanent members, determines whether the BIA’s decision should be published as a precedent decision.

Secondly, the US system is that summaries of BIA precedent decisions and relevant Circuit Court published decisions are e-mailed to immigration judges weekly. Completed BIA precedent decisions and Circuit Court published decisions are available in electronic and printed form. Questionnaire answers both from a judge of the BIA and from an immigration judge, expressed an opinion that BIA and Circuit Court decisions rarely contain generalisation concerning country conditions or risk faced by large categories of individuals. BIA’s decisions and Federal Circuit Court’s decisions based on country conditions are usually fairly fact specific, i.e. the holding is likely to be stated in a narrowest possible terms and tied to the particular facts in the case rather than a sweeping statement of categories of persons who may or may not be at risk.

A further feature of the US system is that records of asylum proceedings are routinely expected to address the most recent version of the relevant U.S. Department of State Country Report on Human Rights Practices. Immigration judges are also required under the Religious Freedom Act to receive regular training on religious freedom issues, which helps to ensure that findings of immigration judges on these issues are reliable and consistent. A ruling of an immigration judge “should comport with information concerning country conditions contained in the relevant U.S. Depart-

ment of State Country Report on human rights Practices.” These reports are updated annually and are based on research conducted by the U. S. Department of State’s Bureau of Democracy, Human Rights. Similarly, annual reports prepared by the U. S. Commission on International Religious Freedom are based on research conducted by employees of that agency.

2.1.1. CRITICISM OF COUNTRY GUIDANCE CASES

On this question, both answers from the United Kingdom refer to criticism by the Immigration Advisory Service (IAS). In sum, the criticism of the IAS⁶ is directed to the following legal standards:

- a duty to give reasons with particular rigour or that a judicial decision should be effectively comprehensive; the IAS proved that in a number of early country guidance cases the AIT made findings on issues that were not pertinent to the specific case or that the AIT relied on obsolete material or that the country guidance cases did not specify with total precision the sources and materials on which they had based their decision or that the sources relied on were questionable;
- the right of the individual claimant to distinguish his case from any precedent;
- the AIT should make more publicly known what their criteria were for selecting certain cases as country guidance or for removing them as country guidance cases from their website, and that country guidance should be fixed with an expiry date of six months and should be designated or removed when that date passes;
- the AIT would need to adopt more pro-active inquisitorial approaches, the AIT should adopt a research role and perhaps appoint an independent assisting counsel to contribute research and submissions to the case.

On three important points, answers concerning experiences with country guidance cases in the Netherlands correspond to the criticism of the IAS. Firstly, lower-instance judges are critical of the guidance of the Council of State as regards the clarity of the sources the country guidance relies upon. Secondly, the respondent think it is a problem that regarding governmental guidance, the Ministry of Foreign Affairs on its own initiative updates most country reports on a regular basis - approximately once a year. Thirdly, there is criticism concerning the very limited possibilities of challenging policy decisions of the Ministry of Aliens Affairs and Integrations and the guidance of the Council of State, because the combination of an adversarial system and a very limited role for district court judges in the Netherlands’ refugee decision-making system makes it very difficult to challenge such guidance.

6 Storey, Hugo, Cousineau Gaetan, Kagedan, Ian, North Tony, Perkins, Daniel, 2005, Country Guidance by Judges, (IARLJ) European Chapter Conference, Budapest, November 2005.

In the USA, criticism has occasionally come from the Circuit Courts who have questioned the objectivity of U.S. Department of State Country Reports on Human Rights Practices. Circuit Courts have also complained that, by the time a Circuit Court adjudicates on an asylum application, information contained in the record of proceedings may be out of date. Recent decision from the United States Court of Appeals for the Seventh Circuit have suggested that the system might be improved if there were independent experts available to report on country conditions in the context of individual cases and that a system of grids should be developed, as in social security disability cases, to identify categories of persons at risk of persecution in particular countries.

2.2. STANDARD JURISPRUDENCE MODEL

The rest of the examined countries apply the so-called Standard Jurisprudence Model. Within this group, it is not relevant whether the State has an adversarial or inquisitorial system.

Since New Zealand has a less formal country guidance model, it seems to be closer to a Standard Jurisprudence model than other common law judiciaries which have developed a formalised country guidance model.⁷ The answers from New Zealand show that the Refugee Status Appeal Authority (RSAA) makes determinations on matters that cover country guidance with the assistance of research findings by legal associates and expert librarians. The outcome is based on a comprehensive discussion of country conditions.⁸ These research findings in New Zealand are circulated in written form between members of the RSAA, or they are otherwise accessible to adjudicators.

Answers from Australia clearly indicate that findings of facts concerning country conditions are not intended to provide guidance to other members of the Refugee Review Tribunal or primary decision makers. However, as with answers from New Zealand, both answers from Australia are barely distinguishable from the answers of judges from other countries with a Standard Jurisprudence Model. This is due to the great emphasis on research. The Refugee Review Tribunal has a Country Research Service and Library Services Section. The employees of this section are professional researchers with expertise in the collection, dissemination and management of country information. Researchers do not draw conclusions, but provide information directly relevant to claims. Researchers identify the interests and perspectives of persons who are sources of information

⁷ H. Storey and A. Mackey in the aforementioned paper (see footnote 5) put New Zealand together with other common law countries where »the opportunity often arises to bring together a significant amount of country of origin material in a way that not only assists the determination of the applicant's case but also gives guidance for other judges in future cases where the same country of origin information may be relevant.« (Ibid. p. 7)

⁸ This is the so-called "comprehensive findings in a precedent decision".

for members of the tribunal. Judges may even conduct their own research from various source documents. Apart from providing a range of country and issue-specific packages of source information, the country research service conducts specific research at the request of members concerning ethnographic, historical, cultural, legal, human rights and political materials. In addition to a standardised approach of sharing information, attending seminars and presentations and holding regular workshops or discussions, country information sessions are conducted for members on topical issues and countries. A weekly awareness service alerts members to the acquisitions of journals, monographs, maps and articles, and to all research responses prepared for members during that week. A monthly decisions bulletin alerts members to selected tribunal decisions made during the past month. These decisions represent a cross-section of decision making, rather than being intended as country guidance cases. "However, it would seem that findings made in higher court cases which do amount to guidance on general country issues are followed by the Tribunal for as long as those country conditions remain current."⁹

The Belgian model could also be classified as a Standard Jurisprudence Model, although in a forthcoming new statute the consultation between judges who deal with similar cases will be formalised. In France, the so-called "combined section" has the function of settling questions of law that have no precedent and it also ensures that the Refugee Appeals Board's case law remains consistent.

Generally speaking, within the Standard Jurisprudence Model, country guidance cases are managed in a similar way as any other type of case before a court, where the general principles of law need to be applied and where judgments of the higher court must be taken into consideration. The principle of equality before the law is a general principle of law, which in many countries is expressly stated in a Constitutional Act and it is intended to prevent arbitrariness and promote consistency in deciding like cases alike. Similarly, under customary international law, the principle of equality before the law is based on the application of some sort of test of arbitrariness. That is why it is reasonable to say that this principle works to deter there being important differences between countries from the standpoint of country guidance phenomena in the field of refugee law cases. The questionnaires show that some differences between countries in respect of country guidance could occur due to different rules or standards of respecting judgments of higher courts by lower courts. In some jurisdictions, judgments of the Supreme Court are binding on all courts (for example, in India). In other countries, a lower court is not bound by judgments of the Supreme Court (for example, in Finland) even

⁹ See footnote no. 4.

in a particular case where the Supreme Court has quashed the judgement of a lower court and returned the case to subsequent further procedure before the lower court. In such cases the lower court has an obligation to follow the procedural guidelines of the judgement of the Supreme Court, while it is again fully independent from the Supreme Court in respect of the application (interpretation) of substantial law (for example, in Slovenia). Some countries have several mechanisms related to the power of the Supreme Court in order to effectively ensure a uniform application and interpretation of the law. These could be formal mechanisms defined in statutes, but they are designed in general for all types of disputes (for example, in the Czech Republic).

However, in respect of the purpose of this survey, which is to identify approaches that can improve consistency, efficiency and convergence of case law on refugee issues in the international legal community, I doubt that these differences between rules and standards regarding respect of judgement of higher courts are relevant. Instead, it is reasonable to expect that significant differences between jurisdictions in the examined countries will further emerge from other reasons and that these reasons could be derived from the answers in the questionnaires. These are:

- (in a narrow sense) – the quality of criteria for the assessment of *Country of Origin Information*;
- (in a broad sense) – the quality of court management in the field of knowledge management, which includes close cooperation and joint discussions between judges, researchers and experts on country conditions, efficient exchange of information and databases between all relevant courts and judges, efficient use of information technology and training of judges.¹⁰

3. Other important findings for the future Development of Country Guidance Models

For the eventual future development of country guidance practices, there are five additional specific findings that are important:

- 16 out of 21 respondents believe that the IARLJ database should have country guidance decisions as a distinct subset, since it would be beneficial for national adjudication processes;
- 19 out of 21 judges or officials consider formal or informal guidance or jurisprudence from other countries (or international courts); among

¹⁰ The importance of the future support of researchers to judicial work for the rule of law is also pointed out by the criticism of the IAS of the country guidance model in the UK. The IAS proposed that the AIT adopt a research role and that it consider the possibility of adopting an independent assisting counsel to contribute research and submissions to the case. (See footnote 5, p. 13).

them, there are two cases where this happens rarely (Canada, Germany), or where this mainly depends on the style of the individual judge (Slovenia);¹¹

- On a scale of 1 to 5 (where 1 means very low and 5 means very high), the average estimation of the actual or potential impact of formal or informal CG cases on the consistency of the judicial process is 4.0;
- On the same scale, the average estimation of the actual or potential impact of formal or informal CG cases on the speed of the judicial process is 3.3;¹²
- there was no answer in the questionnaires which would indicate that sources of country of origin information should or should not be included in judgments or decisions; the only exception is USA where Immigration Judge do not itemize all of the sources in the body of their decision, however, sources relied upon are generally discussed within the decision insofar as relevant to the resolution of the issues presented by the facts in the particular case;
- 10 respondents expressed the opinion that there are no problems in respect to similar cases being adjudicated differently,¹³ while 4 respondents think that this problem does exist. Two respondents believe that criticism exists, but it is part of the general and ongoing criticism of judgments.¹⁴

4. Conclusion: criteria for assessment of Country of Origin Information as a link between different models of Country Guidance Phenomena

Analysis of the questionnaires shows that, in principle, both models – Special Country Guidance Model and Standard Jurisprudence Model – have sufficient guarantees for the protection of equality before the law, which is a fundamental general principle in international law (Article 26 of the International Covenant on Civil and Political Rights).¹⁵ Further development of both models could be justified on the grounds of protecting the right to adjudicate in a reasonable time and the protection of the right to an impartial tribunal, because country guidance models also aim to diminish judicial subjectivism in asylum adjudication. The fourth factor which could determine the further development of this judicial phenomenon is political or administrative interest – to avoid wasted expenditure of financial resources in court,¹⁶ which

11 One respondent did not answer this question.

12 Nine respondents did not answer this and the previous questions.

13 Among them, there are small countries like Liechtenstein, Slovenia, Slovak Republic and Finland.

14 Five respondents did not express an opinion on this matter.

15 In European law, the principle of the equality before the law is a general principle of law in the European Union, and it is incorporated in the Convention for the Protection of Human Rights and Fundamental Freedoms, where Article 14 in conjunction with a particular substantive human right (for example: Article 3, Article 8) could be relevant in refugee law disputes.

16 In the judgement of the Court of Appeals, *S and others v SSHD* (2002) Judge Laws in respect of country guidance cases also mentioned wasted expenditure of judicial and financial resources.

could perhaps engender more public confidence in the judiciary as well.¹⁷ However, it would be to naïve to think that the future development of country guidance models will converge in the direction of any particular model. It is only recently that country guidance has been identified as a significant aspect of judicial decision-making in asylum-related appeals. Due to the different legal traditions, institutional structures and political circumstances in various countries, it is currently unlikely that there will be any move towards harmonisation (internationalisation) of country guidance mechanisms whether according to the Special Country Guidance Model or the Standard Jurisprudence Model. In my opinion, any real advances in the internationalisation of country guidance issues require prior advances on a separate front. In particular what is required is agreement on basic criteria for the assessment of country of origin information and further development of accessible databases of country guidance cases, that of the IARLJ database in particular.

Prof. Boštjan Zalar,

Assoc. Prof. Dr. Boštjan Zalar is Associate Rapporteur of the Country of Origin Information and Country Guidance Working Party of the IARLJ; he is High Court Judge at the Administrative Court of the Republic of Slovenia, Senior Research Fellow at the Institute of Social Sciences, Faculty of Social Sciences, University of Ljubljana, Lecturer at the Postgraduate School for Government and European Studies, Brdo pri Kranju (Slovenia) and co-chair of the Asylum and Immigration Working Party within the Association of European Administrative Judges.

¹⁷ According to Hugo Storey, the introduction of country guidance cases in the UK has saved enormous amounts of time in the United Kingdom, in that it has avoided the necessity in each asylum hearing for the same background evidence on country conditions to be pored over and evaluated afresh on each occasion (see footnote 4).

CONVENTION REFUGEE STATUS AND SUBSIDIARY PROTECTION WORKING PARTY

Dr. Jane McAdam

First Report

This report is comprised of three parts. Part I is a brief overview of European Union and Canadian systems of complementary protection, with particular reference to French practice, written by Dr Jane McAdam of the Faculty of Law, University of Sydney. Part II comprises two related country reports on France, written respectively by Vera Zederman and Laurent Dufour of the Commission des Recours des Réfugiés in France. Part III is a country report on Canada, written by Jessica Reekie, Law Clerk to Madam Justice Carolyn Layden-Stevenson (Federal Court of Canada), under the supervision of Justice Layden-Stevenson.

Part I: Overview

Jane McAdam

The first report of the Working Party on Convention Status and Subsidiary Protection comes at an opportune time: by 10 October 2006, the participating Member States of the European Union were supposed to have transposed the Qualification Directive¹ - the first supranational instrument containing a definition of and status for 'beneficiaries of subsidiary protection' - into national law, although as at 9 October, the European Commission had only received six (out of 24) instruments of transposition.² The Qualification Directive was adopted on 29 April 2004, following a two-and-a-half year drafting process, and has been described as 'unquestionably the most important instrument in the new legal order in European asylum because it goes to the heart of the 1951 Convention Relating to the Status of Refugees'.³ In addition to 'clarifying' the constitutive elements of

1 Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 (Qualification Directive).

2 European Commission, 'Entry into Force of European Rules on the Qualification and Status of Persons in Need of International Protection' MEMO/06/368 (10 October 2006) 1. In accordance with articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union [2002] OJ C325/5 and the Treaty establishing the European Community [2002] OJ C325/33, the Qualification Directive does not apply to Denmark (see Qualification Directive, recital 40).

3 H Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law' (2006) 55 ICLQ 161, 161.

the Convention refugee definition and ensuing status, it seeks to establish a harmonized approach towards *de facto* refugees in the Member States of the EU—called ‘beneficiaries of subsidiary protection’—by setting out the eligibility criteria for persons with an international protection need falling outside the scope of the 1951 Refugee Convention, and codifying their resultant status. In doing so, the Qualification Directive is the first supranational instrument to elaborate a distinct *status* for extra-Convention refugees.⁴

It was propelled by the idea that the creation of a harmonized set of criteria ‘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.’⁵ However, while unique in its establishment of a supranational system of complementary protection, the Qualification Directive represents a synthesis of existing EU Member State practice, rather than a radical re-thinking of international protection needs. It has been criticized for ‘equalizing down’ at the refugee’s expense,⁶ adopting *minimum* standards which do not preclude Member States with higher standards in place from reducing them.⁷ It did not derive from a systematic, principled analysis of protection obligations under international and regional human rights and humanitarian law, but developed as a pragmatic instrument of compromise, seeking to balance the divergent political views of the various Member States. As such, it may be described as a regionally-specific political manifestation of the broader legal concept of complementary protection.⁸

Although transposition of the Qualification Directive into national law was not required until 10 October 2006, it was given effect in France from 1 January 2004. French decision-makers have therefore been interpreting and applying the Qualification Directive for almost three years, and their experiences provide a useful case study for the EU Member States that are only just beginning to consider subsidiary protection claims in accordance with the Directive for the first time.⁹ The second part of this Report examines how the Directive’s provisions on subsidiary protection have been

4 Note that the regional OAU Convention and the Cartagena Declaration apply Convention refugee status rather than a separate status: Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85).

5 Qualification Directive, recital 7.

6 G Gilbert, ‘Is Europe Living up to its Obligations to Refugees?’ (2004) 15 European Journal of International Law 963, 969.

7 Qualification Directive, art 3. On this point, see Lambert (n 3).

8 On this point, see J McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’ (2005) 17 IJRL 461, 462. During discussions in the EU, Commission Services described subsidiary protection as an asylum issue that was ‘more of a political nature’: Note from Commission Services, ‘Horizontal Issues in the Asylum Proposals’ 13636/01 ASILE 53 (9 November 2001) 2. ‘Complementary protection’ describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework, based on a human rights treaty or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence.

9 Lithuania also implemented the Directive early, but based its law on a draft of the Directive which contained more expansive subsidiary protection provisions: Law on the Legal Status of Aliens (29 April 2004) No IX-2206 (Official Gazette No 73-2539, 3 April 2004). The United Kingdom, had, in effect, already incorporated a number of the Directive’s underlying ideas in a 2002 revision of the law (Nationality, Immigration and Asylum Act 2002), but did not formally implement it until October 2006.

implemented in France, and highlights potential issues of concern for the other Member States currently embarking on this exercise.

An important counterpart to the European system, considered in the third part of this Report, is the Canadian model of complementary protection, which has been operating in its present form since 2002. Extra-Convention protection is conceived of quite differently in Canada. Whereas the EU Qualification Directive establishes a protection hierarchy, according Convention refugees a higher status than beneficiaries of ‘subsidiary’ (secondary) protection,¹⁰ Canadian law provides an identical status for refugees and other persons in need of international protection.¹¹ This better reflects States’ obligations under human rights law, and avoids additional litigation relating to the ‘upgrading’ of status.¹²

1. Comparative Scope

In the EU, a beneficiary of subsidiary protection is defined in article 2(e) of the Qualification Directive as:

a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country 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.¹³

‘Serious harm’ is defined in article 15 as:

- (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

¹⁰ This is clearly reflected in France, where beneficiaries of subsidiary protection are entitled to a one year residence permit, which may or may not be renewed, compared to the ten year ‘carte de residence’ to which Convention refugees are entitled: Admission and Residency of Aliens and Asylum Code, art L.313-13. Furthermore, subsidiary protection may be withdrawn for national concerns about public order, such as criminal offences, whereas Convention status may not be: art L-712-2(d).

¹¹ This is also reflected in the terminology: in the Canadian report below, ‘refugee protection’ is used to describe the status granted to both categories.

¹² The Netherlands has implemented a uniform residence permit which provides all beneficiaries of international protection with the same rights and benefits: Aliens Act 2000 section 27. See discussion below about criticisms of the Qualification Directive’s hierarchical approach.

¹³ 7944/04 ASILE 21 (31 March 2004) art 2(e). It was originally article 5, but was moved to the definitions section in art 2 by 11356/02 ASILE 40 (6 September 2002).

armed conflict.

These categories are based on the various international and regional legal obligations already assumed by the EU Member States, although differ in some significant respects. The most obvious of these is that the Directive applies only to third country nationals rather than universally, a matter that has been particularly criticized in relation to the Directive's definition of a 'refugee' in article 2(c).¹⁴

Article 15(a), relating to non-return to the death penalty or execution, was based on Protocol 6 to the European Convention on Human Rights (ECHR), prohibiting the imposition of the death penalty in peace time, which has since been strengthened by the entry into force of Protocol 13, prohibiting the death penalty in all circumstances.¹⁵ Furthermore, all Member States except France are parties to the Second Optional Protocol of the ICCPR which contains a similar requirement.¹⁶ It is also consistent with the jurisprudence of the European Court of Human Rights¹⁷ and the Human Rights Committee.¹⁸

In Canada, section 97(1)(b) of the Immigration and Refugee Protection Act (IRPA) provides protection to persons facing 'a risk to their life or to a risk of cruel and unusual treatment or punishment'. Although there is no express mention of the death penalty or execution, Canadian case law suggests that this would be encompassed by cruel and unusual treatment or punishment.¹⁹

14 *McAdam* (n 8) 469–70; UNHCR's Observations UNHCR's Observations on the European Commission's Proposal for a Council 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' 14109/01 ASILE 54 (16 November 2001) [11]; Amnesty International EU Office, 'Amnesty International's Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country National [sic] and Stateless Persons as Refugees or as Persons Who Are Otherwise in Need of International Protection, COM (2001) 510 final' (2 October 2002) <<http://www.amnesty-eu.org>> (21 October 2002) 2; European Parliament, 'Report on the Proposal for a Council 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' (8 October 2002) Final A5-0333/2002, PE 319.971, 53; House of Lords Select Committee on the EU, *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office, London 2002) [54].

15 Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty (adopted 28 April 1983, entered into force 1 March 1985) ETS No 114. This has since been strengthened by Protocol 13, prohibiting the death penalty in all circumstances: Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances (adopted 3 May 2002, entered into force 1 July 2003) ETS No 187.

16 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted by UNGA Res 44/128 of 15 December 1989); Status of Ratifications as at 13 October 2006 <<http://untreaty.un.org>>.

17 *Soering v United Kingdom* (1989) 11 EHRR 439 [88].

18 *Judge v Canada* Comm No 829/1998 (5 August 2003) UN Doc CCPR/C/78/D/829/1998.

19 The Immigration and Refugee Board states that the test is 'whether the possible sanction would shock the conscience of Canadians'. It suggests that where the death penalty has been imposed, it must be scrutinized to see whether, in the individual case, it violates international legal standards. Matters to be considered would include the gravity of the offence, the legal safeguards in the country where the penalty has been imposed, and the proposed method of execution: Immigration and Refugee Board, 'Consolidated Grounds in the *Immigration and Refugee Protection Act*: Persons in Need of Protection: *Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (15 May 2002) 3.1.8. In *United States v Burns* [2001] 1 SCR 283, the Supreme Court of Canada held that extradition without assurances that the death penalty would not be imposed would violate section 7 of the Canadian Charter of Rights and Freedoms in all but exceptional cases. More recently, the Human Rights Committee, in a case involving Canada, stated that States parties to the ICCPR that have themselves abolished the death penalty 'may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out': *Judge v Canada*, UN Doc CCPR/C/78/D/829/1998 (2003) [10.4].

Article 15(b) of the Qualification Directive reflects Member States' obligations under article 3 of the ECHR, but with a limitation: it expressly requires that such treatment relate to an applicant 'in the country of origin'. This may be intended to obviate a claim by an asylum seeker that he or she would face torture in a third country to which return may be contemplated (although in such circumstances, article 3 of the ECHR would prevent removal, but subsidiary protection status would not apply).²⁰ In Battjes' view, the reference to harm 'in the country of origin' suggests that the Directive regulates only 'classic' *refoulement* cases - where an individual fears the positive infliction of ill treatment in the country of origin - but not 'humanitarian' cases, such as illness, where ill treatment stems from the country of origin's failure to provide adequate resources or care combined with termination of care in the host EU State.²¹ The question is whether ill treatment in the country of origin must be constituted by a positive act of harm committed there, or whether it may derive from the deprivation of health care in the host State plus generally inadequate care in the country of origin. Whether or not decision-makers will interpret the 'country of origin' requirement so strictly as to exclude combination cases remains to be seen, but given recent jurisprudence on 'humanitarian' claims and the very high threshold imposed on applicants, grants of subsidiary protection on this basis seem unlikely.²²

This interpretation echoes the Canadian approach. Section 97(1)(b) of the IRPA lists four criteria which circumscribe the scope of a risk to 'life' or 'cruel and unusual treatment or punishment':

- (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Thus, even though 'inhuman or degrading treatment or punishment' under article 15(b) of the Qualification Directive may be substantially similar to 'cruel

²⁰ In *Bongers v The Netherlands* App No 10154/04 (15 September 2005) 14, the European Court of Human Rights stated that 'neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit'.

²¹ An example of this type of case is *D v UK* (1997) 24 EHRR 423.

²² *N v Secretary of State for the Home Dept* [2005] UKHL 31.

and unusual treatment or punishment' in section 97 of the IRPA,²³ the latter is more tightly circumscribed by legislative caveats. In the absence of European jurisprudence reading in similar restrictions, article 15(b) provides wider protection than section 97(1)(b). However, the precise scope of article 15(b) will depend on the meaning given to 'inhuman or degrading treatment or punishment'. While the case law of the European Court of Human Rights is expected to be particularly influential in this regard,²⁴ as has been the case in France,²⁵ national interpretations may extend the concept in different directions.

Many of the French decisions on this provision have focused on protecting individuals from *non-State* actors whose conduct the authorities cannot (or will not) proscribe, granting subsidiary protection in cases including domestic violence,²⁶ threats by an employer,²⁷ and risks arising from testifying against persons involved in criminal activities.²⁸ Even though persecution by non-State agents has at times given rise to refugee status in France,²⁹ in accordance with article 6 of the Qualification Directive which expressly states that agents of persecution (for the purposes of granting refugee status) *include* non-State actors, it appears that subsidiary protection has almost become the default status for persons at risk of harm by non-State agents. Furthermore, the nature of 'serious harm' has seldom been defined or comprehensively analysed in French subsidiary protection cases, suggesting that it is simply being viewed as a fallback status for individuals who do not easily fit within the Refugee Convention's qualification criteria. Although Canada has also developed a jurisprudence on 'victims of crime' under section 97, it has done so only in cases where it has not been possible, after considerable consideration, to establish a link between the persecution feared and a Convention ground.³⁰

The final criterion for subsidiary protection in the EU is article 15(c) of the Qualification Directive, which extends protection where there is a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.' This provision reflects the existence of consistent, albeit varied, State practice of granting some form of complementary protection to persons fleeing the indiscriminate effects of armed conflict or generalized violence without a specific link to

23 In *United States v Burns* (n 19), the Supreme Court of Canada equated 'inhuman or degrading' in article 3 of the ECHR with 'cruel and unusual' in section 12 of the Canadian Charter of Rights and Freedoms.

24 It should be noted that ill-treatment due to underlying social or political chaos, or a lack of resources, will only satisfy the requisite level of severity in exceptional circumstances: eg *HLR v France* (1997) 26 EHRR 29 [42]; *D v UK* (n 21); *Hennao v The Netherlands* App No 13669/03 (24 June 2003); *BB v France* App No 30930/96 (9 March 1998).

25 See below Pt II.

26 *Commission des recours des réfugiés (CRR) Mme D* App No 535458 (7 October 2005), in *Commission des Recours des Réfugiés, Contentieux des réfugiés: Jurisprudence du Conseil d'Etat et de la Commission des recours des réfugiés* (2005) 44.

27 *CRR M K* App No 494377 (21 April 2005) in *ibid* 52.

28 *CRR Mlle Z* App No 493983 (8 February 2005) in *ibid* 51 (a Chinese unaccompanied minor feared retribution for testifying against a 'mafia gang' involved running a clandestine emigration network); *CRR M C* App No 480899 (8 October 2004): an individual in Moldova denounced the participation of his superior in trafficking cigarettes.

29 eg *CRR Mejia Suero* (17 October 2003).

30 See below Pt III.

Convention grounds.³¹ During the drafting process, the vast majority of Member States supported the requirement that the threat must be 'individual', since it was thought that this would avoid 'an undesired opening of the scope of this subparagraph.'³²

The individual requirement is strengthened by recital 26, which provides:

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.³³

This is reminiscent of section 97(1)(b)(ii) of the IRPA, and severely restricts the ambit of article 15(c).³⁴ The language of article 15(c) and recital 26 suggests that a person in an area of indiscriminate violence will need to at least show that he or she is *personally* at risk, rather than simply being able to claim subsidiary protection status by virtue of geographical location. This is problematic, since indiscriminate violence by definition is random and haphazard.³⁵ If interpreted even more strictly, it might require individuals to be singled out, which would establish a higher threshold than is required for either Convention-based protection or temporary protection. Indeed, the EU Temporary Protection Directive protects persons fleeing *en masse*

who have had to leave their country or region of origin, or have been evacuated ... and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.³⁶

31 See European Council on Refugees and Exiles (ECRE), 'European Asylum Systems: Legal and Social Conditions for Asylum Seekers and Refugees in Western Europe' (2003) (13 June 2004); ELENA 'Complementary/Subsidiary Forms of Protection in the EU States—An Overview' (April 1999). UNHCR's mandate extends to such persons: see eg UNGA Res 1671 (XVI) of 18 December 1961; UNGA Res 1673 (XVI) of 18 December 1961; UNGA Res 3143 (XXVIII) of 14 December 1973. The UK will also include 'unlawful killing' in its definition of 'humanitarian protection' (its name for 'subsidiary protection'): The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 reg 2, read in conjunction with UK Immigration Rules rule 339C; Home Office, 'Implementation of 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 Protection Granted: A Public Consultation' (June 2006) [7.4].

32 12382/02 ASILE 47 (30 September 2002) [4].

33 Qualification Directive, recital 26.

34 Neither Belgium nor Lithuania requires persons fleeing generalized violence to demonstrate an individual threat of harm: *Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (15 September 2006) art 26, inserting new art 48/4(2)(c) into the Aliens Act 1980 (Belgium); Law on the Legal Status of Aliens (29 April 2004) No IX-2206 (Official Gazette No 73-2539, 3 April 2004) art 87 (Lithuania). In practice, however, it might be necessary to show some element of personal risk in order to meet the standard of proof.

35 eg UK Secretary of State's refusal of asylum on the basis of such violence, as recorded in the case of *Vilvarajah v UK* (1991) 14 EHRR 248 [13]: 'But it is noted that the incidents you have related were random and part of the army's general activities directed at discovering and dealing with Tamil extremists and that they do not constitute evidence of persecution'; see also [25], [40], [52], [62].

36 Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such

However, unlike the Qualification Directive, the Temporary Protection Directive is not automatically applicable to anyone satisfying the above definition; rather, it only takes effect if the Council of the EU decides, following a proposal by the Commission, that a mass influx exists.³⁷ This trigger mechanism, which enables its application to be controlled, may explain its more generous scope.

French jurisprudence on article 15(c) of the Qualification Directive suggests that a decision-maker must first establish the existence of an 'international or internal armed conflict', in accordance with the Additional Protocols to the Geneva Conventions, before proceeding to consider the applicant's substantive claim. This is despite the fact that during the drafting process, a reference to the 1949 Convention relative to the Protection of Civilian Persons in time of War was deleted.³⁸ One disadvantage of linking subsidiary protection to the Geneva Conventions or their Additional Protocols is that 'strictly applied, it would only cover armed conflicts that were conducted in violation of international humanitarian law norms'.³⁹ Accordingly, it would not encompass situations where the intensity of violence falls below the threshold required by an 'armed conflict'⁴⁰ - and thus outside the scope of international humanitarian law - even though individuals might be at risk for similar reasons. For this reason, it may be that article 15(b) comes to be relied upon as a fallback provision in cases where it is difficult to establish the existence of an armed conflict in accordance with international law. Similarly, although Canada does not expressly protect individuals fleeing from generalized violence, section 97(1)(b) may protect them in certain circumstances. Like article 15(c), that section requires that the risk faced by a claimant is personal and not faced generally by others in the country. The Immigration and Refugee Board suggests, and jurisprudence reflects, that in a situation of civil war, a claimant would have to demonstrate that 'the risk faced is not an indiscriminate risk faced generally in that country, but linked to a particular characteristic or status'.⁴¹ This does not preclude members of a large group of people from being recognized as 'protected persons', provided that the violence is directed at the group by virtue of its (real or perceived) characteristics, rather than randomly.⁴²

Persons and Bearing the Consequences thereof [2001] OJ L212/12 art 2(c).

37 Qualification Directive, art 5(1).

38 13354/02 ASILE 55 (23 October 2002) art 15(c) and 12620/02 ASILE 54 (23 October 2002).

39 H Storey and others, 'Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention?' (Joint ILPA/IARLJ Symposium, 6 December 1999) (copy with author) 15.

40 International Institute of Humanitarian Law, '14th Round Table on Current Problems of International Humanitarian Law' (San Remo 12-16 September 1989) 10 (Introduction by G Arnaut).

41 Immigration and Refugee Board (n 19) 3.1.7. See also Immigration and Refugee Board (Chairperson's Guidelines), Civilian Non-Combatants Fearing Persecution in Civil War Situations (7 March 1996).

42 In *Re WXY* [2003] RPDD No 81, it was held that 'the risk to his life and the risk of cruel and unusual treatment or punishment feared by the claimant is general to the whole population of Sierra Leone. That risk is linked to the civil war which has been fought in Sierra Leone since 1991, and which, according to the claimant and his counsel, can start again at any moment. However, since the alleged risk is not personal, but faced generally by the whole population, I conclude that the provisions of Section 97(1)(b) do not apply to the claimant.' See also *Re WVZ* [2003] RPDD No 106, in relation to a Sri Lankan claimant.

2. Standard of Proof

While much of the analysis of and commentary on the Qualification Directive has focused on the *qualitative* differences between ‘persecution’ (giving rise to refugee status) and ‘serious harm’ (leading to subsidiary protection status), it may be that in some cases - as has been the experience in Canada - procedural thresholds determine the applicability of one type of status over another. As discussed below, the Canadian courts have determined that a lower standard of proof applies to Convention refugee claims (under section 96), than to complementary protection cases (under section 97). In other words, it is easier to meet the well-founded fear of persecution standard applicable in Convention refugee claims (interpreted as meaning a ‘reasonable chance’ or ‘serious possibility’ of persecution⁴³), than the standard applied in section 97 claims, requiring the applicant to demonstrate that the risk of ill-harm on removal is ‘more likely than not’.⁴⁴

The standard of proof for subsidiary protection under article 2(e) of the Qualification Directive is ‘substantial grounds ... for believing’ that the applicant ‘would face a real risk of suffering serious harm’ if returned. It, too, is a higher threshold than the well-founded fear test for persecution, which generally falls somewhere lower than the ‘balance of probabilities’.⁴⁵ The ‘substantial grounds ... for believing’ standard derives from the case law of the European Court of Human Rights (on article 3 of the ECHR), the Torture Committee (on article 3 of the Convention against Torture), and the Human Rights Committee (on the ICCPR), and was deliberately selected in order to avoid divergence between international and Member States’ practice.⁴⁶ The ‘belief’ in the Qualification Directive does not relate to the applicant’s belief (unlike the applicant’s well-founded fear), but rather to the decision-maker’s judgment that substantial grounds (based on objective circumstances) exist for believing that the applicant would face harm. The Torture Committee has consistently held that ‘substantial grounds’ involve a ‘foreseeable, real and personal risk’ of torture. They are to be assessed on grounds that go ‘beyond mere theory

43 *Adjei v Canada (Minister of Employment and Immigration)* [1989] 2 FC 680, 57 DLR (4th) 153 (CA).

44 *Li v Canada (Minister for Citizenship & Immigration)* [2005] 3 FCR 239 (FCA) [27]–[29].

45 For example, in the UK, the test for a well-founded fear of persecution is a ‘reasonable likelihood’ of such danger: *R v Secretary of State for the Home Dept, ex parte Sivakumaran* [1988] AC 958 (HL). Article 7(b) of the original proposal for the Qualification Directive stated that well-founded fear was to be ‘objectively established’ by considering whether there was ‘a reasonable possibility that the applicant [would] be persecuted’. The Explanatory Memorandum noted that a ‘fear of being persecuted ... may be well-founded even if there is not a clear probability that the individual will be persecuted or suffer such harm but the mere chance or remote possibility of it is an insufficient basis for the recognition of the need for international protection’: See Commission of the European Communities Proposal for a Council 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 COM(2001) 510 final (12 September 2001) 15.

46 Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 25 September 2002 Doc 12148/02 ASILE 43 (20 September 2002) 5. The Netherlands supported Sweden’s argument that wording from decisions of the Torture Committee should be taken into account to avoid different rulings from different courts or bodies concerning similar situations: 12199/02 ASILE 45 (25 September 2002) 3 fn 3. See eg *Soering v UK* (n 17) [91]; Human Rights Committee, ‘General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ CCPR/C/74/CRP.4/Rev.6 (21 April 2004) [12].

or suspicion' or 'a mere possibility of torture',⁴⁷ but the threat of torture does not have to be 'highly probable'⁴⁸ or 'highly likely to occur'.⁴⁹ The danger must be 'personal and present'.⁵⁰ 'Substantial grounds' may be based not only on acts committed in the country of origin prior to flight, but also on activities undertaken in the receiving State.⁵¹ Furthermore, 'it is not necessary that all the facts invoked by the author [of the claim] should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable'.⁵²

Thus, if an applicant can demonstrate a 'reasonable chance' of serious harm amounting to persecution, in some cases it may be less onerous for him or her to try to show that the harm relates to a Convention ground, than to instead demonstrate that there are 'substantial grounds ... for believing' that he or she would be exposed to such harm if removed.

3. Comparative Statuses

Importantly, for the first time in a supranational instrument, the Qualification Directive codifies the rights of beneficiaries of subsidiary protection. However, the very name of the status they receive - subsidiary protection - reveals the hierarchical approach to protection that the Directive has entrenched, which is difficult to justify as a matter of law.⁵³ Furthermore, distinctions may encourage individuals granted subsidiary protection to attempt to 'upgrade' to Convention status, thereby creating additional litigation.

Although a differentiation between refugee rights and those of beneficiaries of subsidiary protection was always envisaged as part of the

Qualification Directive,⁵⁴ the latter were considerably reduced as part of a political compromise, rather than for any legal reason. Throughout the negotiations, a key stalemate was Germany's opposition to recognizing

47 *EA v Switzerland* Comm No 28/1995 (10 November 1997) UN Doc CAT/C/19/D/28/1995 [11.3].

48 Report of the Committee against Torture UNGA OR 53rd Session Supp No 44 UN Doc A/53/44 (1998) Annex IX.

49 *EA* (n 47) [11.3].

50 Report of the Committee against Torture (n 48) Annex IX.

51 *Aemei v Switzerland* Comm No 34/1995 (9 May 1997) UN Doc CAT/C/18/D/34/1995 [9.5].

52 *ibid* [9.6].

53 GS Goodwin-Gill and A Hurwitz, 'Memorandum' in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) (10 April 2002) [19], in House of Lords House of Lords Select Committee on the EU, *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office, London 2002) Oral Evidence 1-2; European Parliament, 'Report on the Proposal for a Council 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' (8 October 2002) Final A5-0333/2002, PE 319.971, 54 (see also comments of European Parliament Committee on Women's Rights and Equal Opportunities at 58); UNHCR's Observations (n 14) [46]; UNHCR, 'Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive' (March 2004) 2; UNHCR, 'Towards a Common European Asylum System' in CDU de Sousa and P de Bruycker (eds), *The Emergence of a European Asylum Policy* (Bruylant, Brussels 2004) 249-50; Amnesty International Irish Section, 'The Case for Complementary Protection' (January 2003) <<http://www.amnesty.ie/act/refug/protection.shtml>> (6 September 2003); Refugee Council (UK), 'Refugee Council's Response to the Home Office Consultation on Changes to the Policy of Issuing of Certificates of Identity' (February 2003) <http://www.refugeecouncil.org.uk/downloads/policy_briefings/cid_traveldocs.pdf> (12 April 2004); 'Explanatory Memorandum Submitted by the Home Office on Proposal for a Council 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 (2001/0207 (CNS))' in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) [22], in House of Lords (above) Oral Evidence 63.

54 Proposal (n 46).

non-State actors as agents of persecution for the purposes of refugee status. As the deadline for finalizing the Directive drew ever closer, Germany finally agreed to capitulate on the issue of non-State agents in exchange for considerably reduced rights for beneficiaries of subsidiary protection.⁵⁵ Three meetings in March 2004 ultimately secured agreement on a text which accepted many of the German demands, finalized on 31 March 2004.

Beneficiaries of subsidiary protection are entitled to some of the same rights as refugees, but there are also some significant differences. For example, they receive less extensive entitlements with respect to family unity, access to and length of residence permits, eligibility for travel documents, access to employment, social welfare and health care entitlements, access to integration facilities, and the rights of accompanying family members. The particulars of these differences are set out in **Annex I**.⁵⁶

By contrast, in Canada all 'protected persons' - Convention refugees, and those facing a personal risk of torture, or a personal risk to life or cruel and unusual treatment or punishment - are eligible to apply for permanent residence. In other words, they are eligible for an identical status. Accordingly, the Act does not itself set out a list of rights or entitlements.

55 Refugee Council (UK), 'International Protection Project Update' (September 2003) 2. Indeed, German commentators noted that the German government would have liked subsidiary protection to be set at the level of *Duldung* (tolerance), described as 'a non-status on the level of immigration rights': Pro Asyl, 'Council for Justice and Home Affairs in Brussels: Common EU Asylum System in Danger of Falling through because of Germany: Appeal to Chancellor Schroeder and Foreign Minister Fischer to Withdraw the German Reservations' (8 May 2003) <<http://www.proasyl.de/presse03/mai08.htm>> (6 September 2003).

56 For a more detailed analysis of eligibility and status, see McAdam (n 8).

4. Conclusion

Comparing the EU and Canadian models, it appears that the broader the eligibility criteria, the less extensive the status entitlements. In other words, there is an apparent 'trade off' between the extent of beneficiaries' rights and the class of people who may access them. The Qualification Directive may be wider in scope than the IRPA, but it differentiates between the rights of different types of protected persons. By contrast, the narrower qualification criteria under the IRPA give rise to an identical status.

Importantly, though, the Qualification Directive does not affect Member States' pre-existing obligations under international law.⁵⁷ The Directive's subsidiary protection categories are selective, and do not necessarily encompass the full range of persons to whom Member States may owe protection obligations and thus be precluded from removing.⁵⁸ The function of the Directive, then, is to provide a harmonized status for *certain* persons in need of international protection. It determines who is entitled to a *particular legal status* in Member States, rather than comprehensively mapping the extent of States' *non-refoulement* obligations.

Dr. Jane McAdam

⁵⁷ On the implications for States joining the EU post-10 October 2006, see M-T Gil-Bazo, 'Refugee Status and Subsidiary Protection under EC Law: The EC Qualifications Directive and the Right to Be Granted Asylum' (revised paper from 'How Much Freedom, Security and Justice?' ILPA, Justice and the British Institute for Comparative and International Law Conference, London May 2005) 5-7.

⁵⁸ For example, under the ECHR, CAT, and ICCPR, the prohibition on return to torture or inhuman or degrading treatment is absolute, no matter how abhorrent a claimant's conduct: eg *Chahal v United Kingdom* (1996) 23 EHRR 413. The Qualification Directive previously included a provision preventing an applicant's removal to a risk of a 'violation of a human right, sufficiently severe to engage the Member State's international obligations' (former article 15(b)), suggesting that the protection categories are not closed (on this point, see *Ullah v Secretary of State for the Home Dept* [2004] UKHL 26). The rights of 'other' persons with an international protection need remain ill-defined, and, as Vedsted-Hansen notes, they 'are likely to end up in a kind of *tolerated* situation in the actual Member State that may be prohibited from deporting them': J Vedsted-Hansen, 'Assessment of the Proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the Perspective of International Law' in D Bouteillet-Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant, Brussels 2002) 76.

ANNEX I

Differences between 'Refugee' and 'Subsidiary Protection' Status in the EU Qualification Directive

	Refugee status	SP status
Maintaining Family Unity (art 23)	Family members ¹ entitled to same substantive rights	Same entitlements, but States can define applicable conditions to such benefits, provided they guarantee 'an adequate standard of living'.
Residence Permits (art 24)	As soon as possible At least 3 years and renewable Family members: less than 3 years and renewable	As soon as possible At least 1 year and renewable
Travel Document (art 25)	Convention travel document	Travel docs at least for serious humanitarian reasons Only to those who cannot get national passport
Access to Employment (art 26)	May engage in employed or self-employed activities immediately after status granted	May engage in employed or self-employed activities immediately after status granted, BUT 'the situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law.'
Social Welfare (art 28)	Entitled to necessary social assistance on same terms as nationals	Entitled to necessary social assistance on same terms as nationals , BUT Member States may limit social assistance granted to beneficiaries of SP to core benefits.
Health Care (art 29)	Access to health care under the same conditions as nationals	Access to health care under the same conditions as nationals, BUT Member States may limit health care granted to beneficiaries of SP to core benefits
Access to Integration Facilities (art 33)	Provision for integration programmes considered to be appropriate to help integration into society	Where Member States consider it appropriate, access shall also be granted to integration programmes

¹ 'Family members' are defined in art 2(h) as: spouse or unmarried partner in stable relationship (where the national aliens law/practice treats them in the same way) and minor unmarried and dependent children. Art 23(5) permits Member States to grant rights to 'other close relatives' who: lived with the family in the country of origin; and were wholly or mainly dependent on the beneficiary of refugee/SP status.

THE FRENCH READING OF SUBSIDIARY PROTECTION

Vera Zederman

Second Report: FRANCE (A)

I. Presentation

1.1 Institutions

In 1954¹, France ratified the Geneva Convention on the Status of Refugees which provides for the international protection of persons meeting the definition of the term “refugee” as defined in article 1 of the Convention. We shall now take the institutions in charge of asylum as our starting point.

In France, the *Home Office* is in charge of entry and residency of all the aliens even the asylum seekers. All of them should ask the prefecture for a file and a provisional residence permit.

The Law of the 25th of July 1952 instituted an administrative establishment, the French Office for the Protection of Refugees and Stateless Persons (*OFPPRA*), who is dependant of the Foreign Office and a Commission which was not precisely defined in the text but has been defined, a few years later by the State Council as an administrative jurisdiction² : the French Refugee Appeals Board (*la Commission des recours des réfugiés*). It now explicitly appears in article L. 731-1 of the Admission and residency of aliens and Asylum code and a decision of the Constitutional Council of 4th of December 2003³ asserts that the independence of the Refugee Appeals Board vis-à-vis the OFPPRA is an essential guarantee for the right to asylum.

Initially made up of a single judgment group, from the beginning of the 80s, the Board had to be divided into sections. The number of sections varies according to the number of appeals. Thus, between 2002 and 2005, there was an increase of around forty to a hundred and forty. The sections are made up of a *President*⁴ (member of the State Council, an administrative tribunal body and administrative appellate courts, the Revenue Court or a legal magistrate) who presides over the hearings and ensures the order of the audience and designated assessors. One is by the United Nations High Commission representative in France for refugees among

1 Law No. 54-290 of 17 March 1954.

2 Decision of the 29th of March 1957, *Paya Monzo*

3 Decision No 2003-485 DC, preamble 40

4 Mr François Bernard since the 1st of April 2005

qualified people of French nationality, on notice from the Vice-President of the State Council, the other by the Vice-President of the State Council, chosen among qualified people proposed by one of the Ministries represented at the Office's Board of Directors.

This presence of UNHCR representatives on the Refugee Appeals Board is a unique feature of the French system. The Refugee Appeals Board is in fact the only jurisdiction in France on which a representative of an international organisation sits and has the right to vote.

Within the Board, there is a judgment group called *Reunited Sections* instituted by the decree of the 3rd July 1992 whose function is to settle questions of law that have no precedent and also to ensure the harmony of the case law. An affair may be brought before the Reunited Sections, either upon the initiative of the judgment group, or upon the initiative of the President of the Appeals Board. The Reunited Sections are normally chaired by the Appeals Board President and include the appeals section referred to, and two other sections designated annually.

The President, in addition to his overall responsibility in the smooth running of the Appeals Board, has three quasi-judicial functions. One is specific to him, that is the Presidency of the so-called above mentioned "Reunited Sections". The two others are similar to those of the Section Presidents: they include, on the one hand, the Presidency of any ordinary judgment group, and, on the other hand, allow the possibility, to reject appeals as obviously inadmissible unlikely to be covered at court proceedings or that present no serious elements likely to bring into question the motives for the decision taken by the General Director of the OFPRA.

A *General Secretary* appointed by the President of the Refugee Appeals Board, helps the President, as well as the three Vice Presidents appointed by the latter among the Presidents of sections, in their administrative functions and their control of the smooth running of the jurisdiction. An assistant secretary is in charge of the Clerk's Office, another of the administrative and financial management of the Refugees Appeals Board.

The sections benefit from the assistance of twelve *departmental heads* who organise the work.

They are assisted by *reporters* who are responsible for the inquiry into files of requests for grant of asylum but who have no voting rights (Art. 24, Decree of 14 August 2004).

There are *other departments*: legal aid, reception of the lawyers and inter-

preting, geopolitical department, the legal department and a department in charge of inadmissible claims. About 300 people, who are civil servants or have been recruited by contract, work in this jurisdiction.

1.2 Reform of the right to asylum

Since 1954 to 2003, the French authorities were bound by the sole Geneva Convention and organised temporary protections for some groups or gave a right to stay to persons in individual cases. The law of the 11th of May 1998, instituted the constitutional asylum: in accordance with the preamble of the Constitution of 1946, which concerns “any person persecuted because of his action in favour of freedom”. The constitutional asylum follows the same rules procedure and offers the same protection as conventional asylum, the only difference is the legal basis. The law also institutes territorial asylum. It is granted by the Home office, to any person who established that his or her life or liberty is threatened. *We shall speak later about these particular protections.*

Anticipating upon the adoption and the transposition of European directives⁵, the French legislator has, through its law of the 10th of December 2003, fundamentally modified the legislation applicable to asylum law. During its discussion before the Parliament, the new law has been presented as transposing « by anticipation the measures which, within the framework of these directives have been agreed upon by the Fifteen members of the European Union ⁶ ». In a communication, the Minister of Foreign Affairs explained that: “this project of reform falls within the European framework. It is inspired by directive proposals now being discussed in the field of asylum”.

The aims of the reform

- Give priority to processing outstanding cases (the number of outstanding cases had significantly increased during the last years)
- Organise individual meetings with asylum applicants, rationalize, analyse and improve the reception structures.
- Reduce the average time needed to process the applications.

The mechanism provided by the law of the 10th of December 2003 respects the principle put forward by the directive, as confirmed by the Hague program defined by the European Council in November 2004 and repeated in the Procedure Directive⁷ which aims to institute a « common asylum procedure », as well as a uniform status for people having been granted refugee status or subsidiary protection.

5 According to article 38 of the Qualification Directive of 20th of October 2004, it has to be transposed into law by the member states before the 20th of October 2006. But France has transposed most of its provisions in advance.

6 Report presented before the Senate by Mr. Jean René Lecerf

7 Adopted on the 1st of December, 2005

At present in France, when *the claimant claims « asylum »*, it includes both *protections* and each asylum application is subject to a single procedure.

The OFPRA and the Refugee Appeals Board should decide:

firstly on the right of the applicant to be entitled to the Convention status, and *secondly*, if the Convention status is not granted, on the right of the applicant to be entitled to the subsidiary protection.

The text:

Article L712-1 (Admission and residency of aliens and Asylum Code):

The Office (for refugees and stateless persons) grants subsidiary protection to asylum seekers who do not meet the requirements laid down by the refugee definition, but who have proved that they could be exposed to one of the following serious threats:

1. death penalty;
2. torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;
3. serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

1.3 General rules of Procedure

- *Deadline for the appeal:* asylum seekers have one month from the date they are notified of the decision to file an appeal. *A draft decree provides for a reduction of the delay to only fifteen days.*
- *A substantiated written application:* in its absence, the appeal is inadmissible. An appeal must set out the grounds of the appeal and be written in French.
- *A suspensive effect:* the appeal before the Board suspends the effects of the decision of reject of the General Director of the OFPRA
- *Hearing:* petitioners can present oral submissions before the Appeals Board and be represented by a lawyer. It's not compulsory, but the Appeals Board has a duty to inform the applicant of the possibility that is offered the seeker to be summoned to a public session in order to present his or her verbal observations and to summon to this hearing the applicant who requested it.
- The asylum seekers may be granted *legal aid* on three conditions: their legal entry into France, the limit of their resources and the appeal should obviously not be inadmissible.

- *Way of ruling*: the Refugee Appeals Board's appeal process is adversarial.
- Review is not on legal aspects, but also on the credibility of the statements. During its deliberations, the Appeals Board *bases its decision* to award refugee status and subsidiary protection *on all the information it has in its possession* at the time of its ruling, including information which the OFPRA did not have when it first ruled on the application.
- The decision by which the Appeals Board recognises refugee status is a *final judgement* but the decree of the 14th August 2004 *affords the General Director of the Office the possibility of referring appeals* to the Refugee Appeals Board when its *decisions have been taken on the basis of fraud*.
- The *decisions* of the Refugee appeals Board *can be overturned by the State Council*, for errors of law or procedure.

1.4 Origin of the subsidiary protection

The new law provides a subsidiary protection to the protection granted by the Geneva Convention, which is mainly inspired by the previous territorial asylum, « asile territorial »⁸.

This "asile territorial" was granted to the alien if he/she could prove that his/her life was threatened in his/her country or that he/she could be exposed to abuses in breach of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The new law is also inspired by the provisions of the directives, which provides that *subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention*. (cons.24).

There are nonetheless some *differences between the former territorial asylum and the new subsidiary protection*:

- *Firstly, the authority concerned*: the territorial asylum was granted by the Home Office, which is not usually in charge of the questions related to asylum but only in charge of the admission and residency of aliens. One could find here the reason of the failure of this kind of protection (only 11,6 % in 1998 persons have been protected by this way; 4,6 % en 1999, 3 % in 2000, 1% en 2001 and less than it in 2002 !).
- *Secondly, the scope of the territorial asylum*: it used to concern persons whose life was threatened or that could be exposed to abuses in breach of article 3 of the European Convention for the Protection of Human Rights and Fundamen-

⁸ law of the 11th of May 1998

tal Freedoms. Furthermore, the civil war wasn't recognised as a ground of protection.

- *Thirdly, the claimants concerned* : the former territorial asylum was instituted to protect above all Algerian citizens, who were threatened during the civil war but who couldn't benefit from the refugee status because of the French interpretation of the article 1A2 of the Geneva Convention: through this reading, when the persecutors were groups who didn't support the authorities, the notion of the government authorities inability or powerlessness to provide for the protection of its citizens, was not taken into account.
- *Fourthly, there was no connection between the Geneva Convention and territorial asylum*. Every claimant could successively ask for each kind of protection.
- *Fifthly, the new law targets the article 3 by interpreting it but doesn't define the burden of the proof, which seems to be different for each kind of protection. I shall return to that point later*.
- *Sixthly, the former system hadn't provided for exclusion clauses; a relevant example is the new case of exclusion if the presence on the French territory constitutes a threat to public order*.
- *Finally, another kind of protection, the constitutional asylum – the outcome of it is the refugee status - which was introduced by the law of the 11th May 1998, didn't succeed either in protecting such claimants. In a few cases, the Appeals Board has considered that the petitioner had to be regarded "as persecuted because of his action for freedom"⁹ .*

1.5 Special rules of procedure concerning the subsidiary protection and texts

- *The transposition*

In 2003, the French government considered that the Qualification Directive would be transposed by anticipation, by the new law.

In fact, he decided to organise the vote of a new law as soon as an agreement between the members of the European Union was concluded, in order not to be forced to continue to negotiations. Some authors consider that the provisions in the Directive could be used by the Member States as a way of lowering their existing standards or at least to maintain theirs.

⁹ For example, CRR, 22nd of December 1998, *Haddadou*

Moreover, some of the clauses of the directive have not been transposed. For example, article 10 d : the common definition of a particular social group (we shall speak about it later) or article 14 : “Member States may revoke, end or refuse to renew the status (...) (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present; (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State”. In accordance with the French system, the sole residence permit may be not renewed in this case.

As we shall see in more details later, the transposition concerning the definition of the subsidiary protection is not perfect.

- *The principle of the preliminary decision:*
In France, every appeal before an administrative jurisdiction has to be preceded by an administrative decision or act. The new law entered into force the 1st of January 2004. At this date, the OFPRA had not taken any decision about the subsidiary protection.

➤ *Consequences:*

When the administrative decision was taken before the 31st of December 2003, the Refugee Appeals Board couldn't examine the pending recourses regarding subsidiary protection but only regarding to refugee status. The section should declare that the demand of subsidiary protection was inadmissible or ask the administration to take a decision concerning subsidiary protection. Consequently, the Board took its first decisions about the criteria of the subsidiary protection more than six months after the law entered into force.

In addition, the Board had to specify in which conditions, it could examine the appeal filed by the beneficiary of the subsidiary protection who claimed refugee status. It settled that it was bound by the submissions of the applicant and couldn't withdraw the subsidiary protection in case of rejects¹⁰.

1.6 Statistics

Let's have a look at the statistics:

In 2004, almost 5000 Geneva Convention status were granted by the Refugee Appeals Board, on 39160 decisions.

And in 2005, 9599 refugee status were granted, on 62262 decisions of the Refugee Appeals Board.

¹⁰ Reunited Sections, 17th of December, 2004, Ms Louahiche

In the first six months of 2006, 185 people were granted subsidiary protection (in most cases under paragraph (b) of the Qualification Directive).

Let's compare them to the figures of the subsidiary protection:

In 2004, only 83 subsidiary protections were granted by the Office for refugees and stateless persons and the Refugee Appeals Board.

In 2005, 457 subsidiary protections were granted (108 by the Office and 349 by the Refugee Appeals Board).

It seems that the new law failed to institute a real new system of protection and to give the means to develop the new subsidiary protection. But comparing to the constitutional asylum, the first results of the subsidiary protection are promising. Every year since 1998, less than ten constitutional asylums are granted by the Refugee Appeals Board.

2. Case law

2.1 Death penalty

- Up to now, neither the OFPRA, nor the Commission have granted the subsidiary protection to a claimant at risk of death penalty.
- It is important to note that the law takes into account death penalty but not execution (art 15 a of the qualification directive).

The OFPRA and the Commission have considered that they have not had the opportunity to take a decision on an extra judicial death threat, even if some applicants put forward the risk of being killed (for example, fear of an honour crime). Concerning the execution, I would like to mention briefly that neither the difference between execution and death penalty, nor the difference of the wording between the Directive and the French law, have been underlined by its authors.

Let's take the example of an Iranian applicant who alleges that his mistress – a married woman - was exposed to a stoning, and his own serious harm. He fled alone but it would be interesting to know how the asylum judge would have appreciated the serious harm of the woman¹¹: Would it have considered that she was threatened with death penalty or inhuman and degrading treatment? We shall see later that the fear of a so-called honour crime is already considered as a fear of inhuman and degrading treatment. In my view, the consistency of this analysis is not certain.

Allow me to conclude this point by highlighting the fact that some claimants, fearing a death penalty, come within the ambit of exclusion clauses

¹¹ the case is going to come before the tribunal in a few months.

of the Geneva Convention, which have been transposed to the subsidiary protection. In which cases? We shall come back to this question later.

2.2 Torture or inhuman or degrading treatment

First of all, we must bear in mind that the French Refugee Appeals Board should refer to the experience and interpretation of other jurisdictions of the article 3 of the European of human rights convention:

Let me give the example of the case law of the *European Human Rights Court*. In the case, *Selmouni v. France*, 28th of July, 1999, the applicant complained that he had been subjected to various forms of ill-treatment. These had included being repeatedly punched, kicked, and hit with objects; he also complained that he had been raped. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. The Court considers *that this "severity" is, like the "minimum severity" required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim(...)*.

In the case of *Aksoy v. Turkey*, 18th of December, 1996 the police had identified the applicant as a member of the PKK. He was arrested and taken to custody. On the second day of his detention, he was stripped naked, his hands were tied behind his back and he was strung up by his arms in the form of torture known as "Palestinian hanging. The Court considers that article 3 makes no provision for exceptions and no derogation, even in the event of a public emergency.

In order to determine whether any particular form of ill-treatment should be qualified as torture, the Court should have regard to the distinction drawn by Article 3 between this notion and that of inhuman or degrading treatment. As it has remarked before, this distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering. In the view of the Court this treatment of "Palestinian hanging" could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. The Court considers that this treatment was of such a serious and cruel nature that it could only be described as torture. In addition, let's have a look at *the French case-law regarding deporta-*

tion. According to the law, (article L513-2 of the Admission and residency of aliens and Asylum code) : *an alien shouldn't be escorted back to a country where he or she has established that his or her life or liberty is threatened or where he or she is exposed to torture or inhuman or degrading treatment, in accordance with the Article 3.*

Regarding the administrative decisions about the country of return, the administrative judge checks the gravity of the threats which might result for example from a political activity¹², a cultural tradition¹³, or a particular sexual orientation¹⁴.

Compared to *the refugee status*, a constant police pressure, bullying or vexatious measures repeated to the point the person who is a victim thereof can no longer live normally, can constitute a persecution when they stem from one of the grounds listed in Article 1, A, 2 of the 1951 Refugee Convention. According to consistent case law, persecution or fear of persecution must furthermore be personal in nature¹⁵.

Concerning the definition of what amounts to a serious threat giving access to that protection, one should pay attention

firstly, to the fact that there is no substantial difference between fear of persecution and torture or inhuman and degrading treatment. In many cases, the risk of persecution is a risk of torture or inhuman and degrading treatment. Its gravity might be even sometimes lower. In this respect, the point to note is that for an equal risk, in other terms for the same degree of risk, the claimant may benefit from a lower protection.

Furthermore, the judge hasn't made the distinction yet between torture and degrading or inhuman treatment, in the light of the ECHR Court's jurisprudence and hasn't recognized yet a subsidiary protection based on the fear of torture. Apparently, the Board seems to be reluctant to implement it. In fact, there's a large difference between the check of the right to asylum and the check of the legality of an administrative decision concerning the sole residence permit.

Secondly, one should pay attention to the fact that the scope of the new subsidiary protection is defined in relation to the scope of the Geneva Convention and that the subsidiary protection should be only complementary to the Geneva Convention, regardless of the amount of the risk.

¹² Council of State, 23rd of February 2001, *Nouri*

¹³ Administrative tribunal of Lyon, 12th of June 1996, *Condé*

¹⁴ Council of State, 30th of May 2001, *Robles Alava*

¹⁵ Council of State, 21 May 1997, *Sahin*

To illustrate this point, let us consider the cases of *women submitted to violence*.

- It would be useful to consider the situation of *women fearing a genital mutilation* for themselves or their daughters. Before the entry into force of the new law, the Refugee Appeals Board decided to recognize such women as being refugees in accordance with the Geneva Convention, because they could be considered as members of a social group¹⁶. It is significant that the French definition of the particular social group doesn't result from the law, but from the case law of the State Council. Claimants may be considered as members of such a group when its members would be likely to be exposed to persecutions because of the common characteristics that define them in the eyes of the society and also because of the authorities' inability or powerlessness to provide for their protection. In the French meaning, the social group is also defined by the risks to which its members are likely to be exposed and, in spite of the definition of the new qualification directive - article 10d¹⁷ -, this definition is still valid.

Whereas, we have to remember that in France, before the decision of the Refugee Appeals Board, the administrative tribunals had already decided to define a female genital mutilation as an inhuman and degrading treatment¹⁸.

From my point of view, the basic problem in this context and after the adoption of the new law, was to decide if, henceforth, the Refugee Appeals Board should grant the sole subsidiary protection – which gives less guarantees than the refugee status – for these women, instead of the refugee status.

Finally, the judge made a distinction : he decided to confirm his first analysis and to reserve the subsidiary protection for the cases in which all the requirements provided by the case-law, were not fulfilled, for example when the authorities were fighting against FGM¹⁹.

- I might add that, when they are threatened with a *so-called honour crime because they have refused a forced marriage*, women are likely to be granted to refugee status or subsidiary protection, in accordance with the same framework. On the one hand, a relevant example is the case of women coming from Eastern Turkey, threatened by an honour

¹⁶ CRR, Reunited Sections, 7th of December, 2001, *Mr and Ms Sissoko*

¹⁷ The definition of a particular social group is provided for by article 10, d of the qualification directive which states that: "a group shall be considered to form a particular social group where in particular: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation".

¹⁸ Administrative Tribunal of Lyon, 12nd of June 1996, 96-00127, *Condé*

¹⁹ CRR, 16th of June 2005, *Miss Sylla* for a claimant coming from Sahel

crime if they refuse a forced marriage, without any protection from the authorities. These women are likely to be granted refugee status. On the other hand, a claimant coming from Cameroon is likely to be granted subsidiary protection when there is no infringement in her behaviour of the social rules.^{20 & 21}

To put it bluntly, it's difficult in these cases to make a distinction between the criteria of each protection. One may have doubts about the implementation of such decisions.

- Generally speaking, the situation of women, suffering from *domestic violence* at the hands of their partners or husbands is a matter of subsidiary protection²². Such kind of violence has already been regarded as an inhuman and degrading treatment, by the administrative judge. In spite of this statement, we must bear in mind that, before the new law, such women have also already been considered as refugees, because of their membership to a *particular social group* of a kind - hiding behind another name - or because their involvement in women's rights has been analysed as an action for freedom. In this case, they've been recognized as refugees on the basis of the constitutional asylum²³.

Crimes witnesses, victims of offenders and of the mafia and other cases

Let me give you some examples:

The OFPRA has granted subsidiary protection to crime witnesses, subjected to harassment by criminals (for example in Russia, in Ukraine or in Albania). Just consider, by way of illustration, the example of a young Algerian citizen who refused to perjure after a car's crash, in which the son of a police officer (in fact, a "gendarme") was involved. The harassment his parents were submitted to, was analysed as an inhuman and degrading treatment by the OFPRA. We shall see how the asylum judge has raised the question²⁴.

The French Refugee Appeals Board has granted subsidiary protection:

- to a Nigerian ill-treated by offenders, who wanted him to join their group,²⁵
- to an Ukrainian who was swindled out of his money by Tartar offenders,²⁶

20 CRR, Reunited Sections , 15th of March 2005, *Miss Tas*

21 CRR, Reunited Sections, 29th of July 2005, *Miss Tabe*

22 CRR, 28th of September 2005, *Ms Apleni Aguocha* (South Africa) ; CRR, 21st of March 2005, 493515, *Ms Gueye Reckoundji* (Democratic République of the Congo).

23 CRR, 25th of September 2003, *Ms Zouaouia Benaouda* for a Algerian teacher, threatened by Islamists or CRR, 27th of February 2003, *Ms Khanam Nipu Khan* for a women involved in several women rights associations in Bangladesh.

24 *Ms Louahche* op.cit.

25 22nd of December 2004, *Mr Umokoro*

26 3rd of February 2005, *Mr Fateyenko et Ms Okopski Fattyenkova*

- to Albanese claimants, mugged by a gang, or victims of a vendetta and of the « Kânun law». It's worth stressing that the *Kânun law* organizes a system of revenge, by which the family of deceased tries to recover her honour , by killing a member of the murderer's family.
- As the saying goes, those fears were not based on one of the grounds provided by the article 1A2 of the Geneva Convention and these claimants did not meet the requirements to obtain refugee status.²⁷
- To Chinese teenagers, victims of a prostitution network²⁸, helped in France by social services; one of them has given evidence to the police, as a witness. It's important to note that in this particular case, the law provides a special residence permit. It remains to be seen whether the judge of asylum is responsible for this question²⁹.
- To claimants who decided to expose criminal acts³⁰;
- Furthermore, the claimants who allege to have been sentenced for a non-political crime or a criminal offence, in the respect of the procedure, can't be regarded as fearing an inhuman or degrading treatment, on condition that the sentence isn't discriminatory and fits the offence.

2.3 Situations of armed conflicts

Definitions

A “**civilian**”: someone who does not participate directly to the conflict. Those persons may be direct targets of attacks, taken as hostages, forcibly recruited, made to do forced labour, or even deported³¹.

“**Internal or international armed conflict**”: this definition results from the Protocols additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I and II).

Protocol I article I (4) : The situations referred to in the preceding paragraph include *armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination*, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

²⁷ 4 th of February 2005, *Mr Ndreca* and 3rd of March 2005, *Mr Vukaj*

²⁸ 18th of March 2005, *Miss Liu*

²⁹ 8th of February 2005, *Miss Zheng*

³⁰ CRR, 8th of February 2005, *Miss Z.*; CRR, 2st of April 2005, *Mr Kahn*

³¹ Examples given by Marguerite Contat Hickel in her study: *Protection of internally displaced persons affected by armed conflict: concept and challenges*

Protocol II article I (1) : This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of the 12th of August 1949 without modifying its existing conditions of application, *shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts. Before the new law, when it appeared that the fears reported were the result of a general situation of insecurity, even on a conventional ground, case law had failed to apply the 1951 Refugee Convention³².

Concerning the threat against one's life because of the prevailing violence³³, resulting from a situation of an internal or international armed conflict, the new law could seem to be even more evasive in its writing than the Directive because it requires the existence of a threat recognised as **serious** and **individual** but also **direct**. On that matter, the refugee judge has already given its opinion on the prevailing situation in Iraq and in Haiti.

The Refugee Appeals Board considers that such situations should be recognised not by the ordinary sections but by the Reunited ones. It's reasonable to assume that this kind of assessment is a political one. In these cases, it turns out that the assessment of the United Nations or the European Union is conclusive.

³² For example, CRR, Reunited sections, 9 of October 1998, *Mr Maxamed* for a Somali national whose fears arose from the general situation prevailing in Somalia, divided into areas ruled by different clans and factions, and could not be imputed to the action of an organised power exercising *de facto* authority in the country

Or the example of a citizen of Sierra Leone, suspected to be a supporter of the united revolutionary front

³³ "Undiscriminate", according to the directive, CRR, Reunited Sections, 3 of July 1998, *Mr D*. According to the judge, the fears weren't based on one of the grounds of Geneva convention .

Case law

Case of militaries: in only one case, the French Refugee Appeals Board examined the case of a member of a group of Patriots (self-defence) in Algeria, threatened during the civil war. The Board decided not to consider him as a civil in the legal sense³⁴, because those groups were set up with the agreement of the authorities, *if at the beginning, they only had defensive activities, they also participated to insurrectionary operations*³⁵, *wearing uniforms and using the equipment of the security forces.*

Ivory Coast

In the case of a servant who used to work for the family of the former president Konan Bedie and who claimed that she was considered as a slave, the Refugee Appeals Board decided that she wasn't exposed in case of return to inhuman or degrading treatments or to another direct or individual threat by reason of indiscriminate violence in situations of international or internal armed conflict³⁶. More precisely, this motive is not really explained, in the decision.

Haiti

As I was saying, the Protocol to the Geneva Conventions of the 12th of August 1949, and Relating to the Protection of victims of non-international armed conflicts, *shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.*

2466 claimants coming from Haiti applied in 2005 before the French Appeals Board (an increase of 25%). 8,21% were given a protection.

The French Refugee Appeals Board had granted in a few cases subsidiary protection for the risk of degrading or inhuman treatment, for example in the cases of small shopkeepers swindled out of their money, by armed groups. It hasn't yet officially recognized a situation of instability and sporadic violence, which has not the intensity and gravity of a situation of armed conflict, in the meaning of the 1949 convention relating to the protection of victims of non-international armed conflicts.

However, the Board has also granted the refugee status for opponents³⁷ to the former president Aristide and, in these decisions, had taken into account the situation of general insecurity. This kind of decision blurs the distinction between the scope of Geneva Convention and the scope of subsidiary protection.

³⁴ this is written in a tacit way in the decision

³⁵ according to Amnesty International

³⁶ CRR, Reunited Sections, 25th June 2004, *Miss Koffi Amani*

³⁷ in 2005

Iraq

The Reunited Sections have considered that the context prevailing in Iraq was characterized by an indiscriminate violence in situation of internal armed conflict. They decided that this situation could be illustrated by terrorist attacks, serial killings and kidnappings, rapes and muggings and was a result of the conflict between the Iraqi security forces, the Coalition forces and some armed groups, under responsible command, that exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. In this context, an accountant, member of the presidential cabinet and of the Baath's party, can be considered as member of a group exposed to serious harms in case of return³⁸. The context and the authorities' inability to protect him prevail over the conventional grounds (political reasons). The same argument was followed for a Christian woman who was alleged to live without her family and to be wealthy³⁹.

Other cases

On one occasion, the Refugee Appeals Board took into account the situation of indiscriminate violence in the Darfur area⁴⁰ of Sudan, because of the current deterioration of security in Darfur including attacks by the *Janjaweed*. It's an acknowledged fact that the Janjaweed and the Sudanese armed forces were responsible for a campaign of ethnic cleaning and forced displacement by bombing and burning villages, killing civilians and raping women.

2.4 Family unity rule

In a few cases, the Refugee Appeals Board directly used the principles as laid down by the directive, by recognising that the family unity rule « principe de l'unité de famille » applies to spouses and minors of the person who is granted subsidiary protection. The Refugee Appeals Board thus ensures that « asylum as provided by the Alien's code and by the Council Directive of the European Union on the 29th of April 2004, assures to all the beneficiaries – those who have obtained refugee status or subsidiary protection – the guarantees which spring from the general principles of law applied to refugees ». ⁴¹ The case law, in order to be coherent, and has it had done for the refugee's family⁴² through the interpretation of the Geneva Convention's provisions, also insures to the beneficiary of subsidiary protection an equivalent protection.

38 CRR, Reunited Sections, 17th of February 2006, *Mr Alazawi*

39 CRR, Reunited Sections, 17th of February 2006, *Miss Kona*

40 CRR, 22nd of November 2005, *Mr Azzine Ahmed*

41 CRR, SR, 27th May 2005, *Mme A.*

42 CE, Ass., 2nd December 1994, *Mme A*

Concerning the residence permit, if subsidiary protection is granted, the refugee and his or her spouse will have the right to a renewable temporary residence permit (if the marriage took place before subsidiary protection was granted and the husband and wife have lived together continuously). When they reach the age of eighteen (or sixteen if they wish to work), children who were minors, will then have the same rights.

3. Legal points and perspectives

3.1 Limits (cases of exclusion, suspension and withdrawal)

Exclusion

Article L712-2:

The subsidiary protection shall not be granted to any person with respect to whom there are serious reasons to consider that.

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
- (b) He has committed a serious non-political crime outside the country of 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.*
- (d) His activity on the territory constitutes a serious threat for public order, public security or State's safety.*

Regarding to the cases of exclusion, what goes for the Geneva Convention applies equally for the subsidiary protection. It may concern the degree of personal involvement of the petitioner in the commission of such action, the gravity of these acts, or the notion of "serious reasons".

In its decisions, the Refugee Appeals Board excludes the petitioner not successively but at one go, from the benefit of the two protections. To illustrate this point, we can mention the case of individuals in charge of executing actions inconsistent with the goals and principles of the United Nations : an Iraqi, member of an armed group placed under the authority of the former president Saddam Hussein⁴³, responsible for the arrest of opponents, or in Turkey, the case of a member of "Ozel Tim", a militia responsible for violent acts against Kurdish activists⁴⁴.

On the other hand, the exclusion case for threat to public order, which concerns the sole subsidiary protection, has not been yet examined by the French office for refugees and stateless persons and by the Refugee Appeals Board.

⁴³ CRR, 17 th of October, *Mr Zian*

⁴⁴ CRR, 29th of April 2005, *Mr Cicek*

It's important to note that usually, the ordinary administrative judge rules on whether or not an alien is a threat to public order and has the right to have a residence permit.

However, in a few cases, in addition to its function as a jurisdiction, the Refugee Appeals Board examines petitions by individuals with refugee status who are the subject to one of the measures provided by Articles 31, 32 and 33 of the 1951 Refugee Convention and gives its opinions on whether to maintain or revoke such measures (*i.e.* escorting the refugees back to the border, deportation, house arrest, etc.). Only in such a case, the Appeals Board acts as an advisory administrative body and may assess the risk for public order⁴⁵. In this context, it will be able to make the most of its experience.

Suspension or Withdrawal

According to the article L712-3, *the OFPRA may refuse to renew subsidiary protection if the reasons that originally justified it no longer apply or the change of circumstances is of such a significant and non-temporary nature that the refugee's serious harm can no longer be regarded as well-founded.*

At any time, the benefit of the subsidiary protection may come to an end for one the motives of the article L712-2 (cases of exclusion)

For the moment, I don't have any case of withdrawal to present. But it's reasonable to assume that it would be a difficult task for the OFPRA to re-examine every year each subsidiary protection, which was granted or renewed the previous year, except for the case of the end of a civil war.

3.2. Geneva Convention and subsidiary protection: logic of the distinction, differences and common points

The main issue under discussion seems to be the distinction between the scope of the Geneva Convention and the scope of the subsidiary protection. Those two protections have some common criteria but not the same guaranties.

➤ On the one hand, *the definition of fear of persecution and serious harm are quite similar. The state's protection concept concerns the two protections: Provisions of the law of the 10th of December 2003 provide that the persecutions taken into account when granting refugee status and serious threats which can give rise to subsidiary protection can come from non state actors in the case where the authorities refuse or are not able to offer a protection.*

⁴⁵ Less than ten cases a year

The law provides the same *cases of exclusion*.

➤ On the other hand, the refugee status is based on the grounds provided by the Geneva Convention and the origins of subsidiary protection are defined by the law. A refugee has a ten years residence permit and the beneficiary of the subsidiary protection has a one year residence permit.

However, the difference between the grounds of Geneva Convention and the origin of subsidiary protection is not clear.

Let me give you the example of *situations of armed conflicts*. In these cases, the origin of a war is often a political, ethnical or religious ground. But the subsidiary protection can be examined only when the claimant does not meet the requirements provided by the Geneva Convention. In the example of Iraq, the case law seems to individualize the threat (which should be direct and individual) by using some characteristics that could be qualified as Geneva Convention's grounds. Who is likely to be threaten in Iraq? Women, Christians, supporters of the former regime...all members of groups at risk that could be analyzed in the light of Geneva Convention, but who weren't protected in the former system.

When it comes to the *social group*, the asylum policy which is carrying on, concerning the situation of women, is ambiguous. For a few years but before the implementation of the subsidiary protection, some of them have been considered as belonging to a group whose members would be likely to be exposed to persecutions.

Finally, the subsidiary protection sets a question mark against the so-called "*attributed political opinions*". According to the State Council, when the petitioner's activities, even when they have no political motive, are regarded by the government of his/her country of origin as a manifestation of political opposition, they're likely to result in persecution⁴⁶. Some claimants allege to be considered as opponents, because of their fight against corruption, for example against a corrupt authority. As I was saying, some of them may also be considered as victims of the mafia and now benefit from the subsidiary protection. Let's take the example of the Algerian family threatened because one of them refused to perjure. The origin of the threat was an ordinary car crash. But this family was continuously attacked, and harassed. Several court actions were brought against its members and finally the story was related in the newspapers. The continuity, the nature and the authors of the threats led the judge to consider that they were so treated unfairly because they were considered

⁴⁶ State Council, 27th of April 1998, *Mr. Beltaifa*

as opponents of the regime⁴⁷.

Does it mean that the scope of Geneva Convention is going to be redefined? We're still in the dark about this question.

Let's take the example of a woman who has fought for women's rights and fears for a life.

She could be considered as a refugee on the basis of constitutional asylum (for her action for freedom), on the ground of political opinions, as well as on the ground of membership of a particular social group. But she also could benefit from subsidiary protection because of the risk of death penalty or degrading or inhuman treatment, regardless of their origin.

To conclude

It's a bit early to draw conclusions on the effect of the new asylum rules, especially on the implementation of the subsidiary protection, which is not achieved.

From a practical point of view, the rationalisation of the procedure was aiming at reducing delays⁴⁸ - and to stop claimants using a wide range of procedures.

From a legal point of view, the reform isn't about to achieve, because the scopes of the each protection aren't completely separated.

The law gives the priority to the refugee status. The lawyers don't argue in favour of subsidiary protection. According to them, it's a secondary form of protection. The sections are tempted to grant it, when they decide to grant a protection, but haven't come to an agreement on the refugee status.

Should it be given up? I don't think so. The institution of this kind of protection is a progress. Before its institution, there was only a form of protection arbitrarily defined (the territorial asylum) and the control of the ordinary administrative judge was very limited. However, it has to be admitted that its criteria should be more precisely defined. Maybe, in an optimistic view, the subsidiary protection is only a stage towards a single system for the persons in need of a protection, whatever the reasons is. The issue is not the maintain the primacy of Geneva Convention. What is at stake is to give an efficient protection to the persons who need it.

Vera Zederman,
<http://www.commission-refugies.fr>

⁴⁷ Ms Louahche op.cit.

⁴⁸ From one year to less than six months for the procedure

THE 1951 GENEVA CONVENTION AND SUBSIDIARY PROTECTION: UNCERTAIN BOUNDARIES

Laurent Dufour

Second Report: FRANCE (B)

1. Particular Social Group and Subsidiary Protection: The Forced Marriage Example

Whereas political opinion, religion and ethnic belonging grounds are “invariant” concepts, PSG gives space for interpretation: its existence depends on a set of social, legal, and psychological factors at a given time in a given place. Logically, PSG, more than other grounds, is liable to be “invaded” by subsidiary protection. Our recent case law shows how the same kinds of cases lead to different protections depending on the analysis we develop on the country of origin. The *Tabé* case (29 July 2005, Reunited Sections, CRR) sets the standards in that matter:

“...Considering that women willing to avoid a forced marriage - namely concluded without their free and full consent - whose attitude is perceived by part or whole of the society of their country of origin as transgressing customs and laws in force and who are facing, for such reason, persecution that the authorities are unwilling or unable to prevent, must be regarded as belonging to a particular social group as defined by article 1A(2) of the Geneva Convention.

...Considering that, when those conditions are not fulfilled, especially when their behaviour is not perceived infringing social order, such women are nevertheless likely to face inhuman or degrading treatments (as defined by article 712-1 (b) of the Admission and Residency of Aliens and Asylum Code, the text that sets out the definition of SP).”

The following case, *Dolgor* (7 October 2005, CRR) is a direct application of the *Tabé* jurisprudence. The decision starts with the preliminary analysis of the consistency of the case with Geneva provisions:

“... It does not arise from examination that the attitude of the appellant, who escaped from a forced marriage, has been perceived by part or whole of the Mongol society as transgressing

customs and laws in force, such laws forbidding, moreover, the practice of forced marriage. Hence, the fear of the appellant, rooted in her behaviour, cannot be regarded as resulting from her belonging to a particular social group as defined by article 1A(2) of the Geneva Convention”.

The first stage of analysis completed, the judge still has to consider “eligibility” for SP:

“...In this particular case, it arises from both documentary evidence and declarations of the appellant that, in case of return to Mongolia, she would be victim of serious damages to her physical integrity, on behalf of her brother in law; considering that, because of the prominent position of her brother in law and of the strong reluctance of Mongol authorities to interfere in family conflicts, she is unable to avail herself of the protection of these authorities; she establishes being exposed in her country of origin to one of the serious threats mentioned by article 712-2 (b) of Admission and Residency of Aliens and Asylum Code”.

Ratio: Mrs Dolgor, a Mongol citizen, is granted SP because in her country, women refusing forced marriage do not form a PSG and are therefore outside the scope of the Convention. A close look at the arguments supporting this solution shows their relative frailty: while admitting that appellant is at risk to be killed by her brother in law without any possibility of effective state protection (the strong reluctance of the authorities), we reject the PSG ground because her behaviour has not been perceived as transgressive by...part or whole of Mongol society. Besides the extreme difficulty of judging, through a single case, the global perception of a society, we could infer from this decision that forced marriage is a Convention matter not only when authorities are reluctant to interfere, but when society approves the punishment, generally killing or severe ill-treatment, of the “guilty” woman.

Let’s have a look at an opposite ruling in the case of *Diallo*, (27 April 2006, CRR):

“...it arises from examination that even though the Guinean civil code demands consent of the woman to marriage, and that the penal code punishes forced marriage as a criminal offence, these legal provisions are not respected in the Middle-Guinea area, where the appellant comes from and where forced marriage is a common practice among the Peuhls. Therefore, in the conditions currently prevailing in some rural areas of the Middle-Guinea region in Republic of Guinea, the attitude of

Peuhl women, of Muslim belief, who intend to avoid forced marriages, is perceived by society as transgressive towards customs and Islamic law, these women being subject to persecutions inflicted with general approval of the population; ...that the women refusing forced marriages in these areas, such as the appellant, therefore form a group whose members are likely to face persecutions because of the common characteristics that define them in the eye of this fraction of Guinean society; ..those who ask for the authorities' protection are systematically returned to their husbands."

Mrs Diallo was granted Convention refugee status. It is not in the aims of this working paper to discuss or criticize these solutions: they might address different situations with different levels of danger but they can also result from a very subjective point of view, of an ethical kind, on the degree of compliance of such society with our accepted values. It can be observed that in the *Dolgor* case, allusion to the fact that national law forbids forced marriage is not followed, like in the *Diallo* case, by an enquiry on the degree of enforcement of these provisions: the subsequent statement on the reluctance of the authorities to "interfere" is nevertheless an implicit acknowledgement of a low degree of enforcement.

A common characteristic in gender cases (excision, forced marriage, marriage related ill treatments, sexual orientation, transsexualism) is that persecution is mostly the fact of the family cell or private parties of people. Authorities are in an ambiguous position, since many countries do have a legislative arsenal allowing, in theory, to prevent or punish gender persecutors. The problem seems to be that the legal framework does not fit comfortably with the customary framework, which appears, in the field, to be the "real law". Protection may be costly for the state, in the sense that it may break the peace among a whole community or area, especially when public authorities are fragile and rely heavily on the consent and allegiance of the tribes or communities that form the nation (e.g. the Guinean case is a good example: what would be the price for Guinean authorities to "intervene" against the will of the whole Peuhl community who reject Mme Diallo for her behaviour?). It is interesting to remark that in such cases we are defining, perhaps unwillingly, a social group of persecutors who punish a member of the group for violating the law of the group, much more than a particular social group subject of persecution.

The non-existence of the PSG who commands the SP analysis, is linked, in the *Tabé* decision, with the absence of a negative perception by a segment of the society, generally the "group" to which the claimant belongs. Therefore, SP tends to apply to more restricted conflicts, involving fewer

potential persecutors. This distinction is not purely theoretical since the PSG scheme implies that the outcast will not find protection anywhere else, which is not so in the “purely familial” SP case. We can pinpoint here a tangible difference with Canadian complementary protection, whose definition excludes the harm that can be avoided in another part of the country. It is also true that France has been until now extremely careful in applying the internal flight dispositions introduced by the 2003 law as a limitation clause for both refugee status and subsidiary protection (for the high standards set for what we call “internal asylum”: see *Boubrima*, (25 June 2004, Reunited Sections, CRR).

Armed Conflict: The Big Nowhere

(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.

It is reasonable to think that generalized violence calls for a specific response in the asylum perspective, because it raises the probability of harm and persecution to a very high level and lowers at the same time the degree of personal involvement or representativeness usually required in eligibility for refugee status.

It is also reasonable to think that the third case of SP envisaged by the Directive endeavours to fill a striking lack of protection.

Despite these good intentions, a close look at recent French jurisprudence reveals that, cornered in between the Convention refugee and the “en masse” war refugee, the beneficiary of SP (c) still has to be clearly identified.

The 1951 Refugee Convention, although born of the major 20th century armed conflict, was not apparently conceived to encompass the countless individual consequences of wars. As far as we can remember, the eligibility enquiry for those fleeing an armed conflict always proved to be uneasy. Mass movements and generalized violence, which characterize conflicts, alter the meaning and use of the Convention grounds. Through the years, it has been a very common ruling in CRR decisions to reject claims because the harm feared, although obviously well-founded, was not personally aimed at claimants. This “general situation” doctrine has been applied to a vast range of troubles, from mere “civil unrest” to the full “classic” war. This solution was formalized in different ways:

“...state of war is not a situation encompassed within dispositions of the Geneva Convention”, (*Miss Abbas-Akarim*, 10 February 1984, in the Iran-Iraq war context).

“...the threats alleged by the appellant result from the political and military current crisis in Lebanon. Whatever serious they may be, dangers arising from a civil war do not constitute risks of persecutions in the sense of the Geneva Convention.” (*Zein El Abiddine*, 13 June 1985, for the Lebanese civil war).

These blunt statements were somewhat tempered, by the Supreme Administrative Court, Conseil d’Etat, in a set of Yugoslavia-related cases. In *CE* (12 May 1997), *Miss Strbo*, the High Court took the first step:

“...considering that, in her claim for refugee status, *Miss Strbo*, limited herself in stating that, being of Bosnian nationality, she could not envisage returning to the city of Sarajevo, because of the events who were then taking place, namely the siege of the city and the bombings of Serbian forces; that if the situation prevailing at that time in Sarajevo could possibly reveal fears of persecution in the sense of article 1A(2) of the Geneva Convention, *Miss Strbo* did not allege any fear of persecution of a personal character but based her fear merely on the general situation in that city.”

War is no more “excluded” from the Conventional provisions, as it could be inferred from the Lebanese and Middle East case law of the eighties. But what would be such a “personal” fear of persecution in this context? In *CE* (12 May 1997), *Mrs Adamovic*, quashed the negative decision of the CRR for not having considered the allegation of the appellant that she had just scraped out from an attempt that killed one of her colleagues and having based its decision on the fact that “...the argument of the general situation in her country, whatever tragic it might be, cannot found her claim since the Geneva Convention demands personal fears...”.

This recall of past case law is not without motive: the personalized fear in midst of a besieged city seems a prefiguration of the requirement in SP (c), that the threat has to be individual. The 2003 French legislator made the requirement even harder in order not “to leave the gates open”: the threat has to be “direct, serious and individual”. What an individual but not direct threat could be remains to be explained. In any case, besides this minor point, the real difficulty for a coherent application of SP (c) derives directly from the hierarchical order of protections set out by the Directive, and the order in examining the claim it implies. SP (c) may be

granted only if the claim has been rejected on the Convention basis. As we just said, the Conseil d'Etat holds that a situation of armed conflict can "possibly reveal fears of persecution according to article 1A(2) of the Geneva Convention". This means that the existence of an armed conflict is not an obstacle to refugee status recognition and that SP (c) is not necessarily the standard for those fleeing from a war. It is not therefore possible to motivate on the mere consideration that a war or a civil war is outside, whatever personal reasons, the scope of the Convention.

The matter becomes even more awkward when Convention reasons are put forward by the appellant to justify his or her fears. If, by one way or another, we manage to put them apart at the first stage, we will necessarily find them at the second stage, as individualizing factors: the great divide between Convention status and SP, namely the absence of grounds for SP, seems to be completely blurred (see the Iraqi cases mentioned above in "the French reading of Subsidiary Protection", *Miss Kona and M. Alazawi*, 17 April 2006, Reunited Sections, CRR).

Such a double-bind system can only work for someone having non-Convention individualizing reasons to be threatened in a situation of generalized violence. In the case of a Darfur Sudanese claimant, *Azzine Ahmed* (22 November 2005, CRR) the decision-maker did not believe that the claimant's political involvement with Equity and Justice Movement rebels justified the claim, nor that his problems may have been caused by one of the other reasons of article 1A(2). When dealing afterwards with SP, the judge stated that "...because he was facing, once again, a serious direct and individual threat against his life (from Janjawid "Arab" militias acting on behalf of the Khartoum government) by reason of his noteworthy and well-off position, he fled the situation of generalized violence resulting from the armed conflict currently taking place in Darfur..."

After remarking on the consistency of that conflict with the criteria set by article 3 of the 1949 Geneva Conventions, the judge granted SP on the basis of article (c) of the Qualification Directive. There is something laborious and uneasy in this qualification, simply because we have to present the individualizing factor as clearly non-Conventional, which is not so obvious in this particular case.

In a more recent ruling (*Miss Rincon Perez*, 29 September 2006, CRR) the applicant, a young Colombian woman was granted SP (c) because she was seriously threatened by the FARC rebels due to her being an accountant and a member of a landowning, cattle-breeding family.

It is remarkable that in both cases the SP individualizing factor could have been easily considered as a Convention ground: ethnic rivalries encouraged for political intentions in the Sudanese case, membership of the social group of landowners, politically targeted by Marxist FARC as “class enemy” in the Colombian ruling.

It is obviously too early to predict the fortune of SP (c). French judges seem reluctant to use it when they are convinced that a claim is well-founded: Colombian, Afghan, Iraqi or Sudanese claimants are commonly granted refugee status, which makes, in return, the difference between the two protections even less understandable. If the present trend continues, it will remain a marginal instrument.

It falls within the traditional purposes of jurisprudence to provide a “constructive” interpretation of uneasy or unclear legal provisions: a smoothing of the individualizing factor could perhaps reduce the inherent contradiction of the concept and increase its legitimacy as a protection instrument.

Laurent Dufour

COMPLEMENTARY REFUGEE PROTECTION IN CANADA: The History and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)¹

Jessica Reekie,
under the supervision of Madam Justice Carolyn Layden-Stevenson

Third Report: CANADA

On June 28 2002, Canada's *Immigration and Refugee Protection Act (IRPA)*² came into force and introduced an "expanded and consolidated" mandate for the country's refugee determination system.³ Under the former *Immigration Act*,⁴ refugee claimants appeared before a panel of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB), where their claims for refugee status were assessed based on the five enumerated grounds in the *Refugee Convention*.⁵ The *IRPA* expanded the IRB's jurisdiction and enabled the CRDD's successor – the Refugee Protection Division (RPD) – to confer refugee protection on both "Convention refugees" and the newly created class of "persons in need of protection."⁶

1 This paper addresses Canada's refugee law and policy for in-land refugee claims and does not address Canada's overseas refugee program (i.e. refugee resettlement). Other immigration programs and policies which have "complementary protection aspects" to them, but do not form part of the Canadian in-land refugee protection system (i.e. matters strictly within the mandate of the Immigration and Refugee Board), are also beyond the scope of this paper. These Citizenship and Immigration Canada (CIC) programs include applications assessed on "Humanitarian and Compassionate" grounds and Pre-Removal Risk Assessments (PRRAs).

2 S.C. 2001, c. 27. The tabling of the *Immigration and Refugee Protection Act* (originally Bill C-31) occurred in April of 2000. In February of 2001, *IRPA* was reintroduced as Bill C-11. The new bill introduced changes addressing concerns over the initial Bill C-31. This bill received royal assent in November of 2001.

3 In a presentation to the Canadian Bar Association in May of 2001, Peter Showler (then Chairperson of the Immigration and Refugee Board) explained the upcoming changes to the refugee determination system under the new *IRPA*. He used the term "expanded and consolidated grounds" to refer to the Board's newly revised authority to grant protection. A copy of his speech can be found online at: http://www.irb-cisr.gc.ca/en/media/speeches/2001/cba_e.htm

4 R.S.C. 1985 c. 1-2.

5 *Convention Relating to the Status of Refugees*, (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Can. T.S. 1969 No. 6. The five enumerated grounds in the *Refugee Convention* are: race, religion, nationality, membership of a particular social group and political opinion.

6 This jurisdiction is found in para. 95(1)(b) of the *IRPA*. Section 96 of the *IRPA* encapsulates Canada's international obligations under the *Refugee Convention*, while s. 97 articulates the criteria for finding a "person in need of protection":

96. 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.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

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

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

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

The new class encompasses claimants whose return to their home country would subject them personally to torture, or would constitute a risk to life, or a risk of cruel and unusual treatment or punishment. Successful refugee claimants in either class (Convention refugee under section 96, or “person in need of protection” under section 97 of the *IRPA*) become “protected persons”⁷ under Canadian law and may apply for permanent residence status in Canada.

While the *IRPA* extended the IRB’s mandate and allowed its members⁸ to consider grounds other than those historically applied through the *Refugee Convention*, the notion that the Canadian refugee definition was expanded in 2002 is misleading. The mechanisms to grant protection to claimants who faced torture or a risk to life or a risk of cruel and unusual punishment existed under the previous *Immigration Act*. However, these risk assessments were conducted through a process unaffiliated with the IRB.⁹ Previously, ministerial delegates or immigration officials evaluated the risk to life or risk of cruel and unusual punishment faced by failed refugee claimants as part of an assessment under the Post-Refugee Determination in Canada Class (PRDCC). Thus, in reality, the change in *IRPA* constituted an effort to consolidate and streamline a process, which under the predecessor Act, was fragmented into different levels of decision-making.

Although parliamentary committee debate in the period leading up to the enactment of *IRPA* confirms that changes to the refugee determination process under the new Act were aimed at consolidation rather than expansion of refugee protection in Canada,¹⁰ the efforts to streamline the refugee determination process have contributed to a greater entrenchment and prominence of non-Convention refugee protection in Canada. Under the former PRDCC, determinations, unless judicially reviewed by the Federal Court, were virtually invisible while those of the IRB were reported and constituted a body of significant jurisprudence. The consolidation of the refugee protection grounds in *IRPA*, in essence, has elevated complementary protection by according it a status similar to that of Convention refugee protection. Although the jurisprudence on section 97 is still in its infancy, an analysis of over 300 reported RPD decisions since *IRPA*’s enactment indicates that complementary protection in Canada is serving

7 *IRPA*, ss. 95(2).

8 In Canada, those who adjudicate the refugee claims of persons seeking protection are referred to as RPD “members.” Part 4 of the *IRPA* outlines the administrative structure of the IRB. An organizational chart of the IRB can be found online at: http://www.irb-cisr.gc.ca/en/about/orgchart/index_e.htm. A brief overview of the RPD (including its mandate and process) can also be found online at: http://www.irb-cisr.gc.ca/en/about/publications/overview/index_e.htm#rpd.

9 In a Legislative Summary on Bill C-11, the Parliamentary Research Branch highlighted this fact, explaining that the proposed new act *consolidated* rather than expanded Canada’s refugee protection process. (Parliamentary Research Branch, *Bill C-11: The Immigration and Refugee Protection Act* (Legislative Summary) by Jay Sinha and Margaret Young, Law and Government Division (Ottawa: Library of Parliament, 26 March 2001, revised 31 January 2002) at 29.) A copy of this Legislative Summary can be found online at: <http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/summaries/c11-e.pdf>.

10 Canada, Parliament, Standing Committee on Citizenship and Immigration, Minutes of Proceedings (14 June 2000) at 1655 and 1720 (Ms. Joan Atkinson, then Acting Deputy Minister, Policy and Program Development, Department of Citizenship and Immigration); Canada, Parliament, Standing Committee on Citizenship and Immigration, Minutes of Proceedings (28 September 2000) at 940 (Mr. Peter Showler, then Chairperson, Immigration and Refugee Board).

to provide protection for refugee claimants outside the scope of the *Refugee Convention*. This paper will examine some of the trends which have developed in the last four years and highlight, in particular, two recent developments in the section 97 jurisprudence from the Federal Court and the Federal Court of Appeal.

Background

As a decision-making body, the now defunct CRDD was not created until 1989. Although Canada became a signatory to the 1951 *Refugee Convention* and its 1967 Protocol in 1969, until the IRB's creation in 1989, refugee determinations did not include an oral hearing. In 1985, the Supreme Court of Canada held that the requirements of fundamental justice necessitated the provision of an oral hearing for the determination of refugee claims.¹¹ Writing for the majority of the Court, Madam Justice Bertha Wilson stated:

[E]ven if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing

[T]he absence of an oral hearing need not be inconsistent with fundamental justice in every case. My greatest concern about the procedural scheme envisaged by ss. 45 to 48 and 70 and 71 of the Immigration Act, 1976 is not, therefore, with the absence of an oral hearing in and of itself, but with the inadequacy of the opportunity the scheme provides for a refugee claimant to state his case and know the case he has to meet.¹²

In response to this decision, a quasi-judicial body (the CRDD of the IRB) was created and tasked with the responsibility of providing oral hearings for people seeking protection under the *Refugee Convention*. Failed refugee claimants received an automatic review to determine if they would be subject to "unduly harsh or inhumane treatment in the country to which they were to be removed."¹³ Although this review did not encompass an oral hearing, it responded to concerns for claimants who did not conform to *Refugee Convention* criteria, but who would nevertheless face a personal risk of serious harm if removed from Canada. In 1993, the former Act was amended to create the Post-Refugee Determination in Canada Class

11 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11; [1985] 1 S.C.R. 177.

12 *Ibid.* at paras. 59-60.

13 Regulatory Impact Analysis Statement, SOR/DORS/93-44, Canada Gazette Part II, Vol. 127, No. 3, at pp. 653-661.

(PRDCC).¹⁴ In 2002, *IRPA* expanded the IRB's jurisdiction to include the areas previously assessed by immigration officials under the PRDCC. Canada's refugee protection system now has three grounds of protection available to claimants fleeing persecution, torture, risk to life, or risk of cruel and unusual treatment/punishment.

The Application of section 97 in Canadian Refugee Protection Jurisprudence

Section 97 of the *IRPA* provides for two distinct branches of complementary refugee protection. Under paragraph 97(1)(a), claimants may succeed in their refugee claims if they establish that removal from Canada would subject them personally to a danger of torture (within the meaning of article 1 of the *Convention Against Torture (CAT)*).¹⁵ They may also succeed under paragraph 97(1)(b), if removal from Canada would subject them personally to a risk to life, or a risk of cruel and unusual treatment or punishment. For both branches of section 97, the burden of proof is on the claimant and the legal test applied by the RPD member when assessing the claim, is "balance of probabilities."¹⁶

With respect to claims involving torture, both domestic and international jurisprudence has informed the determinations of the RPD.¹⁷ The definition of torture mirrors that of the *CAT*, and it encompasses severe physical or mental pain or suffering intentionally inflicted upon the claimant for such purposes as: obtaining information or a confession; punishment for an act committed; intimidation or coercion. Additionally, the purpose of the torture could be for any reason based on discrimination of any kind. State involvement (or complicity) is required to sustain a claim although an exception exists in relation to punishment arising from lawful sanctions. Claimants must demonstrate that the feared torture is prospective and that they would be subjected personally to this danger of torture. It is insufficient to allege broadly, without more, that torture is practiced (in general) in the country to which the claimants would be removed.¹⁸ The "country of reference" element to a paragraph 97(1)(a) claim is no different than that required under section 96: claimants must establish a danger of torture in their country or countries of nationality. For stateless claimants, the danger of torture must be in reference to his or her "country(ies) of former habitual residence."¹⁹

¹⁴ *Ibid.*

¹⁵ *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, Can. T.S. 1987 No. 36.

¹⁶ This issue will be covered in more detail in another section of this paper.

¹⁷ The Legal Services of the IRB provides a very helpful legal guide to the interpretation of para. 97(1)(a) claims. An electronic copy of this legal guide can be found online at: http://www.irb-cisr.gc.ca/en/references/legal/rpd/cgrounds/torture/cgtorture_e.pdf.

¹⁸ *Ibid.* at pp. 17-18.

¹⁹ *Ibid.* at p. 17.

There is no general requirement to seek state protection in claims of alleged torture because the definition of torture itself specifies that the state is either directly or indirectly involved in the abuse. However, the issue of state protection may arise when the torture is not so widespread that it involves “all of the state apparatus.”²⁰ With respect to the availability of an internal flight alternative (IFA), paragraph 97(1)(a) “implicitly requires proof of the absence of an IFA for protection to be granted... a danger of torture must be shown to exist throughout the territory of the country of reference.”²¹

For refugee claims arising from a risk to life or risk of cruel and unusual treatment or punishment under paragraph 97(1)(b), the lengthy wording of the legislation enumerates the conditions upon which protection is conferred.²² Interpretation of this section draws upon both domestic and international jurisprudence, and includes Federal Court judicial reviews of PRDCC decisions. The “country of reference” requirement that is common to both Convention refugee claimants and those who claim a danger of torture, is identical to that under paragraph 97(1)(b).

The risk faced by a claimant under paragraph 97(1)(b) must be personal and not one faced generally by others in the country, i.e., “there must be some particularization of the risk to the person claiming protection as opposed to an indiscriminate or random risk faced by the claimant and others.”²³ As with Convention refugee claims, the requirement that a claimant rebut a presumption of state protection applies in s. 97(1)(b) claims.

A distinction exists with respect to IFA in that paragraph 97(1)(b) claims will fail if an IFA exists anywhere in the country. Under section 96, the possibility of an IFA is subject to a “reasonableness element.” The language of paragraph 97(1)(b) mandates that the risk must be faced by the claimant in every part of that country. Thus, both grounds under section 97 incorporate a more demanding IFA test than that applied in section 96 claims. Finally, under paragraph 97(1)(b), the legislation stipulates that the risk cannot be inherent or incidental to lawful sanctions, and it cannot arise from inadequate health or medical care.

The most notable distinction with respect to paragraph 97(1)(b) claims relates to the inapplicability of nexus and state involvement in claims involving risk to life or risk of cruel/unusual treatment or punishment. Unlike Convention refugee claims, paragraph 97(1)(b) claims do not require

20 *Ibid.* at p. 23.

21 *Ibid.* at pp. 23-24.

22 This ground of refugee protection, as outlined in the IRPA, has much in common with the regulations governing the PRDCC under the former *Immigration Act*. As is the case for claims based on danger of torture, the Legal Services of the IRB provides a legal guide to the interpretation of para. 97(1)(b) claims. An electronic copy of this legal guide can be found online at: http://www.irb-cisr.gc.ca/en/references/legal/rpd/cgrounds/life/cglife_e.pdf.

23 *Ibid.* at p. 9.

a “nexus” between the fear of persecution and an enumerated *Refugee Convention* ground. Additionally, the requirement of state involvement or complicity under claims pursuant to a danger of torture, does not apply in paragraph 97(1)(b) claims. Despite the absence of these two requirements, early predictions as to the scope of paragraph 97(1)(b) suggested that it would not provide the broad ground of protection that refugee advocates had hoped for:

The scope of s. 97(1)(b) appears to be very narrow. Who exactly will benefit from a determination under s. 97(1)(b) remains to be determined but it seems that the provision will benefit mainly those claimants who are unable to establish a nexus to the Convention refugee definition and who face a risk which is not generalized or due to inadequate health or medical care. Section 97(1)(b) does not appear to broaden the scope of coverage of claims arising out of civil war situations. Likewise, persons who may have an IFA available to them do not appear to benefit from a more liberal interpretation of that concept under s. 97(1)(b) than exists under Canadian jurisprudence for Convention refugees. Lastly, s. 97(1)(b) is not intended to grant protection on the basis of humanitarian and compassionate grounds.²⁴

Positive section 97 Claims

Regrettably, an informed analysis of positive refugee claims is limited because many positive decisions by members of the Refugee Protection Division (RPD) are brief, delivered orally, and are not reported. Negative determinations are often lengthier decisions and yield more detailed analysis of refugee claims. In circumstances where claimants seek protection under both sections 96 and 97, but a positive determination can be made under section 96, the presiding member will decline to assess the section 97 claim, it being superfluous to do so.²⁵ Subject to these limitations, a survey of reported positive decisions, which include a section 97 analysis, indicates that these claims are most often successful when nexus cannot be established with respect to an enumerated *Refugee Convention* ground.²⁶

In *Re E.Y.L.*,²⁷ the RPD member granted refugee protection to a claimant, when his return to Cambodia would possibly subject him to being falsely accused of a high-profile crime, tortured into confession by government

²⁴ *Ibid.* at p. 11.

²⁵ For example, in *Re I.V.H.*, [2004] R.P.D.D. No. 57, the Colombian claimant sought protection pursuant to s. 96 and s. 97. The RPD member determined that there was a “reasonable chance that the principle claimant [would] be persecuted by the ELN by reason of his pro-government/anti-ELN political opinion” if he were to return to Colombia. She concluded, “having found that the claimants are Convention refugees, I did not assess their claims to be persons in need of protection due to a risk to their lives or of cruel and unusual treatment or punishment or torture.”

²⁶ Of the 13 positive decisions where the RPD member granted protection pursuant to s. 97, 11 (84.6%) were based on lack of nexus under s. 96.

²⁷ [2002] R.P.D.D. No. 187.

authorities and victimized by mob violence. The decision described the claimant as “a member of a group who is falsely accused of a crime and does not have political connections or financial resources in Cambodia.” The RPD member concluded that this particular group did not constitute a “social group” within the meaning of *Refugee Convention* jurisprudence. Thus, nexus was not established. Rather, the claimant was found to be a person in need of protection on the basis of both paragraph 97(1)(a) and paragraph 97(1)(b), because the criteria for these grounds were satisfied on the facts of the case.

In *Re M.Q.F.*,²⁸ the nine-year-old claimant was found to be a person in need of protection on the basis of risk to life (paragraph 97(1)(b)) after the RPD member determined that the child’s claim fell beyond the scope of the *Refugee Convention*. Born in Haiti and brought to Canada at the age of four (by a woman who turned out not to be his biological mother and who later abandoned him in Canada), the child’s counsel claimed Convention refugee protection on the basis of membership in a social group. The RPD member determined that there was no nexus. Protection was granted under paragraph 97(1)(b) because the child’s life would be at risk, if removed from Canada, in that the identity of the child’s parents / family was unknown and the documentary evidence indicated that upon return to Haiti, he would become a street child, prey to prostitution and homelessness.

Other positive section 97 decisions – where lack of nexus was noted – included those where the claimant was a target of a blood feud in Albania²⁹ and where a claimant was convicted *in absentia* (in Myanmar) for an assault, which occurred while defending his sister from an attempted rape by two soldiers.³⁰

Within this category of decisions – where lack of nexus is recognized and section 97 is invoked to grant protection to those falling outside the parameters of the *Refugee Convention* – a small group of refugee claimants, sometimes referred to as “victims of crime,” appears to be developing within the RPD jurisprudence.

In *Re I.D.Q.*,³¹ the claimant alleged persecution on the basis of perceived political opinion. The RPD member determined that the agents of persecution in Colombia were not members of paramilitary units, but “common criminals” who made several attempts to kidnap the claimant’s children for purposes of extortion. Since the kidnappers were not motivated by the claimant’s political opinions, nexus did not exist and the claimant was not a Convention refugee. Refugee protection was nevertheless granted under

28 [2004] R.P.D.D. No. 87.

29 *Re E.A.N.*, [2004] R.P.D.D. No. 11.

30 *Re I.O.S.*, [2003] R.P.D.D. No. 108.

31 [2002] R.P.D.D. No. 189.

paragraph 97(1)(b) as the RPD member found that neither adequate state protection nor the possibility of an IFA existed.

In a similar case, the RPD member found the refugee claimant's fear of persecution to be credible, but maintained that her persecutors in Guatemala were not concerned with her perceived political opinion because they were likely common criminals who wanted to "know the details of her late husband's transactions." Accordingly, the member determined that although nexus was not established, the application of paragraph 97(1)(b) could be used to grant the female claimant protected status as a person in need of protection.³²

In another claim arising from Colombia, paragraph 97(1)(b) protection was conferred on a claimant due to his position as a well-to-do businessman who was subjected to a series of extortions by criminals. The RPD member noted that the documentary evidence indicated that "extortion in the Colombian context, [had] the potential for serious harm, including a possible risk to life." State protection was not available because the evidence on record indicated that Colombia's security forces were currently overwhelmed and did not have the ability to deal with the crimes experienced by the claimant.³³

Three similarly successful "victim of crimes" claims under section 97, originate from Jamaica,³⁴ Haiti,³⁵ and Bangladesh.³⁶ In the Jamaican case, the claimant's status as a "victim of crime" and an "informant/witness to a crime" justified the need for protection. The claimant was in Canada with no legal status when he, by chance, witnessed a shooting. Threatened by the "criminals" (also of Jamaican origin) who were aware of him having witnessed the crime, the claimant reported the threats to the police. The police assured him these "criminals" could not harm him while they were detained. Satisfied that they could not carry out their threats, the claimant was persuaded to testify at the murder trial. The accused persons were convicted and given 25-year sentences. The claimant was subsequently deported to Jamaica where he faced threats and physical attacks from friends of the men against whom he had testified in Canada. Unable to obtain protection from the police in Jamaica, the claimant fled to Canada and claimed refugee status. The RPD member found a lack of nexus, but determined that the claimant's life was at risk in Jamaica "because he [had] been labelled a 'rat' and that should he return there, the promised death sentence [would] be eventually meted out." The claimant was then granted refugee protection pursuant to paragraph 97(1)(b).

32 *Re X.H.N.*, [2002] R.P.D.D. No. 168.

33 *Re Z.Z.E.*, [2003] R.P.D.D. No. 14.

34 *Re W.C.Z.* [2003] R.P.D.D. No. 425.

35 *Re Y.A.T.*, [2004] R.P.D.D. No 10.

36 *Re V.S.I.*, [2004] R.P.D.D. No. 284.

Negative section 97 Claims

The reported cases for negative section 97 claims are far more extensive. In general, claims involving risk to life or risk of cruel and unusual treatment or punishment often fail due to a finding of adequate state protection in the country of reference.³⁷ For example, in *Re K.F.F.*,³⁸ a Guyanese claimant sought protection based on both section 96 and section 97 grounds. He alleged that he was a victim of multiple random robberies and threats from criminals who perceived him to be a wealthy businessman. The RPD member dismissed the section 96 claim for lack of nexus, and then assessed the possibility of protection under section 97. Ultimately refugee protection was refused because the RPD member concluded that state protection was available.

In another alleged “victim of crime” case where nexus could not be found, the RPD member rejected the claim under section 97 because the claimant did not make any “diligent or *bona fide* attempt to seek protection in his country of origin before travelling abroad for asylum.” The Mexican claimant had approached the police on one occasion, but had left the country before the authorities could address the complaint. In dismissing the claim (for reasons of adequate state protection), the RPD member noted that the absence of evidence that the police had ever refused to help. Rather, they had demonstrated a willingness to assist by taking the report and assuring the claimant that they would investigate. Although the documentary evidence indicated that police corruption existed in Mexico, the RPD member recognized that the evidence also referred to the government’s recent, substantial efforts to combat and prevent corruption.³⁹

The availability of an internal flight alternative (IFA), especially given its more stringent test under both danger of torture (paragraph 97(1)(a)) and risk to life/risk of cruel and unusual treatment or punishment (paragraph 97(1)(b)), is another reason why section 97 claims do not succeed.⁴⁰ In *Re R.C.C.*,⁴¹ the Ukrainian claimant testified that he feared a criminal group which had extorted money from him, assaulted him, and threatened both him and his family. After finding no nexus, the RPD member assessed his claim under paragraph 97(1)(b), but ultimately denied it on the basis of an available IFA in Kiev. The claimant’s hometown of Dolyna was hundreds of kilometres from Kiev where his sister resided. He testified that his sister had not experienced any problems with criminals and extortion. Additionally, before coming to Canada, the claimant had lived in Kiev for a

³⁷ Of the total 279 negative decisions which encompass a s. 97 claim, 62 (22.2%) mention adequate state protection when giving reasons for the denial of protection.

³⁸ [2002] R.P.D.D. No. 184.

³⁹ *Barro v. Canada (Minister of Citizenship and Immigration)*, [2005] R.P.D.D. No. 101.

⁴⁰ Of the total 279 negative decisions which encompass a s. 97 claim, 16 (5.7%) mention the availability of an IFA when giving reasons for the denial of protection.

⁴¹ [2002] R.P.D.D. No. 462.

month without any difficulties. The RPD member concluded:

The claimant [will] not face a serious possibility of a risk to life or cruel and unusual treatment or punishment in Kiev, and therefore he is not in need of protection... Kiev is easily accessible for the claimant.

[I] cannot go on to consider the reasonableness of the potential IFA under section 97(1)(b) of the [IRPA] for the following reasons. This provision speaks only of a risk faced by the person in every part of the country. It does not add a reasonableness element to the availability of a safe area in the country, an element that has been extensively interpreted by the Federal Court in the context of Convention refugee cases. In order to find, therefore, that the claimant has an internal flight alternative, the panel must be satisfied that the IFA is an area of the country (i) which is reasonably accessible to the claimant, and (ii) where the claimant would not face a serious possibility of a risk to life or a risk to cruel and unusual treatment or punishment.

Refugee claimants who cannot demonstrate a personal risk, but who face “generalized risk” in their country of reference have not been successful in their claims.⁴² In *Re Y.F.J.*,⁴³ the claimant did not want to return home due to his fear of crime and violence in Guyana. He testified that “crime and violence affect[ed] everyone’s life” and had “increased dramatically” in the three years since he had left the country. In dismissing his claim under section 97, the RPD member reasoned that any risk the claimant would face was similar to that of any other Guyanese citizen, as he feared “a risk of random indiscriminate violence” which was a “generalized risk... faced by all citizens of Guyana.”

Notably, the most cited reason for failure of refugee claims under section 97 hinges upon an RPD member’s negative credibility finding.⁴⁴ As section 96 claims also commonly fail on this ground, these statistics for negative section 97 claims, based on lack of credible evidence or testimony, is not surprising. In rendering a negative decision based primarily, or solely, on a negative credibility finding, many RPD members will cite various implausibilities in the claimant’s narrative, point to the claimant’s evasive or suspicious behaviour during the hearing, or highlight the inconsistencies between the claimant’s testimony at the hearing and previous explanations from his personal information form (PIF) or port-of-entry (POE)

42 Of the total 279 negative decisions which encompass a s. 97 claim, 14 (5%) mention the presence of generalized risk (or lack of personalized risk) when giving reasons for the denial of protection.

43 [2002] R.P.D.D. No. 180.

44 Of the total 279 negative decisions which encompass a s. 97 claim, 207 (74.2%) mention the claimant’s lack of credibility when giving reasons for the denial of protection.

interview notes. Taken cumulatively, this evidence will often cause an RPD member to conclude that “the claimant has not presented sufficient credible or trustworthy evidence” that he/she faces a serious possibility of persecution (or danger of torture, or risk to life, etc.) in his/her country of reference.

Recent Developments in the Federal Court and the Federal Court of Appeal Jurisprudence on section 97

Like the RPD reported decisions on section 97 claims, the Federal Court and Federal Court of Appeal jurisprudence arising from judicial review of refugee claims based on danger of torture or risk to life/risk of cruel and unusual treatment or punishment is limited. Notwithstanding, two significant issues have received judicial attention. The first issue concerns the desirability and, in some cases, the requirement for a separate and distinct analysis of a section 97 claim in circumstances where a claimant requests protection pursuant to both sections 96 and 97. The second issue is the Federal Court of Appeal’s determination that the legal test to be applied when assessing the evidence in a section 97 claim is “more likely than not,” also known as the “balance of probabilities” test. Thus, claims based on a danger of torture or risk to life or risk of cruel/unusual punishment must meet a higher threshold than claims based on *Refugee Convention* grounds.

The Desirability of a Separate Analysis of section 97

A survey of some of the earliest negative decisions rendered by the RPD (where protection was claimed under both sections 96 and 97) reveals a weak or superficial analysis of section 97. In some cases, the RPD member found the claimant to be “not credible,” denied the claim for Convention refugee protection and determined that an assessment of s. 97 was “not required.” In other cases, where protection under both sections was claimed, RPD members denied the claimants protection, but provided reasons which exhibited an analysis only of section 96. In October of 2003, Mr. Justice Edmond Blanchard’s decision in *Bouaouni*⁴⁵ provided clarification regarding the assessment of a claim for protection under section 97 and he stressed the importance of separately considering the claims under section 96 and section 97:

A claim under section 97 must be evaluated with respect to all the relevant considerations and with a view to the country’s human rights record. While the [RPD member] must assess the applicant’s claim objectively, the analysis must still be individu-

⁴⁵ *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1540; 2003 FC 1211.

alized... There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founded fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate. A claim under section 97 of the Act requires that the [RPD member] apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97 (1) (a) and (b) of the Act... Whether the [RPD member] properly considered both claims is a matter to be determined in the circumstances of each individual case bearing in mind the different elements required to establish each claim.⁴⁶

Although the failure to specifically analyse the section 97 claim in *Bouaouni* was noted by Justice Blanchard, he went on to conclude that the RPD member "found important omissions, contradictions and implausibilities in the applicant's evidence, which led it to conclude that the applicant's story was not credible... [T]hese findings were open to the [RPD member]."⁴⁷ Thus, in cases where negative credibility findings negate the basis for a claim, the lack of a separate section 97 analysis will constitute a legal error which is "not material to the result."⁴⁸ In other circumstances, this legal error may well be material to the result in which case the RPD member's negative decision will not withstand judicial review.

The requirement of separate consideration was again reinforced by the Federal Court in January of 2004. Mr. Justice Richard Mosley's decision in *Kilic*⁴⁹ cited the *Bouaouni* decision and ordered that the RPD member's decision be quashed and remitted to another member for reconsideration:

In my opinion, the [RPD member] in this case did not address the country documentation and other evidence related to prison conditions in Turkey and failed to consider whether the applicant could be a "person in need of protection" if returned

⁴⁶ *Ibid.* at para. 41.

⁴⁷ *Ibid.* at para. 42.

⁴⁸ *Ibid.* at para 42.

⁴⁹ *Kilic v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 84; 2004 FC 84.

to that country, in light of the possibility that he may face a “serious prison sentence” for evading Turkish military service. Despite the [member’s] negative credibility findings, a separate analysis, along the lines described in *Bouaouni, supra*, and having regard to the legislative wording of section 97, may have produced a finding that Mr. Kilic was a person in need of protection. Therefore, the result of the [member’s] error is unknown, and accordingly, this application should be sent back for redetermination on this ground.

I do not agree with the [Minister’s] submission that the lack of analysis in the [member’s] reasons in relation to section 97 can be explained by a lack of sufficient evidence of risk to the applicant on the section 97 grounds. As outlined above, there was evidence on the record before the [RPD], such as human rights reports describing the abusive conditions in Turkish prisons and correspondence the applicant had received from the Turkish Ministry of National Defence, that went to the applicant’s alleged risk pursuant to section 97.⁵⁰

However, in an April 2004 Federal Court decision, Madam Justice Carolyn Layden-Stevenson, before rendering her decision to dismiss the application for judicial review, expressed reservation with respect to whether a separate analysis is required in every case. After summarizing the *Bouaouni* and *Kilic* decisions, she continued:

In *Yorulmaz v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 193, 2004 FC 128, Mr. Justice von Finckenstein found that the board’s negative credibility finding was substantiated by the facts and that the failure to perform a section 97 analysis was not relevant to the result because of a lack of evidence.

Mr. Justice Gibson, in *Kulendrarajah v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 94, 2004 FC 79, determined that the board did not err in arriving at its negative credibility finding. Since the sole bases for the claim were Convention grounds (ethnicity and membership in a particular social group), the board’s credibility and risk analyses were sufficient to support a denial of refugee status. Justice Gibson further determined that the claimant was not a person in need of protection because no ground to support a need of protection other than a Convention ground had been advanced. While a

⁵⁰ *Ibid.* at paras.27-28.

more extensive explanation for the board's determination regarding section 97 might have been desirable, its absence did not constitute reviewable error.

These authorities, in my view, do not demand that a section 97 analysis be performed in every case. Rather, it will be required in some cases. It is a question that must be reviewed on a case by case basis. If there is evidence before the board to support a section 97 analysis, the analysis must be conducted.

Thus, while a separate section 97 analysis is desirable, the failure to conduct such an analysis will not be fatal in circumstances where there is no evidence that would require it. Here, there were no other grounds to support a finding of person in need of protection and the risk analysis was performed for Mrs. Brovina in the context of refugee protection. Moreover, the board did conduct a brief analysis related to a section 97 risk when it found that there was "no reason to believe" that Mrs. Brovina would face any risk in returning to Albania. There was no objective evidence before the board that might have led to any other conclusion.⁵¹

*The Legal Test for section 97 Claims: "More Likely than Not"
(Balance of Probabilities)*

As is the situation with section 96 claims, the *IRPA* is silent with respect to the standard of proof to be applied by RPD members in assessing claims for protection under section 97. Federal Court of Appeal jurisprudence on the "well-foundedness of the claimant's subjective fear" – also known as the "objective element" in Convention refugee claims (section 96) – is well established. The objective test applied by RPD members should not be so stringent as to require a probability of persecution. Instead, a more accurate way of describing the requisite legal test is whether a "reasonable chance" of persecution would take place if the claimant returned home. "Reasonable chance" means that "there need not be more than a 50% chance (i.e. probability) [yet] there must be more than a minimal possibility."⁵²

In accordance with the jurisprudence indicating that Convention refugee claims benefit from a legal test lower than the standard of "balance of probabilities," the IRB legal services, upon the coming into force of *IRPA* in June of 2002, issued an opinion that claims assessed under paragraphs

⁵¹ *Brovina v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 771; 2004 FC 635, at paras. 15-18.

⁵² *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680; [1989] F.C.J. No. 67 (FCA).

97(1)(a) and 97(1)(b) should likewise benefit from the same legal test as that applied in section 96 claims:

The *IRPA* is silent on the standard of proof to be applied to claims for Convention refugee status. Accordingly, these claims will continue to be decided based on the *Adjei* test of reasonable chance or serious possibility of persecution. Claims to be a “person in need of protection” because of a danger of torture (s. 97(1)(a)) are to be decided based on a standard of proof that the danger is “believed on substantial grounds to exist”. Claims to be a “person in need of protection” because of a risk to life or of cruel and unusual punishment or treatment (s. 97(1)(b)) do not have a proscribed standard of proof set out in the *IRPA*.

The preferred position of IRB Legal Services is that all three grounds for protection should be decided using the same standard of proof, namely the *Adjei* test, “reasonable chance or serious possibility”. The test is premised on the prospective nature of the risk and that same prospective element is present in all three protection grounds.⁵³

Several RPD decisions involving section 97 claims applied the “less than a balance of probabilities, but more than a minimal possibility” legal test in assessing claims for refugee protection.

However, in a 2003 Federal Court decision (judicial review of an RPD determination involving both a section 96 and a paragraph 97(1)(a) claim for protection), the application of this test was questioned and ultimately rejected for claims relating to a danger of torture.⁵⁴ After an extensive review of both domestic and international jurisprudence on the interpretation of the *Convention Against Torture*, Madam Justice Johanne Gauthier arrived at the conclusion that the correct legal test for section 97 claims was more rigorous than the one applied in section 96 claims. Thus, claims pursuant to paragraphs 97(1)(a) and 97(1)(b) should be assessed on a balance of probabilities.

RPD decisions rendered after Justice Gauthier’s ruling indicate that some RPD members preferred to follow previous Federal Court jurisprudence confirming the IRB’s initial opinion as to a uniform application of a “less than balance of probabilities” legal test in all refugee protection claims.⁵⁵ In rendering a positive determination of a claim based on paragraph 97(1)(b), RPD member Ian Kagedan engaged in a lengthy analysis of the purpose of

⁵³ *A legal guide to the interpretation of s. 97(1)(b) claims*, *supra* note 22, at pp. 37-38.

⁵⁴ *Li v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1934; 2003 FC 1514.

⁵⁵ *Tameh v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1859; 2003 FC 1468.

the *IRPA* and in particular sections 96 and 97, the nature of prospective risk assessment, and the type of evidence submitted in support of such claims. Member Kagedan stated that a consideration of the tribunal's process and the need to provide "fair results" all indicated that the RPD should not apply multiple standards of proof in assessing claims under sections 96 and 97. The issue was not simply a matter of "decision-makers being confused and potentially issuing inconsistent decisions." Rather, the application of different legal tests had the potential for rendering unjust outcomes and impinged upon the integrity of the refugee protection system:

...[T]he reputation of the justice system is at stake where two people from the same country, fearing the same harm, and equally having no state protection, get different decisions on protection, just because the harm feared by one is on account of his political opinion and the harm faced by the other is on account of having helped convict a prominent mobster.⁵⁶

This RPD decision precisely identified the dilemma confronting members when meritorious claims fall outside the parameters of the *Refugee Convention*. In cases where nexus cannot be established, section 97 provides an avenue to grant protection to claimants who would otherwise be determined Convention refugees if their status could have been subsumed within one of the five enumerated grounds. The "victims of crimes" cases, canvassed earlier, are illustrative of such claimants. The application of two different legal tests means that the threshold they must meet in order to sustain their claims for protection is higher than that for claimants who "oppose or denounce crime and corruption." The latter group of claimants have been found to fall within the scope of the *Convention* ground of "political opinion."⁵⁷ Victims of crimes and victims "who oppose crime and corruption" have considerable common characteristics in the RPD jurisprudence. The reported RPD decisions reveal that the application of two different legal tests for these two groups of claimants was disconcerting for some RPD members.

However, the issue has been authoritatively resolved in accordance with Justice Gauthier's reasoning in *Li*. The Federal Court of Appeal, in affirming her decision, justified the use of separate legal tests for a number of reasons. Mr. Justice Rothstein (now a Justice of the Supreme Court of Canada), noted that the words in article 3 of the *CAT* are almost identical to those used in paragraph 97(1)(a). Thus a consideration of the jurisprudence which interprets article 3 is essential to the analysis. Case law and UN commentary regarding its interpretation suggested that the test was neither one of "theory or suspicion" nor "highly probable"; instead, it fell

⁵⁶ *Re Y.A.T.*, [2004] R.P.D.D. No. 10.

⁵⁷ *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 228 (FCA).

somewhere in the middle. Justice Rothstein concluded that, “the use of the word ‘would’ requires a showing of probability.” Thus, had the *CAT* used the words “could,” “might,” or “may,” a lower-level test might have applied. Furthermore, in *Suresh*,⁵⁸ the Federal Court of Appeal had interpreted the legal test in article 3 of the *CAT* as meaning “on the balance of probabilities.” Given that Parliament enacted paragraph 97(1)(a) after *Suresh*, the Court’s interpretation of the applicable standard was presumed to have been known when the *IRPA* was drafted. In the face of *Suresh*, Parliament had the opportunity to enact a lower-level test in paragraph 97(1)(a), but declined to do so.⁵⁹

While the Federal Court of Appeal acknowledged the merits of the argument that it “made no rational sense” to adopt a higher legal standard for claims under paragraph 97(1)(a) than for those under section 96, the Court determined that the differences between claims under section 96 and those under paragraph 97(1)(a) support the conclusion that the use of identical tests is not necessary. For instance, although nexus is a requirement under section 96, it is not necessary for a successful section 97 claim. Additionally, a section 96 claim requires both a subjective and an objective fear of persecution. There is no “subjective component” to a paragraph 97(1)(a) claim.

The Federal Court of Appeal also concluded that the use of the same “more likely than not” or “balance of probabilities” test is appropriate for paragraph 97(1)(b) claims. In its concluding paragraphs, the Court stated:

In the absence of some compelling reason suggesting a particularly low or a particularly high level test, I do not see why the degree of risk for purposes of paragraph 97(1)(b) should not be that it is more likely than not that the individual would be subjected, personally, to a risk to his life or to a risk of cruel and unusual punishment if the person was returned to his country of nationality.⁶⁰

Queries whether the Court’s reasoning – that differences between the applicable criteria of section 96 and paragraph 97(1)(a) justify (in part) the application of two legal tests – could be applied to the differences between paragraphs 97(1)(a) and 97(1)(b), were rendered moot when leave to appeal the Federal Court of Appeal decision was denied by the Supreme Court of Canada.⁶¹ While refugee advocates and perhaps some RPD members may not favour the application of two different legal tests, the positive aspect is that a clearer distinction has been drawn between

⁵⁸ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 5 (FCA)

⁵⁹ *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1; 2005 FCA 1, at paras.18-28.

⁶⁰ *Ibid.* at para 38.

⁶¹ *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.C.A. No. 119

the analyses of section 96 and section 97 claims. The application of two legal tests should encourage independent and separate analyses of the three different types of claims contained in the consolidated grounds of protection.

Conclusion

The RPD and Federal Court jurisprudence on section 97 is growing. Recent statistics from the IRB indicate that the number of section 97 and mixed sections 97 and 96 claims appears to be on the rise. One year ago, the national average of section 96 claims represented 92% of all refugee claims made in Canada. IRB records for the past three months indicate that the national average for section 96 claims has dropped to 86%. Section 97 and mixed sections 96 and 97 claims have risen, such that 6% of all claims are section 97 claims and 7% of all claims are mixed sections 96 and 97 claims.⁶²

It should be noted that the *IRPA* provides other means for granting permanent resident status, outside the jurisdiction of the IRB. Although these mechanisms, strictly speaking, are not part of Canada's in-land refugee protection system, they represent other ways in which Canada can bestow complementary protection to people outside the definition of a Convention refugee. For example, any foreign national in Canada may apply for permanent resident status on "Humanitarian and Compassionate" (H&C) grounds.⁶³ This potential vehicle to remain in Canada (with the same rights and duties as any other permanent resident, including the ability to apply for citizenship), is open to failed refugee claimants and non-refugee claimants alike.

Pre-Removal Risk Assessments (PRRAs) constitute another potential avenue of complementary protection, outside the IRB's mandate. PRRAs are available as mechanisms against removal from Canada and are assessed on the same criteria used in section 96 and section 97 analyses. However, when accessed by failed refugee claimants, the basis for granting protection from removal must arise from new evidence indicating a change in circumstances (e.g. country conditions) or from evidence that was previously unavailable at the time of the refugee protection hearing. Although commonly accessed by applicants, the H&C and PRRA determinations do not result in reported decisions. Thus, unless judicially reviewed by the Federal Court, they lack the visibility of RPD decisions regarding complementary protection.

⁶² The results from these IRB records were obtained in a telephone conversation with the current Deputy Chairperson of the IRB on October 16, 2006.

⁶³ The authority for this ability arises in s. 25(1) of the *IRPA*. For more information on the criteria considered in an H&C assessment, please consult CIC's Policy and Program Manual: "IP5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds," available online at: <http://www.cic.gc.ca/manuals-guides/english/ip/ip05e.pdf>.

Appendix A: Chart summarizing a sample of 300 reported RPD Decisions⁶⁴

Positive Decisions	21 of the 300 total decisions
Positive s. 97 decisions (includes 1 decision where the claimant succeeded on both s. 96 & s. 97)	13 of the 21 positive decisions
Lack of nexus mentioned	11 of the 13
“Victim of Crime” decisions	9 of the 13
Positive s. 96 decisions (where both s. 96 and s. 97 were claimed, but member decided on basis of s. 96)	8 of the 21 positive decisions
Negative Decisions	279 of the 300 total decisions
Negative decisions where s. 97 is assessed independently of s. 96	77 of the 279 negative decisions
• Lack of credibility mentioned ¹	32 of the 77
• IFA possibility mentioned	5 of the 77
• Adequate state protection mentioned	28 of the 77
• Generalized risk mentioned	14 of the 77
• Lack of nexus mentioned	8 of the 77
• “Victim of Crime” decisions	7 of the 77
Negative decisions where s. 97 is not assessed independently of s. 96	202 of the 300 total decisions
• Lack of credibility mentioned	175 of 202
• IFA possibility mentioned	11 of 202
• Adequate state protection mentioned	34 of 202
• Exclusion based on war crimes, crimes against humanity; serious criminality, etc. is the reason for claim failure	12 of the 202
Decisions involving both s. 96 and s. 97 claims	294 of the 300 total decisions
Decisions involving only a s. 97 claim (NOTE: all of these claims were unsuccessful)	6 of the 300 total decisions

⁶⁴ These cases were randomly selected from the Quicklaw database for RPD decisions. The search generating these decisions stemmed from a query for RPD decisions which mentioned s. 97 anywhere within the text of the decision. It is important to note that many positive determinations by members of the Refugee Protection Division (RPD) are not reported as they are brief decisions, delivered orally at the end of a Refugee Protection hearing.

⁶⁵ In some cases, no one issue (e.g. state protection, lack of nexus, generalized risk, etc.) was dispositive of the claim. In other cases, where negative credibility findings led the RPD member to determine that risk of torture or risk to life was not established on a balance of probabilities, “lack of credibility” alone could result in a negative decision.

REPORT OF THE EXPERT EVIDENCE WORKING PARTY

**upon the judicial approach to the evaluation of expert
evidence, particularly medical evidence on torture.**

Geoffrey Care

Introduction

This Working party was established following upon a Seminar held in London in January 2004.

The membership of the WP is set out in Annex 1, but since the last Conference two judges have retired from *active service*: Lord (Kenny) Cameron and John Barnes. If this WP is to function effectively it needs an injection of new members from different parts of the world.

We are grateful to the support of the members of the WP and appreciate how difficult it is for active judges to find time to devote to the WP.

At the time of its inception the WP was -

“...established to consider whether, and if so what, general principles apply to the form, reception and evaluation of expert evidence, including medical evidence, and country background material by decision makers in claims for recognition as a refugee and related claims”

The WP made its first Report to the Conference in Stockholm in April 2005.¹

We had sought to identify a working list of principles of general application to the way in which expert evidence should be approached by asylum judges worldwide.

We concluded that there are some principles of universal application irrespective of the model of court procedure. We opined that insofar as any such principles were uncontroversial, they are to be found in the Istanbul Protocol² and the Civil Procedure Rules Part 35 and Practice Direction for England³. The former however is confined to torture.

¹ Conference Papers *The Asylum Process and the Rule of Law* pages 261 -292

² UN 9 August 1999 HR/P/PT/8 ISBN 92-1-1 54136-0

³ See Annexure 2 to the WP Report at Stockholm

We have, perforce, concentrated in this last year or so on torture. But we recognize that our remit is much wider: It concerns not only medical evidence related to other issues such as human rights abuses and many other matters but also expert evidence related to the situation in a country.

In order to reach useful comprehensive “*best practice*” recommendations on all aspects of expert evidence additional in-depth research is necessary, with input from at least all countries represented in the IARLJ. It may well also be advisable to consider whether this task should not further break down into guidelines for expert medical evidence and other expert evidence. This is a matter which can be addressed in Mexico.

Division Of Responsibilities

This working party is no longer charged with country background issues following the creation of a separate Working Party to address Country of Origin and Country Guidance information.

Because the two WPs appeared to be overlapping in their respective areas of concern, we reached agreement upon our respective remits.

It was agreed that this WP would continue to address the evidence presented in an application or an appeal for Convention Refugee Status⁴ or subsidiary protection which purports to be from an expert source *such as* a medical practitioner (including psychiatrist or clinical psychologist). It would also deal with evidence from an expert on country conditions, such as an academic expert or scholar or a journalist who may have spent many years in the field and has become an authority on the situation in a country.

The COO/CG WP would focus on “all” evidence presented: expert evidence being a special category of “all”. That WP is less, if at all, concerned with the relative probative value of the “opinion” expert evidence.

Mandate from Stockholm

At the Plenary Session in Stockholm, we received a mandate to proceed further to produce useful recommendations applicable to all jurisdictions.⁵

The Panel Sessions produced a number of suggestions and raised some relevant issues. These are not recorded in the published papers and it

4 And this will have to extend to any similar application under the AU Convention Governing the Specific Aspects of Problems in Africa 1969; The African Charter on Human and Peoples’ Rights 1981 and the Protocol on the establishment of the African Court of Human Rights 2003; Cartagena Declaration on Refugees (*Problemas Jurídicos y Humanitarios*) 1984. Both these broaden the definition of refugees and provide judicial *fora* for appeals.

5 That part of the mandate which related to country background information is presumably taken over by the COO/CG WP

will be useful for members to know what they were – and we reminded ourselves of them at our first meeting. They are as follows:

- i. Should knowledge of the qualifications and roles of each type of expert be a standard part of the judicial stock-in-trade?
And, if so
- ii. Should decision makers receive special instruction in this area?
- iii. As far as the experts themselves are concerned, if there is a Panel of Experts, by what method is it kept up to date, and what are the criteria for new additions to be made? In this regard s 12 of the Mental Health Act may provide some useful guidance.
- iv. Should the experts work to a given template? If so, who will draw it? In fact, there is a template in Appendix IV to the Istanbul Protocol.
- v. Canada and Australia emphasized the need for the manner of reception and evaluation of expert evidence to be transparent. They consider that the English Rules should achieve such transparency.⁶
- vi. Is there any advantage to be gained by the decision-maker having the power to commission and call an expert? If so should that power be circumscribed by any rules?

A number of practical issues were raised which seem relevant

- a. To beware of a climate of distrust of medical evidence (which had some historical foundation in the courts' attitudes in England)
- b. To pay especial regard to the position of children⁷
- c. The current problems arising out of delays in obtaining reports for various reasons and the impact on a fair hearing.⁸
- d. The need in some cases for psychotherapists' expert reports on long term *sequelae*.

We took these issues as our starting point, but as we have stated above given the constraints of time and available manpower, we decided this time round to limit the aims of this Report to attempting a review of the material we have gathered relating to evidence going to the documentation of torture Together with other organized violence and serious human rights abuses any recommendations could well be rooted in the Istanbul Protocol.

Our Remit and our Limits

We have, as stated earlier in this Report, identified the need for a wider review of expert evidence issues beyond those relating to the assessment

⁶ Annex 2 above n.3 and also see the Code of Guidance in Family Matters in England: Not dissimilar to the RSC nn 3 and 6 above.

⁷ And one might add today both child and women trafficking.

⁸ With the increase in fast track appeals and reduction in facilities for legal aid

of torture. However, we eschewed the temptation to try to deal with this wider area as well lest we lose sight of the questions in the reception of medical evidence which are most commonly encountered, and in which we think there is a sound and authoritative base in the Istanbul Protocol.

Before embarking on a survey of the material, we think Jane Herlihy's observations on the form of the report are a timely reminder of two necessary elements in any Report. Firstly that the language of our Report needs to be such that it is readily understood by anyone; and secondly, that we identify the aims of the Report, to whom we are addressing it, and what we want them to do.

Targets and Aims

The Report is primarily addressed to all members of the IARLJ. More widely to anyone involved in the decision-making process of asylum and human rights claims. More immediately it is aimed at those who attend the Conference in Mexico.

Our ultimate aim is to discover what general principles apply to the form, reception and evaluation of expert evidence, *including* medical evidence, and ultimately to provide some generally acceptable guidelines.

To do this we need to provoke thought in this constantly developing area and to seek information and comment from those attending the Conference in the first place and also from those to whom this Report is made available.

Material Considered

We have received some new and useful material – not all of which is confined to torture. There is some from the Medical Foundation for the Care of Victims of Torture (MF), and Jane Herlihy; other material related to our wider remit from Catriona Jarvis and we have a valuable summary of the approach of the Australian Tribunal from Sue Zelinka. There is a Memorandum also from John Barnes. These are referred to in the list in Annex 2 and some of these are annexed as copies. Extracts from or references to them are contained in the body of this Report. We have also looked again at some of the material listed in the Annexes 2 and 3 to our last Report,⁹ the English RSC and the Istanbul Protocol, and items 9 (Family Law Guidelines), 14 (Canada Evidence Act), 17 (Evidence in Scotland) with guidance from Lord Kenneth Cameron and 20 (Essex Handbook).

⁹ See pages 285-293 of *The Asylum Process and the Rule of Law* Conference papers. We provided copies of the Istanbul Protocol at the last Conference. We have not done so this time but merely incorporated paragraphs 103 and 104 in the Annex 2 item 1

There have also been a number of reported cases and some of the important ratio extracted.¹⁰ There is also a paper delivered by Professor Anthony Good an anthropologist the full text of which is attached ¹¹ - extracts from which are included in this Report.

One of the major lacunae in the material we have is specific information on individual countries. We will in due course prepare a questionnaire, the answers to which will, we hope, assist in considering what effective recommendations are possible.

We annex reference to an Article from the USA which we have had put before us.¹²

Sue Zelinka has added a useful summary of the position in Australia which is set out below. We suggest that this is the sort of information the WP would find useful to have from a diversity of countries and different jurisdictions and systems.

Australia has an interventionist, inquisitorial (non accusatorial – choose your term) system in the hearing of appeals to the Refugee Review Tribunal (RRT). The Tribunal has power to call for expert evidence under s 427 Migration Act 1958. However, access to sound and well informed medical experts in the specialised field of torture and trauma in relation to refugee claimants is limited compared, for example, with the MF in the UK.

The Tribunal will reject or accept the facts on which a Report is based, but may also reject so-called evidence from someone not regarded as an expert in the field in which he offers evidence. There are no rules, but the RRT adopts a “common sense” approach. It must be able to justify its usage of expert evidence to the satisfaction of the Federal Court (if the case went on appeal). Judges of the Federal Court are assisted in this area by the *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* prepared by the Chief Justice¹³.

The courts in the Netherlands have power of their own volition to call expert evidence, and there are rules which circumscribe its exercise. To what extent it is exercised we do not know. The Scottish Court of Session has such power also but rarely exercises it.¹⁴ The UK Asylum and Immigration Tribunal (which replaced the adjudicator tribunal and the Immigration Appeal Tribunal) has no such powers.

¹⁰ There are other cases but have not had the time to research them. They are enclosed with an email forwarded from David Rhys Jones only received on the day the Report was being finalised.

¹¹ Annex 2 referred to as item 2

¹² *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials* Annex 2 item 3 (Too long to include in full)

¹³ See Annex 2 item 4

¹⁴ RCS rule 12.1(1): we will return to the position in Scotland later.

We are satisfied, however, that for any such power to be effective, not only must the court be in full control, it must also have the necessary funds to be able to pay for the Report.

Insofar as a list or Register of experts is concerned, there is the ILPA Directory of Experts on the EIN in the UK.¹⁵ This is part of the ILPA Best Practice Guide, which devotes much time to expert evidence, which it sees as of central importance. The Bond Solon Academy was noted in the last Report, Annex 2 item 4.

It appears that anyone can apply to be registered, and provided on the face of the application the applicant is qualified, he or she will be registered.¹⁶

The desk study “Politically-Motivated torture and its survivors”¹⁷ addresses many issues. Two of them we noted especially. They draw attention to the changing nature of torture following 9/11 related to the extraction of information from suspected terrorists. At the Stockholm Conference we were asked to consider the effects of 9/11, and we opined that nothing in our remit was affected by this event. It may well be that we were wrong. Any expansion of torture or human rights abuses can give rise to medical and ancillary expert evidence as to its occurrence and effects. Where it is alleged to have taken place in a country not usually regarded as practicing human rights abuses or torture, the occasions for the presenting of such evidence may be increased.

The desk study also addressed PTSD in some depth, noting progress in the diagnosis of PTSD on legal and forensic evaluation of torture survivors. They put this down, to some extent, to the guidance contained in the Istanbul Protocol.

Arising from these two matters we noted that there is a constant change in the nature of torture as well as an understanding of its effects. This appeared particularly relevant for decision makers, and the remarks of the President of the IAT in the case HE (DRC-credibility and psychiatric reports) DRC CG¹⁸ highlighted the need for decision makers to be both knowledgeable and careful in their approach to psychiatric evidence. The President said:

“22. Where an advocate seeks to support credibility findings by reference to a medical report, he must identify what about it affords support to what the claimant has said...

¹⁵ ILPAEXPERTS@ein.org.uk. Started in book form in 1997 a copy of the form of application to be entered on the Directory.

¹⁶ We are pursuing this further with EIN. So far we have not had a response. The credentials of experts is an area which greatly concerns us, especially if there are to be registers to which courts are being referred.

¹⁷ See Extracts in Annex 2 item 5

¹⁸ [2004] UKIAT 00231 extracts Annex 2 item 6

23. We hope that advocates will be much more cautious about relying on psychiatric reports for credibility support...
35. It [the case] is reported for what we say about the relevance of medical and psychiatric reports to credibility and the way in which advocates relying on them for that purpose should set out their case..”

The President of this Tribunal did however express disapproval of an earlier case¹⁹ where the then President had stated that any medical or psychiatric report deserved careful and specific consideration in each and every respect. This, he said, went too far given the experience, since that case was decided, of poor quality reports.

The WP acknowledges the need for a decision maker to be able to make a proper decision as to if and when a report is necessary and for what purpose. But often many decision makers lack the necessary expertise and training to make such a decision. We will return to training later.

The Article by Tony Good deals with the reception and treatment of the anthropological expert. That evidence will usually concern data on the situation in a country which may or may not be related to medical issues. But in addressing evidence by anthropologists he deals with the treatment of expert evidence in a court which is of general concern. In so far as he may be suggesting that a judge has to take the anthropologist’s report “on trust” this clearly cannot be a position a judge can accept. Perhaps, as we say below, the anthropologists approach needs further examination. The issue of who is an expert and why is as much one for this WP as it is for the COI group.

The Article as a whole is set out as noted in Annex 2 with some aspects highlighted in bold type. One quotation may suffice for our purpose now as follows to indicate a line of investigation for the future.

He says that there is a -

“practical necessity of [sic for] the existence of some criteria by which the AIT may assess expert evidence and, though he believed that the AIT was too ready to assume that it was being misled or lied to by individual experts, it was understandable and, indeed, essential that the established reputation of sources be taken into account by the AIT. Good maintained, however, that the AIT ought, when assessing country evidence, to take more account of the author’s expertise and experience and less account of the reputation of sources”

¹⁹ Ibrahim [1998] INLR 511

The Responses from a meeting of the Refugee Psychologists Forum early in 2006,²⁰ which Dr. Herlihy supplied, and the Methodology employed by MF in the preparation of medico-legal reports,²¹ both yield useful material upon which to found some conclusions.

The first expressed concern that, in the UK at least, medical reports were not being requested as often as they should in the case of those at risk of return to countries where they may be subjected to human rights abuses. This may be due to lack of time or lack of funds, or both.²² It may also be due to lack of awareness on the part of representatives of psychological difficulties and mental health issues. One remedy would be for the court or tribunal to have the power to commission expert evidence if they saw fit, as in the Netherlands. Otherwise the procedures should allow sufficient time to enable the decision maker an opportunity to decide in advance whether a report is necessary and make strong recommendations to the parties – and adjourn if necessary.

The Methodology highlights the advantage which the UK and other countries with a highly developed and motivated organization such as the MF have over the position in Australia. We noted the MF's approach to a request for a Report. They do not make one simply because they are asked to do so. A multidisciplinary panel, chaired by the Legal Adviser, must first agree. This may be followed by an assessment interview which is guided in its approach by the Istanbul Protocol. The Panel looks again at the case, and a final decision is then taken.

There are some cases where a positive decision is more likely to result, namely in the case of sex trafficking where the police at home may be in collusion with the trafficker (and thus there is a failure of state protection) and domestic violence by a state agent and the absence of redress.

In both these cases, the applicant may be more likely to be a woman, and where this is so, in conformity to para 153 Istanbul Protocol, the specialist appointed to the case will also be a woman. However the WP is very conscious of the position of children too.

There has been criticism from some courts that the medical expert has been associated with the subject either for too short or too long a time – for different reasons. They make reference to two cases, one of which we have already referred to²³ and the other *AE-FE (PTSD –internal relocation) Sri Lanka*.²⁴

²⁰ Annex 2 item 7 (To follow)

²¹ Annex 2 item 8

²² See n.8 ante

²³ see n 12 above

²⁴ [2002] UKIAT 05237

The MF addresses the relative weights to be attached to ‘professional’ and ‘expert’ reports; the former being impartial and the latter of the clinician treating the patient. It is with the latter which courts often have difficulty and must be able to address it properly. Which brings us back to training also.

We referred to Walker and Walker’s Law of Evidence in our last Report.²⁵ Chapter 16.3 provides most useful guidance on the proper approach to the evaluation of who is a ‘skilled’ witness – the preferred expression in Scotland over ‘expert’ - and how to evaluate what he says. The chapter deals with his purpose, his qualification and knowledge, the basis of the facts, the controls upon the use of a skilled witness, the need for presence in court, cross-examination and, as noted earlier, his necessity.

There have been two English Court of Appeal decisions which offer further guidance: *R(FactortameLtd) v Transport Secretary (No8)*²⁶ and *Toth v Jarman*²⁷.

In the *Factortame* case, starting at page 1125 the Court of Appeal considered the position of expert witnesses, in particular in relation to their providing their services on a contingency fee basis. At paragraph 64 of the judgment there is a quote from CPR r 35.3²⁸ headed “Experts – overriding duty to the court” and then going on - “These provisions enunciate principles which are long established, but have not been universally recognized. Thus in *Whitehouse v Jordan* ²⁹*Lord Wilberforce was led to observe:*

“it is necessary that expert evidence presented to the court should be, and should be seen to be, uninfluenced as to form or content by the exigencies of the litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating”

Again, starting at paragraph 67, the judgment refers to *Field v Leeds City Council*³⁰ where the issue concerned a surveyor employed by the Council being called as an expert witness. The Appeal Court decided that the fact that the expert was employed by the council did not automatically disqualify him from giving evidence. Whether or not he was qualified could not be determined without a sight of the report that he intended to give and his background and qualifications.

25 Annex 2 item 9 Cap 16 pp 141 to 248. There is now a later edition 2000 but the reference in chapter 16.3 remains unchanged.

26 [2002] 3 WLR

27 [2006] EWCA Civ 1028

28 See appendix 2 last Report

29 [1981] 1 WLR 246,256-7

30 [1999] CPLR 833

In the same case Waller LJ went on to say at page 841:

“The question whether someone should be able to give expert evidence should depend on whether (i) it can be demonstrated whether that person has relevant expertise in an area in issue in the case, and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence”

In *Toth*, at paragraph 119, the Court considered the nature of an expert’s declaration at the end of his report and went on

“The expert should not leave undisclosed any conflict of interest which might bring into question the suitability of his evidence as the basis of the court’s decision. The conflict of interest could be of any kind, including a financial interest, a personal connection, or an obligation, for example, as a member or officer of some other body. But, ultimately, the question of what conflicts of interest fall within this description is a question for the court taking into account all the circumstances of the case”.

The position where an expert travels outside the area of his expertise was the ratio in the DRC case above.³¹

Reference was made to the importance of language. Firstly, in relation to communications between medical expert or clinician, and secondly in, for example identifying, a person’s place of origin.

The importance of language as an aid to identification has been receiving long overdue attention from a number of aspects.

Care over language is of great importance, and a decision maker needs to know about the interpreter and whether he or she is able to accurately interpret what the patient is trying to communicate. The sort of headings include: lack of common language, alien cultures, and sensitive issues.

In the UK the Home Office recognizes the need for a much more accurate assessment of a person’s region and country of origin at the beginning. It suggested that they have been meeting resistance from the AIT in the rejection of their own expert evidence on this issue. As to whether this is so, and why, calls for further enquiry.³² It is a matter which this Working Party should pursue and will be a matter included in the Questionnaire.

³¹ n 13

³² Some of these issues seem to concern the Country Background WP relative perhaps to procedures and removals. As well as the nature of the expert evidence itself.

We want to revisit some of the comments made by Allan Lutfy for the last Report. They draw attention to section 38 of the Canada Evidence Act and the exclusion of publication of some evidence either potentially injurious or sensitive. In the context of terrorist activities such powers may be necessary, but they may also be abused where the medical evidence may be regarded as relating to international relations. They also point the way towards possible positive actions which the IARLJ can itself take on board or make recommendations on³³.

The last Report dealt with the Expert Evidence position in England, which is set out in Annex 2 to that Report. The added Code of Guidance in Family Matters has for its objectives to -

- i. Provide the court with early information to enable it to decide if it is necessary and/or practical to ask an expert to assist the court
- ii. Identify and narrow or agree on issues
- iii. Provide an opinion
- iv. Encourage early identification of questions to be answered by the expert
- v. Encourage disclosure.

Finally we turn to the Istanbul Protocol. Paragraphs 103 and 104 are set out in full in Annex 2 item 1.

The IP provides guidelines which, as we have seen, are followed by the MF and the Guidelines in Annex 2 item 8. Whilst the guidelines are directed at the maker of the report and to torture, they do arguably give the decision maker a guide on what to look for in evaluating a report offered in evidence relating to wider issues.

It recommends consistency in phraseology in whether or not the condition observed could have been caused by the trauma described.

The Protocol also recognizes two lacunae; firstly, in the lack of training, which results, secondly, in a lack of awareness of the problems. We looked briefly at the approach by international tribunals to medical evidence. Their attitude toward this type of evidence seems to have an important bearing on our deliberations and will repay further study.

We are not here concerned with the International Criminal Tribunals but with those which are responsible for determining primarily the civil responsibility of States. There is the case law of the ECtHR and the Inter American Court (and Commission) – as well UNCAT.

³³ See the comment set out as item 11 Annex 2

Their approach is flexible, unlike national tribunals which are bound by domestic rules. Before such tribunals there may be medical evidence by a State – this tends to be received with caution if not scepticism.³⁴ The absence of any medical evidence is no indicator of the absence of abuse; thus there is no requirement for such evidence. But the presence of medical evidence (e.g. of abuse whilst in the custody of a state) has affected the burden of proof.

When it comes to the evaluation of medical evidence, their approach seems to be consistent with para 104 of the IP.

Summary

The IP provides the only extant clinical standard against which Reports documenting torture can be judged. Its focus however is on survivors of torture rather than on the broader aspect of human rights abuse. Nevertheless it may provide a basis for any recommendations.

The Rules of the Supreme Court (of England and Wales) and the Family Matter’s Guidelines, together with the Scottish approach (and the case law which we so far have seen), are the only practice guidance which we have seen from which to distil generally principles applicable to expert evidence. We have no knowledge of the position in South America, and Mexico is a good opportunity to find out.

We cannot see that it is likely, given the differing approaches to hearing an appeal – varying from no oral evidence at all in Switzerland, through an inquisitorial type system such as in Australia and to the confrontation and adversarial system in England (despite some modification of approach in recent years) that anything more than a Best Practice encomium will receive universal approval.

We are not at the stage where we can provide any Best Practice Guide.

Recommendations

Some of our members think that it is too early to make any useful positive recommendations at this stage and that it may be necessary to break our remit down into manageable compartments³⁵.

However we do believe that this WP has a continuing role. The remit as modified by the introduction of the COI WP seems adequate. But we may

³⁴ Vide the Home Office’s (alleged) experience noted above

³⁵ John Barnes’ cautionary memorandum Annex 2 Item 10

have to continue to prioritise in our focus if we are to achieve our aim which is to see whether Guidelines or Best Practices of general application can be distilled, and if so in which areas. And this will be addressed in Mexico.

To be yet more effective we will pursue a recruitment drive in Mexico for active members of the WP from as wide a spread of countries as possible

*Geoffrey Care,
Past Present of the IARLJ*

Annexes to the Report

Annex 1

List of Members of the Working party

Geoffrey Care, Past President & Rapporteur

John Barnes, former Senior Immigration Judge UK Associate Rapporteur

Allan Lutfy, Chief Justice, Federal Court (Canada)

Lord Kenneth Cameron of Lochbroom, PC, Former Senator, College of Justice Scotland

Catriona Jarvis, Senior Immigration Judge UK

Sue Zelinka, Member Refugee Review Tribunal Australia

Antonio Luis Pale, President Supreme Administrative Court Mozambique

Tjerk Damstra, Refugee Appeals Board South Africa

Dr Jane Herlihy, Traumatic Stress Clinic University of London

David Rhys Jones, Legal Advocacy Officer Medical Foundation for the Care of Victims of Torture

Ex officio:

James Simeon Director

Justice Allan North President

Annex 2

Item

1. Paras 103 and 104 Istanbul Protocol
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Annex 2

Item 1

Paras 103 and 104 Istanbul Protocol

103. The investigator should arrange for a medical examination of the alleged victim. The timeliness of such medical examination is particularly important. A medical examination should be undertaken regardless of the length of time since the torture, but if it is alleged to have happened within the past six weeks, such an examination should be arranged urgently before acute signs fade. The examination should include an assessment of the need for treatment of injuries and illnesses, psychological help, advice and follow-up (see chapter V for a description of the physical examination and forensic evaluation). A psychological evaluation and appraisal of the alleged torture victim is always necessary and may be part of the physical examination, or where there are no physical signs, may be performed by itself (see chapter VI for a description of the psychological evaluation).

104. In formulating a clinical impression for the purposes of reporting physical and psychological evidence of torture, there are six important questions to ask:

- (a) Are the physical and psychological findings consistent with the alleged report of torture?
- (b) What physical conditions contribute to the clinical picture?
- (c) Are the psychological findings expected or typical reactions to extreme stress within the cultural and social context of the individual?
- (d) Given the fluctuating course of trauma-related mental disorders over time, what is the time-frame in relation to the torture events? Where in the course of recovery is the individual?
- (e) What other stressful factors are affecting the individual (e.g. ongoing persecution, forced migration, exile, loss of family and social role, etc.)? What impact do these issues have on the victim?
- (f) Does the clinical picture suggest a false allegation of torture?

And see other paras referred to in decisions of CA annexed to Email from David Rhy-Jones.

Item 2

Anthropology, Expert Evidence and the Asylum and Immigration Tribunal – Summary of presentation by Professor Anthony Good, presented at HJT Training Country of Origin Information, London, 28 June 2006.

Professor Anthony Good gave this talk at the HJT Training Country of Origin Information Conference at Garden Court Chambers in London on 28 June 2006. The presentations on individual countries were reported in Update Issue 16 of 2006, p 27, and this report focuses exclusively on Professor Good's more general remarks about country experts and their relationship with the Asylum and Immigration Tribunal ("AIT"). Professor Good argued that lawyers and anthropologists had a tendency to "talk across" each other and sought to explain this phenomenon by identifying some of the fundamental epistemological differences between the legal and anthropological disciplines. These gave rise, he argued, to differing conceptions of science, objectivity and evidence, which in turn introduced scope for miscommunication and misunderstanding where these terms were used in discourses between lawyers and anthropologists. Professor Good argued that country *experts were often encouraged to testify before the courts in ways that reinforced what he regarded as a serious misconception of the nature of science, including social science and anthropology.*

Professor Good began his talk by pointing to some general differences between typical legal and anthropological thought processes which, he said, affected the mindset with which lawyers and anthropologists approached cases. Lawyers took (legal) principles as their starting point and, through a process of reasoning, applied these principles to cases. Anthropologists, in contrast, took the cases themselves as their starting point and sought, through a process of reasoning, to produce (explanatory) principles. Anthropologists would always resist any temptation to apply pre-existing principles, particularly legal principles, to the cases that they study, for this would be thought to hinder proper understanding of the culture being studied by imposing categories and values upon it which are not properly applicable.

A second general difference between legal and anthropological thought processes concerned probabilism. If an anthropologist were to decide that the evidence in a particular case warranted him in concluding that *x* was probably the case, then he would conclude that "probably *x*." A lawyer, in contrast, may find that he is required to prove something "on the balance of probabilities" and would, in that case, look for evidence to show that "probably *x*" or "it is more probable that *x* than that *not x*." But if he were successful in meeting the burden and standard of proof, then the court

would make a finding of fact that “x.” The move from a probabilistic form of reasoning to a non-probabilistic conclusion may be a practical necessity for the courts, but it is a move that will appear strange and illegitimate to an academic with a social science background. In addition to these general differences of approach, lawyers’ and anthropologists’ conflicting conceptions of science, objectivity and evidence were also highlighted. Professor Good dealt with these points in greater detail in a 2004 article in the *International Journal of Refugee Law* (Good 2004).¹

Two concepts of science

In that paper, Good reviewed two recent works in the philosophy of sociology, one by an historical sociologist² and one by a lawyer.³ Whereas the sociologist, Jones, gave a relativistic account of scientific and sociological findings as “negotiated constructs” borne out of a scientific discipline which was itself a contestable social process, the lawyer, Redmayne, insisted that scientific constructs, though certainly capable of error, were nonetheless accounts of matters of fact, the authenticity of which could be measured against the facts.⁴ Good asserted that the vast majority of sociologists and, in particular, anthropologists would disagree with Redmayne’s objectivist account of scientific knowledge, preferring to argue either that scientific and anthropological findings cannot be “measured” against objective facts but only compared against competing findings or, in the alternative, that objective facts simply do not exist at all. In his talk, *Good stressed the prevalence of relativism in anthropology and identified this, together with the legal profession’s more objectivist view of science, as a key barrier to clear communication between country experts who are anthropologists, and members of the AIT judiciary.*

In relation to the legal profession’s concept of science, Good noted in his paper: “Simplistic notions of scientific objectivity tend to be taken for granted by all parties in the adversarial context of the courts - an unfortunate misapprehension when decisions governing livelihood, life, liberty, and death are generally at stake, but an understandable one given that experts themselves collude in its maintenance.”⁵

Two concepts of objectivity

In the preceding discussion of science, the term “objective” has been used to describe a scientific account which accurately describes and reflects reality, where reality is understood as a domain of fact which exists independently of scientific accounts and is in no way constituted, constructed or distorted by those accounts. This is a metaphysical concept of objectivity; one which is understood and, often, regarded rather disdainfully by social

scientists, especially anthropologists. As a metaphysical notion, it is highly controversial within the fields of social science and philosophy and, where construed in the manner just adumbrated, it is almost universally rejected. Professor Good was keen to stress, however, that the term “*objective*” is used differently by lawyers than by anthropologists and philosophers. For lawyers, objectivity is a practical notion, which does not carry the same negative connotations as the metaphysical notion. Terms like “objective” and “subjective” are used to enable the judiciary to distinguish sharply between, for example, an asylum seeker’s fear of persecution based upon an actually existing risk on return, as distinct from a fear based on a perceived or imagined risk on return. Alternatively, in criminal law, the objective/subjective dichotomy may be used to bring out the distinction between judging a person by that person’s own standards, as distinct from the community or average person’s standards.

Professor Good acknowledged the central importance, for the courts, of distinguishing what an individual thinks or feels or believes to be right or wrong from the court’s independent position on these issues. The courts have to make findings of fact otherwise they would not be able to determine cases, and the tests and standards they employ in order to arrive at these findings of fact are commonly referred to as “objective tests.” Evidence to which the court attaches a great deal of weight is often called “objective evidence.” Neither the tests nor the evidence that the courts regard as objective could possibly meet the standards required by the classical, metaphysical concept of objectivity, but they are the standards the courts apply and, for pragmatic reasons, they are called objective standards.

Two approaches to evidence

Anthropologists and lawyers use evidence for different purposes. Anthropologists study cases, develop explanatory principles and theories, and then subject these principles and theories to the rigours of evidential testing. Often, principles and theories have to be revised in order to account for recalcitrant evidence (i.e. evidence which goes against what the theory predicts will be observed). Evidence is used in the formulation, corroboration and testing of principles (namely explanatory theories).

Legal approaches to sources of evidence are different. The purpose of evidence is absolutely not to challenge or cause revision of the relevant principles, namely legal principles. Rather, the purpose of evidence is to shed light on disputed questions of fact, allowing findings of fact to be made so that the law can be applied to the case.

There are also marked differences in the type of evidence used by anthro-

pologists and lawyers. *While anthropologists handle raw data, gathered by researchers in the course of field studies, lawyers require experts to interpret data for them.* However, anthropologists also make use of evidence provided by other experts in the course of their academic work, but the criteria they use to assess the credibility and weight to be attributed to this evidence is markedly different to those applied by the courts, in particular the AIT. Anthropologists will often defer to another expert where the other expert has more experience of studying the instant case and, it is therefore supposed, is likely to know more about it.

Where there are two experts with a similar amount of experience of a particular case, but who give conflicting accounts of it, this is considered normal and other anthropologists will assess the competing claims by deciding which theoretical explanation is better at accounting for the raw data or, where the two anthropologists' data conflict, which anthropologist employed the better research methods. It is extremely rare for an anthropologist to accuse another anthropologist of bias or lack of objectivity and, where this does occur, it is never solely on the basis of disagreement with other anthropologists. *An anthropologist may reach a conclusion that conflicts with every other expert in his field, but this alone would not constitute grounds for discrediting him.* Something would have to be shown to be wrong with his data or his methodology.

In cases where experts' credibility has been attacked by the AIT, Professor Good remarked that it was unsurprising that many anthropologists found it difficult to understand why this happened. The AIT applies completely different standards for the assessment of expert evidence than an anthropologist would. Because the AIT does not possess the detailed knowledge of anthropological research methods, nor the time, to check the data or methodology of the anthropologist's work, *the AIT must either accept all expert testimony unquestioningly (even when it conflicts with other expert testimony), or adopt alternative criteria for the assessment of evidence.*

These alternative criteria are often unpopular with expert anthropologists. As Professor Good pointed out:

*“While it is commonplace for reports by experts with a lifetime of relevant experience to be savaged by adjudicators and tribunals - on grounds of bias, for example – similar criticisms of **Country Assessments** [now **Country of Origin Information Reports**] are now almost unheard of. Yet it needs to be pointed out that they are mere compilations of secondary or tertiary sources, by UK-based civil servants with no expertise whatever on the countries concerned. One can only assume that the assessments acquire authority in the eyes of the court*

[sic] merely because they bear the imprimatur of the Secretary of State.”⁶

In his talk, however, Professor Good was conciliatory to the extent that he pointed out the practical necessity of the existence of *some criteria by which the AIT may assess expert evidence and, though he believed that the AIT was too ready to assume that it was being misled or lied to by individual experts, it was understandable and, indeed, essential that the established reputation of sources be taken into account by the AIT. Good maintained, however, that the AIT ought, when assessing country evidence, to take more account of the author’s expertise and experience and less account of the reputation of sources.*

Conclusion

Professor Good concluded his talk by introducing two judicial quotations:

“[The IAT has] its own level of expertise as a specialist tribunal, not only in the legal issues for its determination, but also in its knowledge of country situations and, to a lesser extent perhaps, in consideration and evaluation of medical reports.”⁷

“No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act ... in accordance with his concept of what a reasonable man would have done.”⁸

Although the two positions expressed above do not directly contradict one another, Professor Good expressed disagreement with the first on the grounds that a judge’s factual knowledge of country conditions was no substitute for anthropological expertise and professional judgement based on first hand experience. Cultural interpretation of events was best left to experts, he argued, for reasons which were nicely expressed by the second quotation.

1 Good, Anthony “Expert Evidence in Asylum and Human Rights Appeals: an Expert’s View” *International Journal of Refugee Law* [2004] 16 (3) pp.358-380

2 Jones, Carol A G *Expert Witnesses: Science, Medicine and the Practice of Law* (Oxford: Clarendon 1994)

3 Redmayne, Mike *Expert Evidence and Criminal Justice* (Oxford: University Press 2001)

4 *ibid.*

5 Good., *op. cit.*

6 Good., *op. cit.*

7 Barnes, John “Expert Evidence - the Judicial Perception in Asylum and Human Rights Appeals” *International Journal of Refugee Law* [2004] 16 (3) 349-357

8 Bingham, Thomas “The Judge as Juror: the Judicial Determination of Factual Issues” in: Rideout, R & Jowell,

Item 3

[This is a reference only as the article is long and covers many issues]

Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials

Carol Krafka, Meghan A. Dunn, Molly Treadway Johnson, Joe S. Cecil & Dean Miletich federal judicial center

http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentunid=C973D17E84EDA50F85256CA3006991A9

Excerpted from *Psychology, Public Policy, and Law* 2002, vol. 8, no. 3, pages 309-332

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Item 4

Federal Court of Australia

Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia

This Practice Direction replaces the Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia issued on 4 September 2003.

Practitioners should give a copy of the following guidelines to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based on the specialised knowledge of the witness (see - Part 3.3 - Opinion of the Evidence Act 1995 (Cth)).

M.E.J. BLACK

Chief Justice

19 March 2004

Explanatory Memorandum

The guidelines are not intended to address all aspects of an expert witness's duties, but are intended to facilitate the admission of opinion evidence¹, and to assist experts to understand in general terms what the Court expects of an expert witness giving opinion evidence. Additionally, it is hoped that the guidelines will assist individual expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them.

Ways by which an expert witness giving opinion evidence may avoid criticism of partiality include ensuring that the report, or other statement of evidence:

- (a) is clearly expressed and not argumentative in tone;
- (b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;
- (c) identifies with precision the factual premises upon which the opinion is based;
- (d) explains the process of reasoning by which the expert reached the opinion expressed in the report;
- (e) is confined to the area or areas of the expert's specialised knowledge; and
- (f) identifies any pre-existing relationship between the author of the report, or his or her firm, company etc, and a party to the litigation (eg a treating medical practitioner, or a firm's accountant).

An expert is not disqualified from giving evidence by reason only of the fact of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship should be disclosed. Where an expert has such a relationship with the party the expert may need to pay particular attention to the identification of the factual premises upon which the expert's opinion is based. The expert should make it clear whether, and to what extent, the opinion is based on the personal knowledge of the expert (the factual basis for which might be required to be established by admissible evidence of the expert or another witness) derived from the ongoing relationship rather than on factual premises or assumptions provided to the expert by way of instructions.

All experts need to be aware that if they participate to a significant degree in the process of formulating and preparing the case of a party, they may find it difficult to maintain objectivity.

An expert witness does not compromise objectivity by defending, forcefully if necessary, an opinion based on the expert's specialised knowledge which is genuinely held but may do so if the expert is, for example, unwilling to give consideration to alternative factual premises or is unwilling, where appropriate, to acknowledge recognised differences of opinion or approach between experts in the relevant discipline.

The guidelines are, as their title indicates, no more than guidelines. Attempts to apply them literally in every case may prove unhelpful. In some areas of specialised knowledge and in some circumstances (eg some aspects of economic "evidence" in competition law cases) their literal in-

terpretation may prove unworkable. The Court expects legal practitioners and experts to work together to ensure that the guidelines are implemented in a practically sensible way which ensures that they achieve their intended purpose.

Guidelines

1. General Duty to the Court²

- 1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
- 1.2 An expert witness is not an advocate for a party.
- 1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

2. The Form of the Expert Evidence³

- 2.1 An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
- 2.2 All assumptions of fact made by the expert should be clearly and fully stated.
- 2.3 The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and state the qualifications of the person who carried out any such test or experiment.
- 2.4 Where several opinions are provided in the report, the expert should summarise them.
- 2.5 The expert should give reasons for each opinion.
- 2.6 At the end of the report the expert should declare that "[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court."
- 2.7 There should be included in or attached to the report (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials which the expert has been instructed to consider.
- 2.8 If, after exchange of reports or at any other stage, an expert witness changes a material opinion, having read another expert's report or for any other reason, the change should be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court⁴.
- 2.9 If an expert's opinion is not fully researched because the expert

considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report⁴.

2.10 The expert should make it clear when a particular question or issue falls outside the relevant field of expertise.

2.11 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports⁵.

3. Experts' Conference

3.1 If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement about matters of expert opinion, they should specify their reasons for being unable to do so.

1 As to the distinction between expert opinion evidence and expert assistance see *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 per Allsop J at [676].

2 See rule 35.3 Civil Procedure Rules (UK); see also Lord Woolf "Medics, Lawyers and the Courts" [1997] 16 CQ 302 at 313.

3 See rule 35.10 Civil Procedure Rules (UK) and Practice Direction 35 – Experts and Assessors (UK); *HG v the Queen* (1999) 197 CLR 414 per Gleeson CJ at [39]-[43]; *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* [2000] FCA 1463 (FC) at [17]-[23].

4 The "Ikarian Reefer" [1993] 20 FSR 563 at 565.

5 The "Ikarian Reefer" [1993] 20 FSR 563 at 565-566. See also Ormrod "Scientific Evidence in Court" [1968] Crim LR 240.

Item 5

Politically-motivated torture and its survivors: *A desk study review of the literature*

Jose Quiroga, MD

(Program for Torture Victims of Los Angeles (PTV), California, US.

jquiroga@ptvla.org)

James M. Jaranson, MD, MA, MPH

(Center for Victims of Torture (CVT), California, US. jaran001@umn.edu)

<http://www.irct.org/Admin/Public/>

Item 6

Extracts from Ouseley J's Determination in IAT in *DRC CG* [2004] UKIAT 00321

33. She lived in Kinshasa for nearly forty years without any problems until 1998; she would be no stranger to the city and would instead be familiar with her surroundings. She might have no property of her own to live in but it is inconceivable that she would have no contacts who would be able to assist. Three children were living there in 1998. Mr. Bobb referred to a passage in the CIPU Report, 6.33, which said that women were discriminated against in many walks of life, and required their husband's permission before engaging in various transactions including those concerning property. It is far from clear that this applies to someone in the position of the Appellant, the whereabouts of whose husband is allegedly unknown. She might well find life tough and harsh, but that does not involve a breach of Article 3's high threshold, nor does it mean that return would be disproportionate if Article 8 were engaged. It is no basis for international protection or for saying that her human integrity would be disproportionately interfered with.

34. However, that second set of factors is based on a premise which we do not accept. The Adjudicator did not err in not dealing with Article 8 in the light of her findings of fact and the content of the Article 8 point raised.

35. This appeal is accordingly dismissed. It is reported for what we say about the relevance of medical and psychiatric reports to credibility and the way in which advocates relying on them for that purpose should set out their case.

Mr. Justice Ouseley, President

Item 7

Responses from a meeting of the Refugee Psychologists Forum 26/01/06

- It is felt that medical reports are not being requested as often as they could be. In other words, we have clients who we feel are not presenting well due to psychological problems, or have difficulties which might preclude their return under Human Rights Act grounds, but solicitors are not asking for clinical opinions.

This may be due to

- * Solicitors not recognising mental health problems
 - * Concern that professional reports will cost too much, given that funding for each case is now so restricted. This is often not the case - NHS clinicians will tend not to charge for reports concerning current clients.
 - * Less time available to solicitors to consider wider issues that may be affecting their client. If the claim does not draw specifically on mental health issues, the solicitor may consider a medical report to be marginal. However if a client is presenting poorly - with poor concentration for example, that is affecting their credibility - then a clinical opinion might help explain this.
- Clinicians at specialist clinics are seeing many people with severe mental health problems who have come to the end of the application process, but do not appear to have had a good and fair hearing. Whilst it is not our role to comment on the judicial process, we are concerned that mental health problems are interfering with the process, but professionals untrained in mental health are not recognising this. Are there, or should there be mechanisms by which we can feed into the process, at early as well as late stages? One example might be by providing guidelines for the use of the court in e.g. recognising the difficulties of the specific client.
 - People with more severe mental health problems take longer to interview. They may be very fearful, very mistrustful, have strong anger responses that they work hard to control, they may have difficulty remembering or concentrating. Since the funding changes, solicitors' time is so restricted that these clients are discriminated against. Again, is there any way that clinicians can help? Could we be involved in applications to the Legal Services Commission for extra funding?

- In terms of what solicitors should be considering – an overall point is for them to have some guidance in understanding how mental health problems can be interacting with a claimant’s presentation, which usually goes to credibility. This can often be as important, or more so, than diagnoses of PTSD with the aim of establishing the truth of an account. For example, a claimant may not fulfil all the criteria for a diagnosis of PTSD, or Depression, but nonetheless have trauma-related memory problems that are undermining their credibility.
- Perhaps the most acute concern is about the consideration of suicidality in an applicant. Psychiatrists and psychologists are finding that their clinical judgment that a client is suicidal is given no credence unless the individual has already made a serious attempt to kill himself. It is true that one of the predictors of successful suicide is previous suicide attempts. However, it is also true that by setting the threshold for an assessment of suicidality this high we are demanding of applicants that they make attempts on their lives before we believe the extent of their mental health problems.

Item 8

Methodology employed in the preparation of medico-legal reports on behalf of the Medical Foundation

Guidelines for medical evaluation of torture and ill-treatment

The following guidelines are based on the *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. These guidelines are not intended to be a fixed prescription, but should be applied taking into account the purpose of the evaluation and after an assessment of available resources. Evaluation of physical and psychological evidence of torture and ill-treatment may be conducted by one or more clinicians, depending on their qualifications.

I. Case information

Date of exam: Exam requested by (name/position):
Case or report No: Duration of evaluation: hours,
Subject's given name: Birth date: Birth place:
Subject's family name: Gender: male/female
Reason for exam: Subject's ID No:
Clinician's name: Interpreter (yes/no), name:
Informed consent: yes/no If no informed consent, why?:
Subject accompanied by (name/position):
Persons present during exam (name/position):
Subject restrained during exam: yes/no; If "yes", how/why?
Medical report transferred to (name/position/ID No.):
Transfer date: Transfer time:
Medical evaluation/investigation conducted without restriction (for subjects in custody): yes/no
Provide details of any restrictions:

II. Clinician's qualifications (for judicial testimony)

Medical education and clinical training
Psychological/psychiatric training
Experience in documenting evidence of torture and ill-treatment
Regional human rights expertise relevant to the investigation
Relevant publications, presentations and training courses
Curriculum vitae

III. Statement regarding veracity of testimony (for judicial testimony)

For example: "I personally know the facts stated below, except those stated on information and belief, which I believe to be true. I would be prepared to testify to the above statements based on my personal knowledge and belief."

IV. Background information

General information (age, occupation, education, family composition, etc.)

Past medical history

Review of prior medical evaluations of torture and ill-treatment

Psychosocial history pre-arrest.

V. Allegations of torture and ill-treatment

1. Summary of detention and abuse
2. Circumstances of arrest and detention
3. Initial and subsequent places of detention
(chronology, transportation and detention conditions)
4. Narrative account of ill-treatment or torture (in each place of detention)
5. Review of torture methods

VI. Physical symptoms and disabilities

Describe the development of acute and chronic symptoms and disabilities and the subsequent healing processes.

1. Acute symptoms and disabilities
2. Chronic symptoms and disabilities

VII. Physical examination

1. General appearance
2. Skin
3. Face and head
4. Eyes, ears, nose and throat
5. Oral cavity and teeth
6. Chest and abdomen (including vital signs)
7. Genito-urinary system
8. Musculoskeletal system
9. Central and peripheral nervous system

VIII. Psychological history/examination

1. Methods of assessment
2. Current psychological complaints
3. Post-torture history
4. Pre-torture history
5. Past psychological/psychiatric history
6. Substance use and abuse history
7. Mental status examination
8. Assessment of social functioning
9. Psychological testing: (see chapter VI.C.1. for indications and limitations)
10. Neuropsychological testing (see chapter VI.C.4. for indications and limitations)

IX. Photographs

X. Diagnostic test results (see annex II for indications and limitations)

XI. Consultations

XII. Interpretation of findings

1. Physical evidence
 - A. Correlate the degree of consistency between the history of acute and chronic physical symptoms and disabilities with allegations of abuse.
 - B. Correlate the degree of consistency between physical examination findings and allegations of abuse.
(Note: The absence of physical findings does not exclude the possibility that torture or ill-treatment was inflicted.)
 - C. Correlate the degree of consistency between examination findings of the individual with knowledge of torture methods and their common after-effects used in a particular region.
2. Psychological evidence
 - A. Correlate the degree of consistency between the psychological findings and the report of alleged torture.
 - B. Provide an assessment of whether the psychological findings are expected or typical reactions to extreme stress within the cultural and social context of the individual.
 - C. Indicate the status of the individual in the fluctuating course of trauma-related mental disorders over time, i.e. what is the time-frame in relation to the torture events and where in the course of recovery is the individual?
 - D. Identify any coexisting stressors impinging on the individual

(e.g. ongoing persecution, forced migration, exile, loss of family and social role, etc.) and the impact these may have on the individual.

E. Mention physical conditions that may contribute to the clinical picture, especially with regard to possible evidence of head injury sustained during torture or detention.

XIII. Conclusions and recommendations

1. Statement of opinion on the consistency between all sources of evidence cited above (physical and psychological findings, historical information, photographic findings, diagnostic test results, knowledge of regional practices of torture, consultation reports, etc.) and allegations of torture and ill-treatment.
2. Reiterate the symptoms and disabilities from which the individual continues to suffer as a result of the alleged abuse.
3. Provide any recommendations for further evaluation and care for the individual.

XIV. Statement of truthfulness (for judicial testimony)

For example: "I declare under penalty of perjury, pursuant to the laws of (country), that the foregoing is true and correct and that this affidavit was executed on (date) at (city), (state or province)."

XV. Statement of restrictions on the medical evaluation/ investigation (for subjects in custody)

For example: "The undersigned clinicians personally certify that they were allowed to work freely and independently and permitted to speak with and examine (the subject) in private, without any restriction or reservation, and without any form of coercion being used by the detaining authorities"; or "The undersigned clinician(s) had to carry out his/her/ their evaluation with the following restrictions:"

XVI. Clinician's signature, date, place

XVII. Relevant annexes

A copy of the clinician's curriculum vitae, anatomical drawings for identification of torture and ill-treatment, photographs, consultations and diagnostic test results, among others.

Further information can be obtained from:

*The Office of the United Nations High Commissioner for Human Rights,
Palais des Nations, 1211 Geneva 10, Switzerland*

Tel: (+41-22) 917 90 00 Fax: (+41 22) 917 02 12

E-mail: webadmin.hchr@unog.ch Internet: www.unhchr.ch

Item 9

Law of Evidence, Walker and Walker

OPINION EVIDENCE

assist the court in analysing evidence does not require to be corroborated,¹⁴ but if the evidence from the skilled witness is in proof of a crucial fact in the case the normal corroboration requirements apply.¹⁵ So, for example, identification may be proved by analysis of fingerprints or handwriting, which in a criminal case requires two skilled witnesses, although procedures exist to save both from attending court if their joint report is not disputed.¹⁶

16.2 ORDINARY WITNESS

As already observed,¹⁷ evidence which is accepted as fact may really be opinion. **16.2.1** But what is obviously opinion evidence may be admissible from an ordinary witness. Identification of handwriting¹⁸ or of property¹⁹ are examples. In an action of divorce on the ground of adultery a witness who had described the position of the defender and the alleged paramour when she entered a room was allowed to be asked what immediate impression she formed.²⁰ While that decision was expressly rested on the ground that the impression was immediate, evidence was allowed of an opinion which to some extent must have rested on reflection and special knowledge. In a written slander the names had been left blank, and a witness was allowed to be asked to whom in his opinion the slander applied.²¹ Opinions have been expressed, *obiter*, that a witness who has described a depression in a pavement may be asked whether he saw anything dangerous about it.²²

16.3 SKILLED WITNESS

Purpose

A skilled witness is a person who, through expertise or education or both, is specially qualified in a recognised branch of knowledge, whether it be art, science or craft.²³ The term “expert witness” has prevailed in England.²⁴ However, the term “skilled witness” is retained here since it reflects the range of attributes which may qualify the witness to give opinion evidence. **16.3.1**

It is competent to take the opinion of the skilled witness, based on special knowledge, on facts that he or she has observed (including the results of tests made by himself or in his presence)²⁵ or spoken to by other witnesses. The opinion may **16.3.2**

¹⁴ *Davie v Magistrates of Edinburgh* 1953 SC 34.

¹⁵ *McKillen v Barclay Curle & Co Ltd* 1967 SLT 41.

¹⁶ Criminal Procedure (Scotland) Act 1995, ss 280, 281 and 284.

¹⁷ See para 16.1.

¹⁸ See para 16.4.

¹⁹ Dickson, *Evidence* (3rd edn), para 392.

²⁰ *King v King* (1842) 4 D 590 at 596. Similar evidence was led without objection in *Wilson v Wilson* (1898) 25 R 788.

²¹ Dickson, *Evidence* (3rd edn), para 392; *Edwards v McIntosh* (1823) 3 Mur 374.

²² *Hewat v Edinburgh Corporation* 1944 SC 30 at 35.

²³ Dickson, *Evidence* (3rd edn), para 397.

²⁴ See Cross & Tapper, *Evidence* (9th edn), pp 521–525.

²⁵ In *Irvine v Powrie's Trs* 1915 SC 1006 it was said that both parties may have to be present, but in modern practice parties are given the opportunity to have tests carried out by their own skilled witness: eg Criminal Procedure (Scotland) Act 1995, s 276.

be as to the probable cause of facts²⁶ or their probable result.²⁷ So, the pathologist who has carried out a post mortem revealing detailed biological facts may be asked for a scientific opinion as to cause of death or as to whether a particular weapon could have caused an injury of which evidence was found on the body. In a case concerning professional negligence evidence will be led from a person knowledgeable and experienced in the relevant profession as to what is usual and normal practice in that profession, since proof of professional negligence requires evidence of departure from normal practice and also that the course adopted by the defender is one which no professional person of ordinary skill would have taken if acting with ordinary care.²⁸ In exceptional situations the court has permitted evidence as to human nature and behaviour, falling short of psychiatric condition.²⁹ Normally such evidence would be considered incompetent since the assessment of human nature (for example, reactions to stresses such as a partner's infidelity),³⁰ would be deemed to be within the experience and knowledge of a court.³¹ In order to have such evidence admitted a matter of personality must be identified which is particularly relevant to proof or defence of an issue in the case,³² and which is outwith the normal experience of the court, such as the reactions of a child to sexual abuse by an adult.³³

Qualification and knowledge

16.3.3 If the opinion of the skilled witness is not based on the principles of some recog-

²⁶ *The "Nerano" v The "Dromedary"* (1895) 22 R 237.

²⁷ *SS "Rowan" v SS "Clan Malcolm"* 1923 SC 316.

²⁸ *Hunter v Hanley* 1955 SC 200.

²⁹ There is no clear Scottish authority, but in *Green v HM Advocate* 1983 SCCR 42 fresh evidence in the form of psychiatric evidence of the tendency of the victim to fantasise was admitted in support of the appeal against a conviction of rape; and in *Blagojevic v HM Advocate* 1995 SLT 1189 a psychologist was not permitted to give evidence about the suggestibility of the accused in police interview, not on the ground that it was incompetent but because there had been no factual evidence taken from the accused or Crown witnesses to found a basis for the opinion evidence. Although the evidence of psychiatrists as to abnormality or disorder of personality has been allowed in cases where provocation or diminished responsibility is pled (eg *Carraher v HM Advocate* 1946 JC 108, *Connelly v HM Advocate* 1990 JC 349, *Williamson v HM Advocate* 1994 JC 149 and *Martindale v HM Advocate* 1994 SLT 1093), the court has tended to withdraw from the jury a plea of diminished responsibility which is based on evidence of personality rather than mental disorder as defined in the Mental Health (Scotland) Act 1984. The definitions of mental disorder and personality disorder are under review by the Millan Committee (Review of the Mental Health (Scotland) Act 1984), and the MacLean Committee (Review of the Treatment and Sentencing of Sexual Offenders in Scotland), both of which were set up by the Scottish Office in 1999.

³⁰ In *R v Turner* [1975] QB 834, the court refused to allow defence evidence from a psychologist, in support of a defence of provocation, to the effect that the accused was likely to be provoked to extreme violence on learning of his partner's infidelity.

³¹ *R v Turner* [1975] QB 834. For comment upon this case, see Sheldon, "The Admissibility of Psychological and Psychiatric Expert Testimony" 1992 SLT (News) 301, Sheldon & MacLeod, "From Normative to Positive Data: Expert Psychological Evidence Re-examined" [1991] Crim LR 811.

³² In *Lowery v R* [1974] AC 85 one accused blamed the other for the crime of which they were both charged, and evidence as to the dominance of their respective personalities was admitted. The case is considered special, and is frequently distinguished in England, where there is a reluctance to allow evidence from, eg, a psychologist to influence the court upon the reliability of the witness (*R v Turner* [1975] QB 834 and see Cross & Tapper *Evidence* (9th edn), pp 517–518 and cases cited there). No doubt this is why the evidence is admitted in cases of provocation or diminished responsibility cited above.

³³ This is commonly admitted in child welfare cases: eg *M v Kennedy* 1993 SC 115. However, in *Martindale v HM Advocate* 1994 SLT 1093, evidence from a psychiatrist that the accused may have reacted more violently due to delayed reaction to abuse as a child, although led, was not permitted to go to the jury in support of a plea of diminished responsibility.

nised branch of knowledge, it is useless, and probably inadmissible, because it cannot be tested by cross-examination. Accordingly, the qualification and experience of the skilled witness must first be established,³⁴ usually by the testimony of that witness alone, though cross-examination has been known to reduce pretensions and to remind the skilled witness to offer opinion only within that field.³⁵ It has been accepted in some cases that a witness may gain a particular field of knowledge through attendance at seminars or reading academic literature, albeit that they have not qualified personally in that discipline. Hence, police officers who had attended seminars on drug enforcement were allowed to give evidence regarding what they had learnt from the speakers and other participants in the process of drug control,³⁶ and medical witnesses who were not epidemiologists were permitted to refer to and adopt into their evidence published material on epidemiology.³⁷ However, these examples stand on their own facts, and the assessment of the skill of the witness will be a matter for the court to assess in each case. A party seeking to lead a witness with purported knowledge or experience outwith generally recognised fields would need to set up by investigation and evidence not only the qualifications and expertise of the individual skilled witness, but the methodology and validity of that field of knowledge or science.³⁸

After the witness's own knowledge and expertise in the area has been established the witness may refer to relevant books or articles which are recognised in that field,³⁹ and any passages adopted by the witness become part of the evidence.⁴⁰ This written material is not considered to be hearsay⁴¹ but if not so adopted it is not evidence, and the court may not rely on it.⁴² In a criminal case where published material was put to an expert in cross-examination, although not produced for him to examine, the witness stated that he knew of the material but that counter-material had since been published. An appeal on the basis that his evidence was not supported by the material put to him in cross-examination was rejected, and the court stressed that the witness's evidence had been based on his own experience, not the publication to which he had been referred.⁴³ If reliance is to be placed upon the published material as part of the evidence of the skilled

³⁴ Dickson, *Evidence* (3rd edn), para 98.

³⁵ See the warning in *R v Turner* [1975] QB 834 at 841.

³⁶ *Wilson v HM Advocate* 1988 SCCR 384.

³⁷ *Main v McAndrew Wormald Ltd* 1988 SLT 141. Similarly in *M v Kennedy* 1993 SC 115 a paediatric neurologist was permitted to give evidence regarding the gynaecological examination of a child when she had been present at the examination and concurred with the findings, albeit that her only knowledge of that specialism was from attending lectures and working together with other specialists concerned with the identification of cases of child sexual abuse. In accepting her evidence on this point the court noted that "care should be taken to avoid leading more skilled witnesses than necessary, having regard to the evidence which they can give and their experience."

³⁸ A point noted *obiter* in *Mearns v Smedvig Ltd* 1999 SC 243, where an order for examination of the pursuer by a consultant of the novel "Blankenship system" for assessment of the effects of injury was refused.

³⁹ *Main v McAndrew Wormald Ltd* 1988 SLT 141.

⁴⁰ *Davie v Magistrates of Edinburgh* 1953 SC 34. In *Williamson v McClelland* 1913 SC 678, the Lord President based his opinion partly on books never referred to.

⁴¹ *Main v McAndrew Wormald Ltd* 1988 SLT 141, following *Davie v Magistrates of Edinburgh* 1953 SC 34, *R v Abadom* [1983] 1 WLR 126.

⁴² *Davie v Magistrates of Edinburgh* 1953 SC 34.

⁴³ *Di Luca v HM Advocate* 1996 SLT 924. A similar distinction was made in relation to a Code of Practice to which the witness was referred in *Balmoral Group Ltd v HM Advocate* 1996 SLT 1230.

witness it should probably be lodged as a production in order to give fair notice to the opponent.⁴⁴

- 16.3.5** A witness may be skilled without possessing formal qualifications. Much will depend upon the area of knowledge and the extent to which it is exclusive to those with particular educational or professional qualifications. Hence, medical and scientific witnesses will generally require to show relevant qualifications, professional experience and memberships of regulatory bodies; but, for example, a witness who speaks to an office practice or custom of trade should have appropriate experience, but not necessarily qualifications, of that trade.⁴⁵

Basis of fact

- 16.3.6** (i) Since the opinion is based on a certain state of facts, it is valueless unless the facts are averred and proved. In an action for reparation evidence, including that of a skilled witness, regarding a particular process for lifting a disabled patient was inadmissible when there was no notice on record of that process,⁴⁶ and in an action where foreign law might have been relied upon skilled evidence as to that law was inadmissible when the pleadings gave no notice of the substance of that law, its relevance and effect upon the facts, and the alleged difference between the foreign law and the law of Scotland.⁴⁷ Where a pursuer sought to prove by skilled evidence that from the condition of a pole in October it must have been in a dangerously corroded state in the preceding May, she failed because she did not prove by sufficient evidence the condition of the pole in October.⁴⁸ In a criminal trial the connection of the accused with the crime depended, *inter alia*, on a comparison by a skilled witness between material used for the crime and material said to have been found in the pocket of the accused. The Crown, however, failed to establish by sufficient evidence that the material had been found there, and accordingly the opinion evidence was useless.⁴⁹ In a reparation action a report of a medical witness referring to X-ray films not produced was vitiated in so far as it relied upon those films.⁵⁰ A skilled witness for the defence in a criminal case must also have a basis in fact. Hence, the evidence of a clinical psychologist as to the suggestibility of the

⁴⁴ *Main v McAndrew Wormald Ltd* 1988 SLT 141, but cf *Roberts v British Railways Board* 1998 SCLR 577 (OH). However, a flexible attitude to the reception of a late report by a skilled witness in a criminal case—*Torres v HM Advocate* 1998 SLT 811—suggests that the court will not exclude relevant material, and the matter of fairness can be dealt with by, eg, adjournment.

⁴⁵ The knowledge of police officers as to relative quantities of controlled drugs kept for personal use or dealing has been admitted: *Bauros v HM Advocate* 1991 SCCR 768; *Haq v HM Advocate* 1987 SCCR 433; *White v HM Advocate* 1986 SCCR 224. In *Hopes and Lavery v HM Advocate* 1960 JC 104 the typist who had transcribed the content of a tape recorded exchange between the victim and the accused was an expert witness to the process of transcription, with hesitation on the part of the majority since she had never carried out the process before.

⁴⁶ *Parker v Lanarkshire Health Board* 1996 SCLR 57.

⁴⁷ *Armour v Thyssen Edelstahlwerke AG* 1989 SLT 182 (the appeal at 1990 SLT 891 is on another point).

⁴⁸ *Stewart v Glasgow Corporation* 1958 SC. 28. See also *AB v Northern Accident Ins Co* (1896) 24 R 258, decided on similar grounds.

⁴⁹ *Forrester v HM Advocate* 1952 JC 28. See also *Carraher v HM Advocate* 1946 JC 108 at 118.

⁵⁰ *Ward v Upper Clyde Shipbuilders* 1973 SLT 182. Where in a collision case the court was asked to infer from the damage to one of the ships that the other must have been going at a high speed, the argument failed at the outset on the ground that the only evidence of the damage was that of the damaged ship's own master: *The "Nerano" v The "Dromedary"* (1895) 22 R 237 at 246. Such a case would not now require corroboration of that fact—Civil Evidence (Scotland) Act 1988, s 1—but the fact must still be established in evidence.

accused during the pressure of a police interview was not permitted when there had not been factual evidence of pressure.⁵¹

(ii) The experts may have failed to take all the facts into account or have proceeded upon inadmissible facts⁵² or unjustifiable assumptions. In a collision case the experts, in drawing conclusions from marks on one of the ships, had left out of account the possibility of the ship rolling, or, to put it another way, had assumed that the sea was absolutely smooth.⁵³ 16.3.7

(iii) The alleged facts on which an opinion is based may be disproved or explained so as to deprive them of significance. Where medical opinions that a testator was insane depended partly on supposed delusions and peculiar conduct, it was established that one of the supposed delusions was a fact and another probably true, and that the conduct had been characteristic of the testator before insanity was suggested.⁵⁴ In these cases the facts on which the skilled witnesses proceeded were closely connected with the facts in issue, but where they are not, enquiry into them may be refused, not on the ground that they are logically irrelevant, but on the ground that limits must be set to the enquiry.⁵⁵ When sanity is an issue, evidence of mental disorders in close relatives has been considered relevant in a civil case,⁵⁶ but generally not in criminal cases.⁵⁷ In an action of damages for slander contained in letters, where the only issue was authorship, proof was allowed of averments that the defender had written other letters as a basis for skilled evidence.⁵⁸ 16.3.8

Controls upon use of skilled witnesses

In the Court of Session, if an assessor is sitting,⁵⁹ limitations are put upon the parties' recourse to evidence of skilled witnesses. Generally, only one skilled witness may be led on each side on a matter within the qualification of the assessor,⁶⁰ unless leave is obtained.⁶¹ If the case arises out of a collision at sea and a nautical assessor is sitting, no skilled evidence is competent on nautical 16.3.9

⁵¹ *Blagojevic v HM Advocate* 1995 SLT 1189. The police officers had not been cross-examined on this, and the accused elected not to give evidence. Since *Thompson v Crowe* 2000 JC 173, the correct procedure is to allow the accused to give evidence regarding the pressure in a *voirdire*.

⁵² Such as hearsay, confidential or irrelevant facts; however relevance to proof of the issue and relevance to expert opinion on the issue may be two different things, as in *Gemmill v HM Advocate* 1980 JC 16, where previous convictions were referred to in the medical reports regarding diminished responsibility. See also *Macdonald v Munro* 1997 SLT 446, *Sloan v Crowe* 1996 SLT 1094. In civil cases few categories of evidence are now inadmissible, but failure to aver the basis for the factual evidence will render the expert evidence based on those facts inadmissible: see, eg, *Armour v Thyssen Edelstahlwerke AG* 1989 SLT 182 (the appeal at 1990 SLT 891 is on another point), *Parker v Lanarkshire Health Board* 1996 SCLR 57. For a discussion in relation to England see Pattenden, "Expert Opinion Evidence based on Hearsay" [1982] CrimLR 85.

⁵³ *SS "Rowan" v SS "Clan Malcolm"* 1923 SC 316 at 340. Cf *Gardiner v Motherwell Machinery and Scrap Co* 1961 SC (HL) 1, where the opinion evidence rested on an unproved assumption.

⁵⁴ *Morrison v Maclean's Trs* (1862) 24 D 625 at 645.

⁵⁵ *Swan v Bowie* 1948 SC 46 at 51. "Life is not long enough to allow an exhaustive inquiry into every side issue which has or may have a bearing upon the main issue": *Houston v Aitken* 1912 SC 1037 at 1038. See para 7.1.

⁵⁶ *Houston v Aitken* 1912 SC 1037.

⁵⁷ *Edmonstone* 1909 2 SLT 223; *Brown* (1855) 2 Irv 154; *Gibson* (1844) 2 Broun 332; *McClinton* (1902) 4 Adam at 1 at 13; *Paterson* (1872) 2 Coup 222; *McQue* (1860) 3 Irv 578. Cf *Galbraith* (1897) 5 SLT 65; *Dingwall* (1867) 5 Irv 466.

⁵⁸ *Swan v Bowie* 1948 SC 46.

⁵⁹ Which may be at the court's instance, although this rarely occurs, or on the application of either party: RCS, r 12.1(1).

⁶⁰ RCS, r 12.7(2).

⁶¹ RCS, r 12.7(4).

which proceeds as a commercial action in the Court of Session the parties must lodge copies of expert reports at least three days in advance of the procedural hearing,⁷⁴ and amongst the commercial judge's wide range of powers is the power to appoint a skilled person to examine the issues including the reports of any skilled witnesses.⁷⁵ **16.3.11**

Procedures to encourage disclosure and agreement of evidence now pervade both civil and criminal procedure.⁷⁶ For example, in addition to the general enjoiner to seek to agree evidence in optional⁷⁷ and commercial⁷⁸ procedures in the Court of Session, and in criminal proceedings,⁷⁹ parties may by notice call upon the other to admit evidence⁸⁰ or to accept evidence in the form of a report⁸¹ or in testimony from only one of two forensic analysts.⁸² In the event of failure to serve a counter-notice the evidence may be deemed to be admitted, evidence to contradict it may be inadmissible and, in the case of a skilled witness in civil cases, the court may refuse to certify the witness or award the expenses of calling that witness.⁸³

Presence in court

Since the skilled witness is to give an opinion on the facts, it is usually helpful that the witness should be in court to hear the evidence of the witnesses to fact relevant to the area of skilled testimony,⁸⁴ and as a general rule this is allowed unless objection is taken. Traditionally the skilled witness has been excluded while other skilled witnesses are giving evidence of opinion,⁸⁵ although there have been contrary examples.⁸⁶ This is thought to derive from times when the reliability of witnesses was generally doubted and it has been suggested that there should be no rule against a skilled witness who has yet to testify being present in court while another is testifying.⁸⁷ If the skilled witness is to speak to facts as well as opinion, it may be that he ought to be withdrawn while other witnesses are speaking to these facts.⁸⁸ **16.3.12**

Cross-examination

The cross-examiner may challenge the soundness of the conclusions drawn by the witness from the facts as the witness has assumed them. This may involve challenging the extent of the witness's knowledge and understanding of the facts, or it may involve challenging the professional or technical competence of the **16.3.13**

⁷⁴ RCS, r 47.12.

⁷⁵ RCS, r 47.12(2)(f).

⁷⁶ In addition to the procedures mentioned in this paragraph, parties require to disclose lists of witnesses in civil proceedings in the Court of Session, and in solemn prosecutions a list of witnesses must accompany the indictment.

⁷⁷ RCS, r 43.28.

⁷⁸ RCS, r 47.10.

⁷⁹ Criminal Procedure (Scotland) Act 1995 ("1995 Act"), s 257.

⁸⁰ RCS, r 36.6; OCR, r 29.14; 1995 Act, s 258.

⁸¹ 1995 Act, s 280.

⁸² 1995 Act, s 281.

⁸³ *Ayton v National Coal Board* 1965 SLT (Notes) 24.

⁸⁴ Although practical considerations of the time and cost of the skilled witness frequently preclude this.

⁸⁵ *Laurie* (1889) 2 White 326; *Pritchard* (1865) 5 Irv 88; *Milne* (1863) 4 Irv 301; *Murray* (1858) 3 Irv 262.

⁸⁶ *Granger* (1878) 4 Coup 86; *Dingwall* (1867) 5 Irv 466 at 471.

⁸⁷ Macphail, paras 17.11–17.13; Scottish Law Commission Memo No 46, R.07.

⁸⁸ But even if he is not, the court may allow his evidence on fact to be taken: Evidence (Scotland) Act 1840, s 3. Macphail proposes a discretion to allow the witness to be present (para 17.12) and the Scottish Law Commission recommend that the witness be permitted to be present (Scottish Law Commission Memo No 46, R.07). The statement in Macdonald, *Criminal Law* (5th edn), p 295, that he cannot be examined on the facts, is wrong. See para 13.22.

Item 10

Training need - John Barnes

There is the need for training and keeping abreast of all developments. Drawing strongly on Chief Justice Allan Lutfy's Notes prepared for last year's Report. We think that once we have identified the content more precisely the IARLJ can give further thought to training on the following lines,

1. The creation of a training syllabus on similar lines to the Training Manual on the Law aimed at the needs of decision makers in the reception and evaluation of evidence from the expert or skilled witness both in theory and in practice.
2. Seminars similar to the one in London which gave rise to this working party, attended by all those involved in the assessment of the claimant or patient, the preparation of the report and its reception in evidence be held regularly in as many regions of the world as possible.
3. A standing multidisciplinary panel charged with keeping abreast of new developments and preparing information manuals particularly for trainers

THE NOTION OF STATE PROTECTION

Justice Catherine Branson and Paulah Dauns, LL.B.

Human Rights Working Party

The Honourable Justice Catherine Branson, Judge of the Federal Court of Australia is a member of the International Association of Refugee Law Judges (IARLJ) and of the Human Rights Nexus Working Party (HRNWP).

Paulah Dauns is the Assistant Deputy Chairperson of the Refugee Protection Division, Western Region of the Immigration and Refugee Board of Canada (IRB) located in Vancouver, British Columbia. She is also the Rapporteur for the Human Rights Nexus Working Party of the IARLJ, a member of Council and the Chairperson of the Women Judges Forum, of the IARLJ.

The analysis and opinions in this paper are solely those of the authors and do not represent the position of the IRB, the Australian Federal Court or the IARLJ. This paper was a collaborative effort prepared with the contribution and assistance of others. These people should be acknowledged for their substantial contribution to the paper. Justice Rod Madgwick, Judge of the Federal Court of Australia and Associate Rapporteur of the Human Rights Nexus Working Party; James Simeon, Acting Executive Director of the IARLJ; Rolf Driver, Federal Magistrate, Law Courts, Sydney, Australia; Dr. Hugo Storey, Senior Immigration Judge, United Kingdom Asylum and Immigration Tribunal; Patricia Auron, Legal Advisor to the Immigration and Refugee Board of Canada; David Schwartz, Legal Advisor to the Immigration and Refugee Board of Canada; Joan Montgomery, Member, Immigration and Refugee Board of Canada; Lori Scialabba, past Chairperson, United States Board of Immigration Appeals; Sarah Murphy, Member, Refugee Status Appeals Authority, Wellington, New Zealand; Daimhin Warner, Legal Associate Refugee Status Appeals Authority, New Zealand; Professor James Hathaway, University of Michigan, USA and Professor Pene Mathew, University of Sydney, Australia. Special thanks go to research officer of the Australia Federal Court, Mr David Braun for his significant contribution to the content of this paper.

We wish to acknowledge the members of the HRNWP for their submissions and contributions to this paper. Our thanks go to all of those who have assisted us in drafting this paper in the context of a continually evolving area of the law. Any errors or omissions are solely the authors, and not those of any contributor.

1. Introduction

1. The Convention Relating to the Status of Refugees (1951), as amended by the Protocol relating to the Status of Refugees (1967) relevantly defined a '*refugee*' as 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.¹

2. As Professor James Hathaway has observed: Refugee law exists in order to interpose the protection of the international community in situations where resort to national protection is not possible.²
3. The jurisprudence of the United Kingdom³, Australia⁴, New Zealand⁵, United States of America⁶ and Canada⁷ accepts the accuracy of the above observation. The '*international community*' is relevantly those states which are parties to the Convention.⁸

2. the meaning of '*the protection of that country*'

(a) Australia

4. As Gleeson CJ pointed out in *Minister for Immigration v Khawar*,⁹ in discourse concerning the Convention there is a broader sense and a narrower sense in which the term '*protection*' is used. In the narrower sense the protection is the diplomatic or consular protection extended abroad by a country to its nationals. In the broader sense the protection is the protection against ill-treatment or violence which a country ordinarily provides to its citizens.
5. In *Khawar*, after referring to articles by Professor Kälin¹⁰ and Professor Fortin¹¹, and observing that the inability or unwillingness of the refugee to avail himself of the protection of his country, referred to in Art 1A (2), by hypothesis, occurs when he is outside his country, the Chief Justice concluded that '*protection*' was used in the article in the narrower sense.¹²
6. His Honour observed, however, that the inability or unwillingness to seek diplomatic protection abroad may be explained by a failure of internal protection in the wider sense, or may be related to a possibility that seeking such protection could result in return to the place of persecution. That is, in the view of the Chief Justice of Australia, the opening portion of Art 1A (2) postulates a putative refugee who is outside his country of nationality owing to a fear of persecution inside that country; it is that fear which makes him unwilling to avail himself of the protection of his country rather than any fear of being persecuted by his country's diplomats.
7. The view of the Chief Justice was explicitly approved by three members of the High Court (one of whom was Gleeson, CJ) in *Minister for Immigration v S152/2003*¹³ and has been accepted as correct by the Federal Court of Australia.

(b) Canada

8. The approach adopted by the Chief Justice of the High Court in *Khawar* had been earlier urged on the Supreme Court of Canada in *Ward v Attorney General of Canada*¹⁴ by the intervenor, Canadian Council for Refugees. However, the Court was not persuaded to read Art 1A (2) in the way urged.

(c) Other Jurisdictions

9. There seems to have been only limited judicial consideration of the intended meaning in Art 1A (2) of the phrase '*unwilling to avail himself of the protection of that country*'. However, statements made in *Horvath v Secretary of State for the Home Department*¹⁵ and *Butler v Attorney-General (NZ)*¹⁶, as well as in *Ward* favour the broader sense.¹⁷
10. The explanation for the limited jurisprudence on the question may be that little of practical consequence flows from the difference between the two approaches. The choice of approach might prove significant, at least theoretically, where a putative refugee is outside his or her country of nationality notwithstanding that he or she could have escaped any real risk of persecution by relocating internally or where he or she could look to the diplomatic or consular protection of his or her country of nationality for the purpose of obtaining assistance to resettle safely in a third country.

3. The source of Persecution

(a) Authorised State Agents

(i) General

11. The paradigm case of persecution contemplated by the Convention is persecution by the refugee's country of nationality; ie. persecution by state agents. It is apparently uncontroversial in all jurisdictions that where the state itself is wholly complicit in the persecution which the person fears, the obligation of the state to protect the fundamental rights and freedoms of its citizens is breached. The person's fear of persecution will be well-founded and his or her inability or unwillingness to avail himself or herself of the protection of that country self-evident. In such a case intentionally inflicted serious harm will without more constitute a failure of state protection giving rise to a need for the protection of the international community. That is, once the well-founded fear is established, the inability or unwillingness to look to the protection of the country of nationality is logically inevita-

ble. Cases in which the state, for a Convention reason, pursues a policy of not providing protection against probable serious harm probably fall within this paradigm.¹⁸ But see [20] and [51] below concerning the position of the United States of America.

(b) Rogue State Officials

(i) General

12. National protection does not necessarily fail because protection from harm is denied by a rogue official. Rogue officials are found even in states committed to the protection of fundamental rights and freedoms. The case law seems to draw a distinction between jurisdictions that simply assume that there is a failure of state protection when the threat emanates from an official agent and those who qualify that proposition by reference to concepts such as “timely and effective rectification” (*Svazas*).

(ii) United Kingdom

13. *Svazas v Secretary for State for the Home Department*¹⁹ is a case concerning rogue state officials motivated by a Convention reason, namely political opinion. In *Svazas* the Court of Appeal of England and Wales considered the position of two members of the Communist party of Lithuania who feared maltreatment by the Lithuanian police. The evidence suggested that members of the Communist Party were arrested and detained in Lithuania and might be maltreated in detention. However, such conduct by the police was unlawful and the authorities tried to prosecute the officers responsible.

14. Lord Justice Sedley at [16] observed:

While the state cannot be asked to do more than its best to keep private individuals from persecuting others, it is responsible for what its own agents do unless it acts promptly and effectively to stop them.

His Lordship at [17] noted that the presumption that a state, and especially a democratic state, which is able to afford protection to its citizens will do so is not matched by an equally strong converse presumption. A country like Lithuania might be willing to afford protection but be impeded in doing so by the legacy of the very past from which it is extricating itself.

15. Lord Justice Simon Brown in *Svazas* at [54] summarised the position as follows:

In short, there will be a spectrum of cases between on the one extreme those where the only ill-treatment is by non-state agents and on the other extreme those where the state itself is wholly complicit in the ill-treatment. Within that spectrum, the question to be addressed is whether or not the state can properly be said to be providing sufficient in the way of protection. When, however, one comes to address the question in this context rather than in the context of ill-treatment exclusively by non-state agents, one must clearly recognise that the more senior the officers of state concerned, and the more closely involved they are in the refugee's ill-treatment, the more necessary it will be to demonstrate clearly the home state's political will to stamp it out and the adequacy of their systems for doing so and for punishing those responsible, and the easier it will be for the asylum seeker to cast doubt upon their readiness, or at least their ability, to do so.

16. The approach adopted by the majority of the Court of Appeal in *Svazas* was approved by the House of Lords in *R v Secretary of State for the Home Department; ex parte Bagdanavicius*.²⁰ Significantly in this case the House of Lords did not demur from the summary of principles enunciated below by the Court of Appeal.²¹ This summary referred to the need for the state to afford 'additional protection' in certain cases; ie protection over and above that which a state is expected to afford to its nationals in the general run of cases.

(iii) *Australia*

17. In *Minister for Immigration v Khawar* the High Court of Australia considered a hypothetical situation in which police protection from serious harm was withheld for a Convention reason although the serious harm was not inflicted or threatened for a Convention reason. The actual circumstances alleged in *Khawar* were that the Pakistani police force systematically failed to protect Pakistani women who were subject to serious domestic violence. That is, unlike the circumstances considered in *Svazas*, *Khawar* did not involve the direct infliction of harm by rogue state officials, but rather the failure of state officials, for a Convention reason, to protect against harm inflicted by a non-state agent for a non-Convention reason. Notwithstanding that the claim made was of systematic discrimination by the police for a Convention reason, namely membership of a particular social group, some members of

the High Court of Australia gave consideration to the possibility that the police in Pakistan did not, as Ms Khawar claimed, systematically discriminate against women who experienced domestic violence but rather that she had been let down by particular police officers. At [26] Gleeson CJ observed:

... as a matter of principle, it would not be sufficient for Ms Khawar to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art 1A (2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes.

18. McHugh and Gummow JJ at [84] said:

If the reason for the systemic failure of enforcement of the criminal law lay in the shortage of resources by law enforcement authorities, that, if it can be shown with sufficient cogency, would be a different matter to the selective and discriminatory treatment relied upon here.

19. It appears that the explanation for the different approaches adopted in *Svazas* and *Khawar* can be found in the different nature of the claims made in the two cases. In *Svazas* the rogue state officials were themselves alleged to be inflicting harm for a Convention reason; the state was responsible for their conduct unless it acted promptly and effectively to stop them. In *Khawar* members of the High Court hypothesised rogue state officials who did not withhold protection for a Convention reason but rather withheld protection by reason of maladministration, incompetence, ineptitude or shortage of resources. In the factual circumstances considered in *Khawar*, if the conduct of the police was not motivated by a Convention reason, the claims advanced would not fall within Art 1A (2) because the conduct in respect of which Mr Khawar sought state protection was not itself motivated by a Convention reason. On that hypothesis neither the domestic violence which she experienced nor the failure of the police protection would be for a Convention reason.

(iv) *United States*

20. In *Boer-Sedano v. Gonzales*,²² a Mexican national was forced to perform sex acts on a high-ranking Mexican police officer who was aware of his homosexuality and threatened him with death. Remarking that “[p]olice officers are the prototypical state actor for asylum purposes,” the Court found that “[t]hese persecutory acts by a single governmental or quasi-governmental official are sufficient to establish state action.” The Court noted that “[A]lthough the [Immigration Judge] faulted Boer-Sedano for not reporting the persecution he suffered to the police, the courts will generally consider whether an asylum applicant reported persecution to the police only when a non-governmental actor is responsible for the persecution.

(v) *Canada*

21. There is no requirement in Canadian law for the persecution to be at the hands of the state. One aspect of protection that has not been addressed by the courts and that might have addressed the situation of “rogue state officials” is the adequacy or standard of protection. The Court in *Ward* referred to “adequate protection” but did not define what it meant by “adequate”. The Canadian courts have thus adopted the test “adequate though not necessarily perfect”. A rogue state official would be behaving in an unlawful manner and therefore if the authorities were prepared to prosecute the official, this would likely be “adequate” protection.

22. Where the state has effective control of its territory as evidenced by the presence of military, police and civil authority and makes “serious efforts” to protect its nationals, the mere fact the state is not always successful in controlling (for example) rogue state officials, will not rebut the presumption of protection. The focus on the efforts of the state has been viewed as a “narrow” approach to protection whereas the “broad” view will grant refugee status to those who are able to establish that protection is “ineffective”.

23. In the Court’s view, the lynch-pin of the analysis is the state’s inability to protect: “it is a crucial element in determining whether the claimant’s fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality.”

24. This standard has been interpreted and applied differently by the Federal Court, thus leading to one school of thought that adopts a broad

view of protection²³ and another one that adopts a narrow view.²⁴ The issue has not been resolved by the higher Court and thus the jurisprudence continues to develop along these two lines although the majority of cases seem to prefer and follow the narrow view.²⁵

25. The broad view of protection will grant refugee status to those who establish that the protection that is being offered is ineffective. In essence, what this means is that the willingness of a state to offer protection (through laws, police, prosecutions, etc) will not necessarily equate to adequate state protection where the efforts at protection do not reduce the risk that make the fear of the claimant well-founded.
26. The narrow view of protection focuses on the efforts the state makes to protect its citizens and as long as those efforts are adequate in relation to the circumstances of the particular case,²⁶ the protection will be seen as meeting the *Villafraanca*²⁷ standard. In many cases that follow this approach, the Court will engage in a comparative analysis of what the Canadian state (or other Western democracies) could do for its own citizens in similar circumstances.

(vi) *New Zealand*

27. The approach taken in New Zealand to the issue of the agent of persecution was established by the RSAA in *Refugee Appeal No 71247/99*.²⁸ The Authority held that the source of the persecution is irrelevant to the question of state protection as it applies to the formula employed by the House of Lords in *Horvath* (that persecution = serious harm + a failure of state protection). Holding that state complicity was not a pre-requisite to a valid refugee claim, the Authority recognised that a failure of state protection could exist in the following four situations:
 1. Persecution committed by the state concerned (that is, by a state actor).
 2. Persecution condoned by the state concerned.
 3. Persecution tolerated by the state concerned.
 4. Persecution not condoned or tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.
28. The Authority in this case concluded that in both state and non-state agent cases the enquiry is the same, that is, does the claimant have a well-founded fear of being persecuted for a Convention reason and are they unable or, owing to such fear, unwilling to avail themselves of the protection of their state of nationality.

29. This decision was applied in relation to an agent of persecution not easily distinguished as either state or non-state. In *Refugee Appeal Nos 73898-9*,²⁹ the Authority considered the appeal of a Colombian national who claimed to have a well-founded fear of being persecuted by both FARC and the paramilitary group *Autodefensas Unidas de Colombia* (AUC). While FARC clearly constituted a non-state agent, the status of the AUC was less clear. The Authority noted that the AUC was distinguished from other armed non-state groups in Colombia by repeated allegations of links between it and the Colombian military. However, the Authority held that, in terms of the focus of the inquiry into state protection, it makes little difference whether the agent of persecution is the state or a non-state actor. In either case, the Authority considered, the steps taken by the state to protect must have the net effect of reducing the risk of harm to below the real chance threshold. Noting the decision of the UK Court of Appeal in *Svazas*, the Authority observed:

Indeed, Simon Brown LJ in *Svazas* ... appears to recognise that the state/non-state distinction, has effect in terms of the state protection inquiry, only at an evidential level in establishing the fact of [a] lack of state protection, ... rather than raising/lowering the standard depending on which side of the state/non-state divide the claimed agent of persecution is said to fall.

30. However, the Authority declined to follow the decision in *Svazas* insofar as it suggested that, in relation to non-state agents, the standard of proof of a failure of state protection was somehow less. The Authority stated:

... it is far from clear that Sedley LJ was doing anything other than making the simple point that it will be easier for a state to control its own agents, rather than private individuals ... Thus, while the starting point of the analysis may be different [depending upon the agent of persecution], ultimately, in either case, the question remains the same: it is the practical effect of the steps taken on the risk that counts....

(c) Non-State Agents

(i) General

31. It is accepted in the UK,³⁰ US,³¹ Canada³², Australia³³ and New Zealand³⁴ that a 'well-founded fear of persecution' may be based on the conduct of non-governmental persecutors. In a number of jurisdictions adherence to the 'accountability theory' has meant that obligations under the Convention will only be recognised where the country of

nationality is complicit in the persecutory conduct.³⁵ However, Arts 6 and 7 of the EU Council Directive 2004/87/EC of 29 April 2004³⁶ are inconsistent with the accountability theory. The directive, which Member States were required to bring into force before 10 October 2006, provides:

Article 6

Actors of persecution or serious harm

Actors of persecution or serious harm include:

1. *the State;*
2. *parties or organisations controlling the State or a substantial part of the territory of the State;*
3. *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

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.*

(ii) United Kingdom

32. In *Horvath v Secretary of State for the Home Department* the House of Lords considered a claim of persecution at the hands of non-state agents. A Roma citizen of the Republic of Slovakia claimed that the Slovak police failed to protect Roma from physical attacks by skin-heads. Lord Hope of Craighead, with whom Lord Browne-Wilkinson

and Lord Hobhouse of Woodborough agreed, at 497 held that:
in the context of an allegation of persecution by non-state agents, the word "persecution" implies a failure by the state to make protection available against ill-treatment or violence which the person suffers at the hands of his persecutors.

33. On the issue of the extent of the duty of the state to provide protection, his Lordship, at 500 observed:

...the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals ... Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection.

34. Lord Clyde, with whom Lord Browne-Wilkinson also agreed, at 511 approved the following formulation presented by Stuart-Smith LJ in the Court of Appeal:

In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders.

35. The above observations should probably now be understood in the light of the failure of the House of Lords in the later case of *Bagdanavicius*²¹ to demur from the summary of principles enunciated below by the Court of Appeal (see [16] above).

(iii) *Australia*

36. Australia has rejected the accountability theory of the Convention.³⁷ In *Minister for Immigration; ex parte MIAH*³⁸ Gleeson CJ and Hayne J. observed:

The distinction between a government's ability or power to protect a citizen against persecution, and the existence of a political will to do so, is not as clear-cut and obvious as the prosecutor's argument would have it. A distinction between the ability to do something and a willingness to do it is sometimes real and important. Here, however, the decision-maker was dealing with a contention about political reality. To ask whether an apprehended failure of the authorities in Bangladesh to control religious fundamentalists would reflect a lack of power, or a lack of political will, would be to make a distinction of little practical significance. To say that a democratically elected government is unable to control a certain group could mean that there are not enough police or soldiers at the government's disposal. But it could also mean that the government cannot take the political risk of alienating the group.

37. The High Court of Australia expressed similar views in *Minister for Immigration v Respondents S 152/2003* at [28] where Gleeson CJ and Hayne and Heydon JJ observed:

'The fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection. For example, an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness. A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed. Paradoxically, fear of certain kinds of harm from other citizens can only be removed completely in a highly repressive society, and then it is likely to be replaced by fear of harm from the state.'

(iv) *Canada*

38. A similar approach was adopted by the Federal Court of Appeal of Canada in *Canada (Minister of Citizenship and Immigration) v. Kadenko*³⁹. The court at [4] approved the comment made by Hugesson JA in *Canada (Minister of Employment and Immigration) v. Villafranca*:⁴⁰

'No government that makes any claim to democratic values or protection of human rights can guarantee the protection of its

citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation ...'

Interestingly the Federal Court of Appeal went on at [5] to observe:

'When the state in question is a democratic state the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.'

(v) *United States*

39. It appears that in the United States proof of past persecution greatly alleviates the evidentiary burden on an applicant of establishing a well-founded fear of future persecution, including persecution by non-state agents.
40. In *Nahrvani v. Gonzales*⁴¹ an Iranian national who had been afforded permanent resident status in Germany sought asylum based on incidents of harassment, threats, and property damage by private individuals in retaliation for his conversion to Christianity. The Immigration Judge found that the incidents described by Nahrvani did not rise to the level of severity required to demonstrate past persecution and that he had not established that the German government was unwilling or unable to protect him from the alleged persecution. In upholding this decision, the United States Court of Appeals for the Ninth Circuit noted that Nahrvani admitted that he could not give the police the names of any suspects because he did not know who they were, that the police investigated the complaints, albeit unsuccessfully, and that there was no indication that racial issues affected the willingness of the police to help Nahrvani. On these facts, the court concluded that Nahrvani did not substantiate his claim regarding the German government's inability or unwillingness to control the asserted persecution from which he suffered and failed to demonstrate an objectively reasonable possibility of persecution in Germany.
41. By contrast, in *Mashiri v Ashcroft*,⁴² past persecution by non-state agents of nationals living in Germany was established. The Mashiri family had received specific and menacing threats involving the terror

of Germany's Nazi past and threatening death if the family did not leave Germany. Police made no arrests after a family member was beaten, school officials refused help to the family and the police quickly closed investigations of a property attack that was apparently motivated by racial hatred telling the family that such things happened all the time and that foreigners '*better try to take care of [themselves]*'. The United States Court of Appeals for the Ninth Circuit confirmed that proof of past persecution shifts the evidentiary burden to the Government to rebut the presumption of a well-founded fear of future persecution and that, in this regard, the Government had failed to provide evidence that the relocation within Germany was a safe reasonable alternative.

(vi) *New Zealand*

42. In *K v Refugee Status Appeals Authority (No 2)*⁴³ Gendall J considered a claim by an Indo-Fijian police officer who claimed to have a well-founded fear of persecution at the hands of indigenous Fijians. At [19]-[21] Gendall J stated:

It has been frequently said that no Government adhering to democratic values or protection of human rights can guarantee protection of all its citizens at all times.

It is not possible, or even desirable, to define in absolute terms the nature of the duty of protection which a State owes to its people, in terms of refugee principles. An isolated act might be a persecutory act (such as for example the painting of a swastika on the home of a Jewish citizen) but it would not amount to persecution in terms of refugee law unless the State, through its system or methods or weakness, was unable or unwilling to control such acts.

(d) Absence of effective government

(i) United Kingdom

43. In *Adan v Secretary of State for the Home Department* the House of Lords gave consideration to a claim for asylum made by a citizen of Somalia who feared to return to that country because of what was described as a clan and sub-clan based civil war which had broken out in the north. Lord Lloyd of Berwick, with whom the other Law Lords agreed, said:

... where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show ... a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare.

What I have said so far applies only so long as the state of civil war continues. Once the civil war is over, and the victors have restored order, then the picture changes back again. There is no longer any question of both sides claiming refugee status. If the vanquished are oppressed or ill-treated by the victors, they may well be able to establish a present fear of persecution for a Convention reason, and in most cases they would be unable to avail themselves of their country's protection.⁴⁴

44. In the subsequent decision *R v Secretary of State for the Home Department; Ex parte Adan* the Court of Appeal state the broad proposition that:⁴⁵

Our courts recognise persecution by non-state agents for the purposes of the Convention in any case where the state is unwilling or unable to provide protection against it, and indeed whether or not there exists competent or effective governmental or state authorities in the country in question.

45. The acknowledgment by the Court of Appeal in *Adan* that there will be a failure of state protection for the purposes of the Convention where no competent or effective government authority exists was approved by Lord Hope of Craighead, with whom Lord Browne-Wilkinson agreed, in *Horvath v Secretary of State for the Home Department*.⁴⁶

(ii) *Australia*

46. The High Court of Australia in *Minister for Immigration v Haji Ibrahim*⁴⁷ also gave consideration to a claim for a protection visa made by a citizen of Somalia. The High Court described that country as in a state of anarchy rather than a state of civil war. The majority of the court did not accept the notion of ‘*differential operation*’ propounded by the House of Lords in *Adan*. They took the view that while it might be helpful to consider whether conduct of a certain kind was ‘*systematic*’, or treatment of a certain kind was discriminatory or ‘*differential*’, the test to be applied was to be found in the language of the Convention. Gleeson CJ at [7] said:

Persecution and disorder are not mutually exclusive. The existence of disorder may provide the occasion of, and perhaps the opportunity for, persecution of an individual or a group. In such a case, the ground of the persecution may or may not be a Convention ground. Nothing in the reasoning of the Tribunal was inconsistent with that. As the clans and subclans in Somalia struggle for power and resources, it is inevitable that from time to time, and from place to place, some will be in the ascendancy and others will be vulnerable. In such a situation, an inquiry as to whether the motivation of those temporarily in the ascendancy is to harm their enemies rather than to secure the benefits of domination is unlikely to be fruitful. The distinction, in a context of the kind revealed by the evidence in the present case, lacks practical content.

47. Gummow J, with whom Gleeson CJ and Hayne J agreed, at [145]-[147] observed:

... the material ... indicated endemic deficiencies in Somali civil society which in recent years have been reflected by the absence of the functioning apparatus of a nation state. The widespread disorder which this has entailed is not aptly described as a “civil war” in the sense of that term described earlier in these reasons. To proceed as was done in *Adan* involves a risk that there will be a blurring of the distinction between the persecutory acts which the asylum seeker must show and the broader circumstances leading to those acts.

It does not advance the inquiry called for by the Convention definition to ask of a particular individual whether that person was to be differentiated from other members of the general

population who were all at risk so long as the “civil war” continued. Nor does it assist to require the administrative decision-maker ... to determine the “objectives”, as a matter of “reality”, of “the war”. The objectives of the various States which were combatants in the First World War were the subject of propaganda at the time and remain a subject for debate between historians with varying degrees of access to primary sources.

... The reasons for a particular conflict may be virtually unfathomable.

The notions of “civil war”, “differential operation” and “object” or “motivation” of that “civil war” are distractions from applying the text of the Convention definition.’

Callinan J at [227] expressed a similar view.

(iii) *Canada*

48. Absent a complete breakdown of the state apparatus, there is a presumption the state is capable of protecting its nationals. However, in cases where there is an actual breakdown of the state apparatus, the presumption will likely be rebutted. The leading case dealing with this issue in Canada is *Zalzali*.⁴⁸ This was an appeal from a decision of the Refugee Division dismissing an application for refugee status. The Division concluded that the applicant did not present evidence of the grounds of persecution alleged and that he was not a credible witness. One of the points used to question the applicant’s credibility, and therefore his subjective fear, was the fact that he had never tried to obtain protection from the Lebanese army. He argued that he would probably be executed if he returned to Lebanon.
49. The appeal was allowed and the decision of the Refugee Division was set aside because the Division made a “gross error in its assessment of the evidence”. It was held that the applicant was unable to seek the assistance of his government since there was no government to which he could resort. This enabled him to meet one of the conditions imposed in the definition of refugee.

In this case the following factors were considered:

- (1) the Lebanese government of national occupation exercised effective control over no part of Lebanese territory at the time of the incidents which led the appellant to flee; (2) in reality, there

were as many governments as militias; (3) the appellant was approached and threatened both by the Amal militia and the Hezbollah militia; (4) if he had to return to Lebanon, the appellant would be regarded as a traitor by either of these militias and probably executed by one or the other.(at [7])

The court went on to say:

In most cases of claims for refugee status the State, while it may not itself be the agent of persecution, makes itself an accomplice by tolerance or inertia. It is then possible to speak in terms of persecution attributable to the State and to conclude that the refugee claimant had good reason to be unwilling to claim protection which a State was in all likelihood not going to give him.(at [9])

And further into the judgment:

The essence of the question that arises in the case at bar, when it is reduced to its simplest and most practical form, is as follows: can there be persecution within the meaning of the Convention and the Immigration Act where there is no form of guilt, complicity or participation by the State? I consider that, in light of the wording of the definition of a refugee, the judgments of this Court and scholarly analysis both in Canada and abroad, this question must be answered in the affirmative. (at [17])

50. The Court essentially affirmed that an individual may be entitled to refugee protection in cases where there is a complete breakdown of the state apparatus such that there is no longer any state to which the individual can turn for protection.

There are probably several reasons beyond a person's control why he might be unable to claim the protection of a State, one of them being, and this is obvious, the non-existence of a government to which that person may resort. There are situations, and the case at bar is one of them, in which the political and military circumstances in a country at a given time are such that it is simply impossible to speak of a government with control of the territory and able to provide effective protection. Just as a state of civil war is no obstacle to an application for refugee status [Footnote: See *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250.], so the non-existence of a government equally can be no obstacle. The position of the

respondent in the case at bar would lead directly to the absurd result that the greater the chaos in a given country, the less acts of persecution could be capable of founding an application for refugee status.(at [22])

4. Issues of proof

(a) *United States*

51. Regulations promulgated by the Attorney General and the Department of Homeland Security (DHS) provide a comprehensive framework for determining whether an applicant has demonstrated a well-founded fear of persecution. These regulations require that the applicant prove that the relevant country of nationality failed or would fail to provide protection from persecution.⁴⁹ As explained below, the regulation establishes certain presumptions in the case of applicants who have demonstrated past persecution.

(i) *Applicants who have shown past persecution*

52. In order to establish eligibility for asylum based on past persecution, an applicant must show (1) that he or she was subjected to harm amounting to persecution, (2) that the harm was inflicted on account of one of the five statutorily protected grounds, and (3) that *'he or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution.'*⁵⁰ As a practical matter, the failure of state protection requirement is rarely addressed as a threshold requirement for finding past persecution once the applicant has demonstrated the requisite nexus and level of harm. Rather, whether the state could afford protection is addressed in the context of whether the applicant currently has a well-founded fear of persecution.

53. Once an initial showing of past persecution has been made, there is a regulatory presumption that the applicant continues to have a well-founded fear of persecution. Under this presumption, the burden shifts to the DHS to produce evidence regarding the state's ability to provide protection. In order to rebut the presumption of a well-founded fear, the DHS must establish by a preponderance of the evidence either of the following:

1. A fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the country of nationality on account of a protected ground, or,
2. Reasonable internal relocation possibilities such that the applicant

could avoid future persecution by relocating to another part of the applicant's country of nationality, and that under all the circumstances it would be reasonable to expect the applicant to do so. In determining whether the DHS has demonstrated the reasonableness of internal relocation, the Immigration Judge is directed to consider whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.

54. If the DHS proves either of the above, it establishes, in essence, that state protection is available such that the applicant no longer has a well-founded fear of persecution.
55. An applicant who proved past persecution but whose well-founded fear of persecution is rebutted by the DHS showing of a fundamental change in circumstances or reasonable internal relocation possibilities in the country of nationality, may nonetheless be granted asylum in the discretion of the Immigration Judge if the applicant shows either:
 1. Compelling reasons for being unwilling or unable to return to the country of nationality arising out of the severity of the past persecution, or
 2. A reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(ii) Applicants who have not shown past persecution

56. An applicant for asylum who has not demonstrated past persecution has the burden of showing that he or she has a well-founded fear of persecution if he or she is returned to the country of nationality. An applicant does not have a well-founded fear of persecution if he or she could avoid persecution by relocating to another part of the country of nationality and the relocation would be reasonable. The burden of proof as to reasonableness of relocation is on the DHS if the applicant fears persecution by the government and upon the applicant if the fear of persecution is not by the government.
57. An applicant does not have a well-founded fear of persecution if he or she could avoid persecution by relocating to another part of the applicant's country of nationality if, under all the circumstances, and taking into consideration all relevant factors, it would be reasonable to expect the applicant to relocate. If the applicant fears persecution by the government, there is a presumption that internal relocation would

not be reasonable unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. If the feared persecution is not by the government or government-sponsored, the applicant has the burden of demonstrating that internal relocation would not be reasonable.

(iii) *'Complete helplessness' standard*

58. The following cases from the 5th, 6th and 8th Circuits have referred to an arguably more stringent "complete helplessness" test in considering the issue of state protection.

Menjivar v. Gonzales:⁵¹ To demonstrate a failure of state protection, the applicant must show more than the government's difficulty in controlling private behavior. Rather, the applicant must show that the government condoned the persecution or demonstrated a "*complete helplessness*" to protect the victims. The court found that the applicant from El Salvador who feared violence from a criminal gang which had targeted her and family members had not met this standard.

Hor v. Gonzales:⁵² "Persecution is something the *government* does, either directly or by abetting (and thus becoming responsible for) private discrimination by throwing in its lot with the deed or by providing protection so ineffectual that it becomes a sensible inference that the government sponsors the conduct." The court found that the Algerian applicant, a supporter of the government, did not demonstrate that the government was unwilling or unable to provide protection from the GIA opposition.

Shehu v. Gonzales:⁵³ The court found that the DHS had effectively rebutted the presumption of a continuing well-founded fear of persecution where incidents of past persecution were at the hands of the Serbian-dominated police or paramilitary forces and the evidence showed that the Kosovo administration and police were no longer dominated by Serbs. In so finding the court stated that "[w]hatever harassment or violence against former KLA members and their families still exists cannot be labeled 'persecution' absent some proof that the current UNMIK and Albanian-controlled Kosovar government 'condoned it or at least demonstrated a *complete helplessness* to protect the victims."

(b) Australia

59. The principal criterion for the grant of a protection visa under Austra-

lian law is that the applicant is a non-citizen in Australia to whom the decision-maker is satisfied Australia has protection obligations under the Convention (ie there is a subjective element to the criterion).⁵⁴

60. The decision to grant or not to grant the visa is made at first instance by a delegate of the Minister for Immigration. That decision is subject to independent administrative review on the merits by a specialist tribunal. The decision of the tribunal is subject to judicial review but not to merits review. While an applicant is required to place evidence or other material before the decision-maker in support of his or her claims, it is not appropriate for the decision-maker to proceed as if determining civil litigation. The decision-maker is involved in an investigative enquiry in which concepts of onus of proof and the requirement to establish factors on *the balance of probabilities* have no part to play.⁵⁵
61. The ultimate question for the decision-maker on the *fear* test is whether he or she is satisfied that the visa applicant has a genuine fear founded upon a *real chance of persecution* for a Convention reason in his country of nationality; that is, a substantial (albeit possibly less than 50%) chance as distinct from a remote chance of persecution occurring.⁵⁶
62. It would not be appropriate for an Australian decision-maker to proceed on the basis of presumptions of any kind (e.g. that a particular state is able to protect its nationals).⁵⁷ An Australian decision-maker is obliged to recognise that no state can guarantee the safety of its citizens from attack by non-state agents and that where a state is itself complicit in persecution material evidencing this state of affairs is likely to be available. However, the Full Court of the Federal Court of Australia has held that:

There is no golden rule which says that a person may never be given refugee protection if they come to Australia from a democratic country governed by the rule of law and with generally effective judicial and law enforcement institutions.⁵⁸

(c) Canada

63. In *Ward*, the Supreme Court of Canada laid down a number of principles, including two presumptions that govern the analysis. The first presumption is that if the fear of persecution is legitimate (i.e., credible) and there is an absence of state protection, persecution is likely and the fear is well founded. The second presumption is that except in

situations where a state is in a condition of complete breakdown, the state must be presumed capable of protecting its citizens. This presumption can be rebutted by “clear and convincing” evidence of the state’s inability to protect.

64. To rebut the presumption of state protection, absent an admission by the country that it is unable to protect, a claimant can establish that state protection would not be reasonably forthcoming where (a) there is a complete breakdown of state apparatus, (b) there are similarly situated individuals who were let down by the state protection arrangements, and (c) there were personal incidents in which state protection did not materialize.

(d) New Zealand

65. In *Butler* the Court of Appeal stated:⁵⁹

A person claiming refugee status has the burden of establishing the elements of the claim. That rule should however not be applied mechanically.

66. The RSAA expanded on this requirement in *Refugee Appeal No. 72668/01*:

Both at first instance and on appeal the respective decision-makers are free, subject to the constraints imposed by the Act, the Immigration (Refugee Processing) Regulations 1999 (SR 1999/285) and to the requirements of fairness, to determine their own procedures: s 129G(7) and Schedule 3C, para 8. The Authority also has the powers of a Commission of Inquiry under the Commissions of Inquiry Act 1908: Schedule 3C, para 7. It is not bound by any rules of evidence: Schedule 3C, para 9(1). The procedures at both levels are informal and non-adversarial. They can be described as investigative or inquisitorial: Practice Note No. 2/99 (1 October 1999), para 6.1 and *Refugee Appeal No. 70656/97 Re KB* (10 September 1997). This is the preferred model of refugee adjudication.’

5. Conclusion

67. It is suggested that the above material shows a high level of consistency in the interpretation of Art 1A(2) of the Refugees Convention so far as the notion of state protection is concerned. It is apparently now uncontentious that a failure of national protection will be de-

monstrated not only where the state itself is an agent of persecution but also where the state is unwilling or unable to provide protection against persecution by non-state agents or rogue state agents. It is also apparently now uncontroversial that the critical issue is whether the individual claimant will be afforded appropriate protection in his or her country of nationality; not simply whether that state affords an appropriate level of protection to its nationals generally.

68. The most significant differences between the jurisdictions considered, appear to concern methods and standards of proof, including the operation in some jurisdictions of rebuttable presumptions.
69. The reference by Lord Justice Sedley in *Svazas* (see [13] above) to a presumption that a state, and particularly a democratic state, which is able to protect its citizens will do so, should probably be understood merely as an acknowledgement that a claimant carries an onus to show failure of state protection where that failure is not self-evident. The more inherently unlikely the case of the applicant appears to be in this regard the more that will be required by way of proof. Notwithstanding that it is not appropriate for an Australian decision-maker to proceed on the basis of presumptions of any kind (see [59] above), the same acknowledgement will ordinarily inform the decision-making process in Australia.
70. By contrast, in the United States, proof of a state's ability to provide protection is, at least in part, governed by rebuttable regulatory presumptions (see [39] above). In some United States jurisdictions a claimant must go so far as to establish that the state condoned the persecution or demonstrated complete helplessness to provide protection (see [57] above).
71. The position in Canada appears to fall somewhere between the UK and Australian positions and that of the United States. The Supreme Court of Canada in *Ward* indicated that only clear and convincing evidence will rebut the presumption that, absent a situation of complete state breakdown, a state is presumed capable of protecting its citizens (see [63] above).
72. The above analysis suggests that, notwithstanding the high level of consistency in the interpretation of Art 1A(2) of the Refugees Convention, the ideal of consistency of outcomes between jurisdictions may remain elusive.

73. The United Nations 2005 World Summit Outcome included a resolution of commitment to safeguarding the principle of refugee protection and to upholding the responsibility of the international community in resolving the plight of refugees.⁶⁰ This resolution reminds us of the desirability of ensuring, so far as we are able, that the normative framework of the Refugees Convention is not implemented in our respective jurisdictions selectively or arbitrarily but rather in a way which gives substance to the protection obligation which member states have assumed.

74. The UNHCR agenda calls upon States to strengthen protection capacities in refugee-receiving countries. Such capacity building goes beyond training in basic concepts. Each country's policies must take into account not only the needs of its own citizens but the also the needs of others. It is a goal of sharing burdens and responsibilities more equitably. Such consensus will be between wealthy and poor nations for we all share responsibility for each other's security.⁶¹

6. Endnotes

- 1 Article 1A(2)
- 2 Butterworths *The Law of Refugee Status*, (2001) at 135
- 3 *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 495
- 4 *Applicant A v Minister for Immigration* (1997) 290 CLR 225 at p 248
- 5 *Butler v Attorney-General (NZ)* [1999] NZ AR 205 at pp 216-217
- 6 *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005)
- 7 *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85
- 8 *Minister for Immigration v Khawar* (2002) 210 CLR 1 per McHugh and Gummow JJ at [68]
- 9 (2002) 210 CLR 1 at [17]-[21]
- 10 Kálin, 'Non-State Agents of Persecution and the Inability of the State to Protect', *Georgetown Immigration Law Journal*, vol 15 (2001) 415
- 11 Fortin, 'The Meaning of "Protection" in the Refugee Definition', *International Journal of Refugee Law*, vol 12 (2001) 548
- 12 Justice McHugh and Gummow JJ took the same view at [62]
- 13 (2004) 205 ALR 487 at [19]
- 14 [1993] 2 SCR 689
- 15 [2001] IAC at 495
- 16 [1999] NZAR 205 at 216-217
- 17 See also Hathaway, *The Law of Refugee Status* (2001) p 135
- 18 Circumstances such as those hypothesised by Lord Hoffmann in *Shah and Islam v SSHD* [1999] 2 WLR 1015 at p (ie a policy of the Nazi government not to protect Jewish shopkeepers from serious attacks by gangs).
See also *Minister for Immigration v Khawar* (2002) 210 CLR 1
- 19 [2002] 1 WLR 1891
- 20 [2005] UKHL 38 at [30]; [2005] INLR 422, HL.
- 21 *Bagdanavicius* [2004] INLR 163
- 22 418 F.3d 1082 (9th Cir. 2005), at 1088
- 23 *Bobrick, Iouri v. M.C.I.* (F.C.T.D. no., IMM-5519-93), Tremblay-Lamer, September 16, 1994
- 24 *Smirnov v. Canada (Secretary of State)*, [1995] 1 F.C. 780 (T.D.)
- 25 For a recent application of this approach see *Castro v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 332; and *C.P.H. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 367
- 26 For example, where the state has a protection apparatus in place (laws, police and prosecutions) but the claimant fails to give the state enough information to allow it to investigate; the Court will view that as adequate state protection. The same approach has been used in analyzing cases where the refusal to protect can be traced to a single policeman and/or the local authorities and the claimant failed to approach higher authorities.
- 27 *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.)
- 28 [2000] NZAR 545
- 29 (9 November 2004)
- 30 See *R v Secretary of State for the Home Department, Ex parte Jeyakumaran* (1985) [1994] Imm AR 45; *R v Secretary of State for the Home Department, Ex parte Chahal* [1995] 1 WLR 526, 536; *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629; *Horvath v Secretary of State for the Home Department* [2000] 1 AC 489 at 495-496; *Adan* [2001] 2 AC 477 at 492
- 31 See *McMullen v. Immigration & Naturalization Service*, 658 F.2d 1312 (9th Cir. 1981), *Artiga-Turcios v. Immigration & Naturalization Service*, 829 F.2d 720 (9th Cir. 1987), at p. 723; *Arteaga v. Immigration & Naturalization Service*, 836 F.2d 1227 (9th Cir. 1988), at p. 1231; and *Estrada-Posadas v. Immigration & Naturalization Service*, 924 F.2d 916 (9th Cir. 1991), at p. 919
- 32 See *Rajudeen v Minister of Employment and Immigration* (1984) 55 NR 129; *Surujpal v Minister of Employment and Immigration* (1985) 60 NR 73; both approved of in *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 709- 721
- 33 See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233; *MIMA v Khawar* [2002] HCA 14 (11 April 2002); *MIMA v Respondents S152/2003* [2004] HCA 18 (21 April 2004)
- 34 See *Refugee Appeal No. 18/92 Re JS* (5 August 1992); *Refugee Appeal No. 135/92 Re RS* (18 June 1993); *Refugee Appeal No. 523/92 Re RS* (17 March 1995); *Refugee Appeal No 2039/93 Re MN* (12 February 1996); *Refugee Appeal No 71427/99* (16 August 2000)
- 35 Germany, France, Italy and Switzerland: See European Council on Refugees and Exiles, 'Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation' (2000), 7, 14. However the Swiss Asylum Appeal Commission has recently rejected the accountability theory (see www.ark-cra.ch -> "Pressemitteilung vom 15.6.06" / "Grundsatzurteil vom 8.6.06")
- 36 EU Council directive 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
- 37 See for example, the consideration of the accountability theory by McHugh J in *Minister for Immigration v S152/2003* (2004) 205 ALR 487 at [66]

THE INTERPRETATION OF MEMBERSHIP OF A PARTICULAR SOCIAL GROUP¹

Justices Michael A. Ross and Patricia Milligan-Baldwin

Many years ago in a land far, far away five children were born. Their parents were justifiably proud of their offspring as they had been trying unsuccessfully for many years to have children. Of the five, four were robust and earned respect wherever they travelled for they supported human rights. The youngest of them – known fondly as “MG” to those close to him – was a more troubled youth. He seemed to vacillate and never to know just where he stood. Some, and indeed most, knew that he too stood for human rights but others were not so sure. They did not detect in him that characteristic; rather they saw an ambivalence. Some even accused MG of being interested in virtually everything so that he was squandering his talents. As he traveled the world, wise men and women met with him and tried to understand him; but they could not all agree. In the end he proved to be a puzzle...

1. Introduction

This paper will address itself to outlining the positions of some of the key countries which have interpreted the Convention² definition of Membership of a Particular Social Group (MPSG). Following a general historical introduction and review of the work done within this Working Party since its inception in 1997, this paper will review the various approaches taken to the interpretation of this ground through the role played by the *Vienna Convention on the Law of Treaties*³ and the analysis of MPSG offered by some of the more well-known commentators. We will then take a cursory look at the interpretation of MPSG in those civil law countries where we were able to find more recent information.

1 The authors wish to record their appreciation for the assistance provided by Sue Zelinka of the Australian RRT; Sarah Murphy and Daimhin Warner both of the New Zealand RSAA and James Hathaway. Professor Hathaway kindly reviewed our draft, offering many helpful and insightful observations. His counsel helped us put in context many of the differing approaches to interpretation of MPSG.

The authors also wish to point out that this paper was submitted on October 15, 2006 to the IARLJ as required. The deadline was adopted in order to provide the Executive of the Association the opportunity to review papers and to allow our hosts in Mexico time to provide hard copies at the Conference. A few days before submission, and well after the paper had been effectively completed, we became aware that the House of Lords was to deliver their judgment in *Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) [Fornah]* three days after the deadline. We requested, and were granted, until October 20, 2006 to amend and submit our paper. As can be imagined, as both authors are working judges, our time to devote to this was limited. Consequently, our comments on the case are first impressions. However, we welcomed the chance to provide notice of, and comment on, the case as it sets out a great number of significant points with respect to the law on MPSG; the paper would have been dated and incomplete without it.

2 The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees can be found at: <http://www.unhcr.org/cgi-bin/texis/vtx/protect/openendoc.pdf>

3 The *Convention* may be found at: <http://law-ref.org/VIENNA/contents.html>.

We move next to an examination of how the major common law countries have dealt with the meaning to be accorded MPSPG. We will examine in some depth the state of the law on MPSPG in the United States, Canada, New Zealand, Australia, the United Kingdom, and outline the position in Ireland. With respect to each of the common law countries we will set out the procedure for applying for refugee status⁴, the rights to appeal or review of the decision makers, and the current state of the law on MPSPG.

We conclude our review with an outline of the positions taken by the United Nations High Commission for Refugees (UNHCR⁵) and the European Union⁶ (EU). Finally, we will summarise the various positions and note some outstanding issues on the interpretation of MPSPG. To this end a chart outlining the various national or international positions is included as Appendix II. A diagram of eleven US Circuit Courts of Appeal is included as Appendix I⁷.

The MPSPG Working Party exists not simply to share information but to encourage further analysis of the definition and, at some point, perhaps to offer its own analysis. Because of this we believe it useful to provide a review of the law as it is in those countries where the definition of MPSPG has received consideration. In those countries where the interpretation is fledgling we hope that the ideas presented might afford some guidance to those responsible for the interpretation of MPSPG and serve as a reference tool directing the reader to particular analyses of MPSPG. Because of this we have, where possible, directed the reader to authorities, case cites, and web sites where documents, papers, treaties and further information can be found.

As a final point we wish to note that, although attempts have been made by the UNHCR and the EU to amalgamate in some fashion the two competing interpretations of MPSPG, we argue such an approach is unlikely to be successful. Each of these interpretations has within itself many unanswered questions. As a result, amalgamation of the two, whether in an “either/or” or on a “cumulative” basis, will not remove the problem areas but likely increase them. Because of this we do not see either of these two approaches as leading to a “final” resolution of the meaning of MPSPG. In fact, as we shall see later the recent judgment of the House of Lords in the UK,⁸ there appears even to be some question as to whether the EU Quality Directive is intended to require both tests be met or only one⁹. To paraphrase Mark Twain “*The reports*

4 As this paper reaches a diverse audience we think it useful to briefly sketch the refugee determination process as a prelude to the discussion of MPSPG

5 The UNHCR website may be found at: <http://www.unhcr.org/cgi-bin/texis/vtx/home>.

6 The home page for the EU website on Justice and Home Affairs can be found at: http://ec.europa.eu/justice_home/index_en.htm.

7 There are in fact 12 regional Circuit Courts of Appeal and one Federal Court of Appeals for the Federal Circuit. Why the Map shows only 11 is not clear.

8 Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) and Fornah (FC) (Appellant v. Secretary of State for the Home Department (Respondent) decided October 18, 2006; this case may be found at: <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd061018/sshd-1.htm>

9 Ibid; Lord Bingham at paragraph 16.

of my death are greatly exaggerated”¹⁰. MPSPG is far from dead.

2. Historical Introduction

Article 1 of *Convention* defines a refugee as:

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and 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. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

Article 1 of the *Protocol* updated the *Convention*:

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.
2. For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” “and the words” ... “a result of such events”, in article

¹⁰ Cable from London to the Associated Press, 1897.

- 1 A (2) were omitted.
3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.

A great deal has been written over the years about the inclusion of the MPSPG category in the Convention and need not be retold here. Suffice to say that the MPSPG category was the last to be added to the Convention definition. In her paper¹¹ June Fraser cites Professor Hathaway on the origin of the definition:

Hathaway in the “Law of Refugee Status” relates how the convention ground of Particular Social Group was inserted at the last minute as a result of the intervention of the Swedish delegate to the Refugee Convention. Mr. Petren of Sweden stated “...experience had shown that certain refugees had been persecuted because they belonged to particular social groups... Such cases existed, and it would be well to mention them explicitly”. The Swedish amendment was adopted without discussion. Consequently, we have no idea what was in the minds of the founders of the Refugee Convention when adopting this amendment.

Because of the absence of a detailed legislative history and little record of debate over the reason for its inclusion, interpretations of MPSPG have had to resort to various methods of determining what the framers of the definition had in mind. This has led to analyses of the plain words of the Convention, of its purposes, and of the historical events of the time which might have led to its inclusion.

As the definition has been interpreted over the years it is generally agreed that MPSPG was added to broaden the reach of the Convention but not to such an extent that the other four categories (race, religion, nationality and political opinion) would be made superfluous. The debate over the meaning to be given MPSPG takes place between these poles.

3. Work of the MPSPG Working Party 1997 – 2005

Partly because of the varying interpretations being given to the MPSPG ground in the *Convention*, the MPSPG Working Party was created by the

¹¹ Review of Case Law on Particular Social Groups from 1999 to 2005; June Fraser, Head of Women’s Unit Refugee Legal Project Legal Services Agency Glasgow; November 2005 at page 3. This paper is available at: www.lsa.org.uk/FileAccess.aspx?id=111

International Association of Refugee Law Judges (IARLJ) executive in 1997. It was placed under the leadership of Rodger Haines, Deputy Chairperson of the New Zealand Refugee Status Appeals Authority (RSAA) who acted as the first *Rapporteur*. Mr. Haines presented a paper to the 1998 IARLJ World Conference held in Ottawa, Canada entitled *Interim Report of the IARLJ Inter-Conference Working Party: Membership of a Particular Social Group (1998)*¹².

The Working Party met next at the World Conference in Berne, Switzerland in 2000 where Dr. Paul Tiedemann presented his paper *Protection Against Persecution Because of 'Membership of a Social Group' in German Law*¹³. Following this Conference, Lory Rosenberg, then of the US Board of Immigration Appeals (BIA), agreed to become *Rapporteur* and presented a brief paper entitled *Examination of Current Country Interpretations of Membership of a Particular Social Group under the United Nations Convention Relating to the Status of Refugees*¹⁴.

In 2001 the UNHCR convened a process of Global Consultations on International Protection designed to clarify interpretative issues arising from the *Convention*. Professor Aleinikoff produced a paper¹⁵ on MPSG which was discussed at an expert roundtable conference held in San Remo, Italy in August, 2001. Lory Rosenberg prepared a response entitled *Commentary and Critique on Membership of a Particular Social Group*¹⁶. The group issued its *Summary Conclusions on MPSG* after the conclusion of the Conference¹⁷.

On May 7, 2002 the UNHCR¹⁸ issued its *Guidelines* with respect to MPSG¹⁹. In October 2002 Ms. Rosenberg presented a paper²⁰ at the World Conference in Wellington, New Zealand. As by this time Ms. Rosenberg had resigned from the BIA she left her position as *Rapporteur*. She was succeeded by Juan Osuna, of the BIA. Mr. Osuna prepared a paper which was delivered at the World Conference in Stockholm, Sweden in April, 2005. His paper summarised US law on MPSG from 1985 to 2005.

Mr. Osuna withdrew from his position as *Rapporteur* in 2005 and Michael Ross was appointed *Rapporteur* along with Patricia Baldwin as Associate *Rapporteur*. Together, with help from others in the WP we have prepared

12 Mr. Haines's paper can be found at <http://www.refugee.org.nz/Reference/larlpaper.htm>

13 Dr. Tiedemann's paper can be found at: <http://www.refugee.org.nz/PaulT.htm>

14 We have been unable to locate a reference for this paper.

15 Aleinikoff's "Membership in a Particular Social Group": Analysis and Proposed Conclusions; Background Paper for "Track Two" of the Global Consultations, 2001. This paper can be found at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.pdf>

16 We have been unable to locate a reference for this paper.

17 The Summary Conclusions may be found at: <http://www.unhcr.org/cgi-bin/texis/vtx/publ/openssl.pdf>

18 The Home page of the UNHCR is: <http://www.unhcr.org/cgi-bin/texis/vtx/home>.

19 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. UNHCR, May 7, 2002. The Guidelines may be found at: <http://www.unhcr.org/cgi-bin/texis/vtx/publ/openssl.pdf>

20 Ms. Rosenberg's paper, entitled Report of Inter-Conference Activities October 2000 – October 2002 can be found at: http://www.upf.pf/recherche/IRIDIP/RJP/RJP_HS03/21_Rosenburg.pdf

this paper.

4. Approaches to Interpretation of MPSG

i. The Vienna Convention on the Law of Treaties

In his 1998 Report Rodger Haines noted that, surprisingly, with the exception of the Australian court in *Applicant A*²¹, no major court to that point had begun its analysis by citing the *Vienna Convention on the Law of Treaties (Vienna Convention)*²². The Treaty was adopted in Vienna on May 22, 1969 and entered into force on January 27, 1980²³. Section 31 governs the matter of primary interpretation:

General rule of interpretation

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

Section 32 offers some further guidance with respect to supplementary means of interpretation:

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including

²¹ (1997) 190 CLR 225. The judgment may be found at: <http://www.austlii.edu.au/au/cases/cth/HCA/1997/4.html>

²² The Vienna Convention may be found at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

²³ United Nations, *Treaty Series*, vol. 1155, p. 331

the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Haines summarised the approach taken by Justice McHugh in *Applicant A*:

First, an interpretation must be in good faith, which flows directly from the rule *pacta sunt servanda*. Secondly, the ordinary meaning of the words of the treaty are presumed to be the authentic representation of the parties' intentions. This principle has been described as the "very essence" of a textual approach to treaty interpretation. Thirdly, the ordinary meaning of the words is not to be determined in a vacuum removed from the context of the treaty or its object or purpose. After referring to the controversy whether textual interpretation takes precedence over the object and purpose of the treaty, McHugh J preferred the ordered yet holistic approach taken by Zekia J in *Golder v United Kingdom* (1975) 1 EHRR 524, 544 (ECHR). That is, primacy is to be given to the written text of the Convention, but the context, object and purpose of the treaty must also be considered²⁴.

In *Ward*²⁵ the Canadian Supreme Court based its analysis more closely on the "context and ... object and purpose" of the Convention. In this they referred to the *Preamble* of the *Convention* where it is stated that

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights ... have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

This led the Supreme Court, as it had the BIA in *Acosta*²⁶, to apply the *ejusdem generis* rule – namely that general words following specific words in a list get their character from the more specific words. Controversies have arisen over whether divining anti-discrimination measures from the four other refugee terms is a proper use of *ejusdem generis* or not²⁷. At any event what is clear is that different adjudicative bodies examining the same phrase have arrived at different conclusions. As Haines noted, even when the High Court judges in *Applicant A* agreed with the manner of treaty interpretation they did not all agree with the result. Suffice to say that the

²⁴ Haines; *Ibid*, at paragraph 15

²⁵ Patrick Francis Ward v. The Attorney General of Canada [1993] 2 S.C.R. 689.

²⁶ A Matter of Acosta; 19 I&N Dec. 211, at 233.

²⁷ Aleinikoff, *Ibid*, at page 33.

matter is moot.

Where Australia focused on the ordinary meaning of the words, and seemed for all practical purposes not to give much scope to the context or object and purpose, the Canadian courts along with the House of Lords in the UK, appear to have placed more emphasis on the context, object and purpose as they believed it needed these interpretative aids to properly get at the *ordinary* meaning of MPSPG.

ii. The Commentators

Goodwin-Gill

As quoted in Aleinikoff, Professor Goodwin-Gill suggests that “[f]or the purposes of the Convention definition, internal linking factors cannot be considered in isolation, but only in conjunction with external defining factors, such as perceptions, policies, practices and laws.”²⁸ Goodwin-Gill would eschew a single principle (such as “immutability”), examining instead a range of variables:

These would include, for example, (1) the fact of voluntary association, where such association is equivalent to a certain *value* and not merely the result of accident or incident, unless that in turn is affected by [social perceptions]; (2) involuntary linkages, such as family, shared past experience, or innate, unalterable characteristics; and (3) the perception of others.²⁹

Goodwin-Gill recognizes that this interpretation might well embrace groups of “*apparently unconnected and unallied individuals*” - such as mothers, women at risk of domestic violence, capitalists, and homosexuals.³⁰

Aleinikoff

In his preparatory paper for the San Remo conference in 2001 Professor Aleinikoff analysed the law on MPSPG and proffered some conclusions. Proposed Conclusions VI.B stated:

The adoption by a number of States Parties of a “protected characteristics” approach to interpreting membership in a particular social group has been important in affirming a human rights approach to the Convention and in moving beyond earlier interpretations that had required that groups be “cohesive.” These States ought to also consider whether in certain circumstances it would be appropriate to recognize as a “particular so-

²⁸ Aleinikoff; *Ibid*, page 45

²⁹ Aleinikoff; *Ibid*, page 45

³⁰ Aleinikoff; *Ibid*, page 45

cial group” a group that is generally recognized - “marked” - by the society in which it exists, even if such a group is not based on a characteristic that is either immutable or fundamental. That is, identification of a group under the protected characteristics approach is sufficient, but not necessary, for Convention purposes.³¹

This position appears to be the one eventually adopted by the UNHCR.

Hathaway

Professor Hathaway makes it clear in his writings that he stands by the *ejusdem generis* approach articulated in *Acosta/Ward* and *Ex Parte Shah & Islam*³². In his paper delivered at the 2002 IARLJ Conference Training Session³³ he argued that this approach is more in compliance with the Vienna Convention than the social perception test enunciated in Australia. He disagrees with the move by the UNHCR to amalgamate both tests although he does not rule out a further exploration as to their compatibility (as suggested in the *Summary Conclusions* at San Remo). He expresses a concern over what the outer limits of the social perception test might be when based upon the fickleness of states – for example would roller-bladers be a protected PSG; is that what the framers of the *Convention* had in mind?

We shall now turn our attention to a brief review of the interpretation of MPSG in civil law countries.

5. Brief review of Civil Law Jurisdictions

In this section we will only very briefly summarise our findings, for, as noted by Professor Aleinikoff, the most detailed discussions of MPSG arise from common law jurisdictions.

i. Austria

Ms. Rosenberg notes in her 2002 *Report*³⁴ that MPSG is rarely relied upon and when it is, it tends to follow the analyses in European Union (EU) cases and *Ward* (Canada). In this respect Austria has allowed PSGs comprising children of an incestuous relationship, gender-based claims, political, religious and mixed grounds³⁵.

31 Aleinikoff; *ibid*, page 48

32 The case may be found at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1999/20.html&query=shah+and+islam&method=all>

33 (2003) 15(3) International Journal of Refugee Law 477.

34 Rosenberg; Report of Inter-Conference Activities October 2000 – October 2002, page 428

35 Rosenberg; Report of Inter-Conference Activities October 2000 – October 2002, page 428

ii. Belgium

In his paper³⁶ David Kosar states:

Belgium case law on MPSG holds a very specific position. Belgian decision makers adopted probably the most comprehensive definition of the 'social group' ground among Continental European States. In 1992, Refugee Appeals Board (CPR³⁷) adopted a formula very similar to that given by James Hathaway:³⁸

"... a group characterized either by innate or unalterable characteristics; or composed of people sharing the same past or the same anterior experiences that cannot be changed by the members; or even as a group made on voluntary basis on the condition that the purpose of the group is so fundamental to their human dignity that one cannot demand that it be renounced."³⁹

In 1998, CPR stressed the common characteristics of a social group, when stated:

"[I]t is a group of people sharing common characteristics that identify them as a distinctive unit amongst the entire society, and that is seen as such, due to its characteristics, by the rest of the population and the authorities."⁴⁰

Kosar suggests that these decisions indicate that the Board appears to embrace both the "protected characteristics" and the "social perception" approach. However, the latter quote adds the qualification that the "entire" society *and* the "authorities" must be able to identify the group. This differs from the Australian perspective where such recognition would not be necessary.

The Belgian authorities have found PSGs composed of family members⁴¹, intellectuals in Romania⁴², progressives in Iran⁴³, single women in Taliban Afghanistan⁴⁴ and 'former civil servants of President Doe in Liberia'⁴⁵.

³⁶ Kosar; Persecution on The Grounds of Membership of A Particular Social Group, 2004. This paper is available at: http://aa.ecn.cz/img_upload/9e9f2072be82f3d69e3265f41fe9f28e/2004_refugee_law.pdf

³⁷ CPR refers to Commission Permanente de Recours des Refugies which is the French-speaking division of the Refugee Appeals Board. The Dutch-speaking division of the Board is the Vaste Beroepscommissie Voor Vluchtelingen.

³⁸ Hathaway; *The Law of Refugee Status*. Toronto, 1991, pp. 160 – 161.

³⁹ VBC, (2 Ch.), 8 April 1992, EO24

⁴⁰ CPR, 21 Oct. 1998, F754 (Georgia)

⁴¹ CPR, 14 March 1994, R2170 (Congo); CPR, 6 April 1995 (Iran)

⁴² CPR, (2 Ch.), 23 Jan. 1992, R319

⁴³ VBC, (1 Ch.), 23 Oct. 1992, EO39

⁴⁴ VBC, 3 Dec. 1998, E305

⁴⁵ VBC, (2 Ch.), 3 Sept. 1992, E no number; also VBC (2 Ch.), 10 June 1993, E58

With respect to homosexuals the Board has recognised them in the past but in the absence of penal legislation it has held that there is a need to establish a well-founded fear of persecution⁴⁶.

iii. Czech Republic

The Czech jurisprudence concerning the fourth ground of the 1951 Convention – ‘membership of a particular social group’ – is very sparse. Kosar states that the MPSPG ground is less developed than in most Western European States. He goes on to provide his rationale for this:

Furthermore, in numerous cases, courts have held the question of MPSPG irrelevant because the asylum claim failed for other reasons and therefore did not elaborate on this issue. More specifically, due to the extreme length of asylum procedure in Czech Republic, many applicants often flee the country before the final judgment.

In my experience, in reviewing my practice in refugee law clinic, I would say that the MPSPG ground is for whatever reasons invoked only scarcely. If a counsel can fashion the claim under any other ground, at least partially, he or she will certainly do so. For example, in a case of women from Afghanistan opposing the Taliban regime, the political opinion and religion grounds were usually addressed. There are many reasons for doing so. Firstly, the decision-makers of the Ministry of Interior are highly reluctant to use MPSPG ground as a determinative issue for fear of creating dangerous ‘precedent’. Secondly, the Czech adjudicators are not familiar with international human rights standards and with public international law in general. Thirdly, there is no specialized appellate authority dealing with refugee claims in the Czech Republic. Therefore, the general courts, due to the absence of adequately developed case law, elaborate rather on the procedural issues leaving the substantive ones aside. Fourthly, the courts are not allowed to grant asylum; they can just remit the case to the Ministry of Interior for reconsideration. Finally, adjudicating the MPSPG claims involves thorough evaluation of country of origin information on a case-by-case basis. It means a global appraisal of an individual’s past and prospective situation in a particular cultural, social, political and legal context. From my point of view, it is this element, where the Czech adjudicators usually fail.⁴⁷

46 CPR, 21 Oct. 1998, F754 (Georgia); VBC, 30 Aug. 1999, W5662 (Georgia); VBC, 14 Sept. 1999, W5678 (Russia); VBC, 28 Jan. 2000, W5916 (Iran)

47 Kosar; *Ibid*, pages 91 – 92.

Kosar cites the decision of the Superior Court in 2001 when it defined MPSPG:

‘Social group’ ... consists of persons of similar social origin or status, habits or similar economic background and the like. Membership of a particular social group becomes a reason for persecution ordinarily in the situation, when the political outlook, past experience, economic activity of its members or the mere existence of this group is held to be an obstacle to the Government’s policies, when such a group is not considered loyal to the State or its Government.⁴⁸

In concluding his remarks on the state of interpretation of the MPSPG in the Czech Republic Kosar states:

In sum, the Czech adjudicators neither applied the anti-discrimination principle or the doctrine of *ejusdem generis* nor did they establish any helpful test for MPSPG ground. The core inquiry, the ‘protected characteristics’ or ‘social perception’ approach, is completely untouched in Czech Republic. The same is true in case of more specific issues, such as ‘defining the group by persecution’ or requirement of ‘cohesiveness’. The Czech Republic has not so far adopted any guidelines on MPSPG or gender persecution. The only issue that has attracted attention of Czech adjudicators is the ‘nexus’ requirement; however the elaboration lacks clarity, comprehensiveness and sufficiency.⁴⁹

iv. Denmark

Initially, the Danish Immigration Service determines whether an applicant is to be granted asylum. If the decision is negative, the case is referred to the Refugee Appeals Board, which will deliver a final decision in the matter⁵⁰.

The Refugee Appeals Board strictly defines MPSPG as a social group with a homogeneous background, behaviour and social status⁵¹.

v. Finland

Ms. Rosenberg notes in her 2002 Report that MPSPG in Finland relies primarily upon a ‘special de-facto-humanitarian status’⁵².

48 Kosar; *Ibid*, page 93. Case cited as Decision No. 6 A 579/94-52, 28 Feb. 2001.

49 Kosar; *Ibid*, page 94.

50 <http://www.udst.dk/english/Asylum/Application+for+asylum/Default.htm>

51 Haines; *Ibid*, at paragraph 9

52 Rosenberg; Report of Inter-Conference Activities October 2000 – October 2002, at page 428

vi. France

The *Commission de Recours des Refugies* (CRR) makes the initial determinations of refugee status with an appeal lying to the *Conseil d'Etat*. Professor Aleinikoff reported that French jurisprudence appears more focussed on whether persecution existed rather than on an analysis of whether that persecution fit tidily under the definition of MPSPG⁵³.

French jurisprudence appears to follow the jurisprudence of common law jurisdictions and has recognised claims under MPSPG by women⁵⁴, homosexuality even where the law against it has been revoked⁵⁵, transsexuals⁵⁶, victims of Female Genital Mutilation (FGM⁵⁷), but not those threatened by abortion or sterilisation as it did not recognise a PSG formed of people who oppose generally applied population control measures⁵⁸.

The case of *Ourbih* marked a significant turning point in French jurisprudence on MPSPG. The *Conseil* overturned the CRR decision and stated that the CRR had not properly analysed the evidence to determine if transsexuals were regarded as a PSG in Algeria "...in the eyes of the authorities and society"⁵⁹. In his paper, Roger Errera notes the statement of the *Conseil*:

The group may consist in a number of individuals devoid of links and of collective structures, but having common characteristics. The only condition is that this group has a social existence, that is it be perceived and recognised by society as a specific whole... The social group then can be said to consist in a number of individuals, defined by common characteristics inherent to the person whom society in a given historical context, designates to apply discriminatory measures.⁶⁰

Once again the test appears to be similar to the Belgian test – although without the focus on protected characteristics – and stricter than the Australian version of the social perception test in that it appears to require that *society* recognise the group. The addition of the word "inherent" in the definition may also constitute another important limitation.

53 Aleinikoff; *Ibid*, at page 26. This paper may be found at: <http://www.judrc.org/materialy/artykuly/socialgroupconcept/>

54 Aminata Diop, CRR, No. 164078, 18 Sept. 1991; the CRR recognised that women could be a PSG but rejected the claim on lack of a well-founded fear.

55 Djellal, CRR, SR, No. 328310, May 12, 1999.

56 Ourbih, CRR, SR, No. 269875, May 15, 1998.

57 Mlle Kinda, CRR, No. 366892, March 19, 2001

58 Zhang, CRR, SR, No. 228044, 8 June 1993; Wu, CRR, SR, No. 218361, 19 March 1994.

59 Ourbih, [171858], *Conseil d'Etat*, SSR, 23 Juin 1997

60 Errera; The concept of particular social group with special relevance to gender-related persecution. The paper may be found at: <http://www.judrc.org/materialy/artykuly/socialgroupconcept/>

vii. Germany

Paul Tiedemann's paper "*Protection Against Persecution Because of 'Membership of a Particular Social Group' in German Law*" (2000)⁶¹ is a valuable analysis of German law. Maryellen Fullerton writing in 1993 identified two trends within German law on MPSC⁶². Some courts looked for homogeneity amongst the group (like the *Sanchez-Trujillo*⁶³ analysis in the US) and others looked at whether the general population held negative opinions of the purported PSG (similar to the 'social perception' interpretation of many continental refugee boards).

In his paper Tiedemann states that jurisprudence on MPSC is very sparse.

The few cases in which the courts do make a statement concerning the question of the social group ground are not illuminating. Mostly, it is only a single sentence without further detailed reasonings in writing.⁶⁴

Tiedemann suggested that the lack of analysis in German jurisprudence can be traced to that country's requirement that persecution be inflicted by state agents and by the court's preference to see PSG cases as instances of political persecution⁶⁵. He notes that even commentators on German jurisprudence ignore the ground, subsume it under political opinion, or suggest that if there is such a concept it would only apply to a group where all the members see themselves as members of a group and are connected to each other. Tiedemann closes with the following observation:

In the German jurisprudence and judicial literature there is a great uncertainty as to the meaning of the Convention ground of social group. It is therefore attempted if possible to subsume cases under another Convention ground. In cases in which it is not possible the Convention ground of social group is consulted, however, without close analysis. Therefore one may state: There is no established interpretation of the Convention ground of social group in Germany. Since most courts are of the opinion that political persecution can only be persecution by the state, no great need exists in Germany to clarify the meaning of the particular social group ground more thoroughly.⁶⁶

61 Tiedemann; *Ibid*

62 Maryellen Fullerton; A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group, 26 Cornell International Law Journal, 505 (1993)

63 Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986)

64 Tiedemann; *Ibid*, at page 2.

65 Tiedemann; *Ibid*, refers to the decision of the Federal Administrative Court (BCerwG Urteil v. 18.1. 1994 – 9 C 48.92 – BVerwGE 95, 42) which is followed by most Administrative Courts that a constituent factor in any recognition of persecution must be the existence of political persecution with either the state being directly involved in the persecution or accepting or tolerating it.

66 Tiedemann; *Ibid*; at page 9.

In his paper Kosar notes that *Bundesverwaltungsgericht* (BVerwG), or the Federal Administrative Court, obliquely identified the unalterable characteristics of homosexuals and yet granted refugee status under political persecution⁶⁷. An administrative court in Wiesbaden had earlier granted refugee status to an Iranian homosexual as homosexuals in Iran "...constituted a social group based on a conclusion that an objective observer in Iran would recognize that homosexuals are perceived of as, and treated as belonging to, a particular social group"⁶⁸.

Kosar also notes a couple of recent cases where German administrative courts have accepted PSGs where Female Genital Mutilation (FGM) has involved "the group of non-mutilated women"⁶⁹ or "female Muslims"⁷⁰.

viii. Holland

An analysis of Dutch law on MPSG by Thomas Spijkerboer (*Gender and Refugee Status, 2000*) cited by Professor Aleinikoff indicates that the concept is not much analysed as, in Dutch law, whether the persecution is personal rather than general is what has activated protection. As Mr. Spijkerboer put it:

In Dutch legal practice, just which of the five persecution grounds is related to the (feared) persecution is virtually considered immaterial. Whether the persecution is clearly discriminatory and not just random, however, is critical. Once the discriminatory nature of the persecution has been established, the particular rubric under which it falls is 'of less importance'. Without much ado, persecution on account of sexual orientation, on account of the nationality or religion of the spouse, on account of descent, and on account of transgression of the Chinese one child policy have been brought under the refugee concept. Only in the decision on sexual orientation was the persecution ground actually specified ('a reasonable interpretation of persecution for reasons of membership in a particular social group can include persecution for reason of sexual nature').⁷¹

Mr. Spijkerboer alludes to a single case on sexual orientation where MPSG was specifically cited. Further, the Immigration and Nationalization Service issued a directive that "*Women in general are too diverse a group to*

67 BVerwG, 9 C 278.86, 79 BVerwGE 143, 15 March 1988

68 Referred to in Kosar, *Ibid.* Case cite is: VG Weisbaden, IV/1 E 06244/81, 26 April 1983

69 VG Wiesbaden, 5 E 31472/98.A (2), 27 Jan. 2000

70 VG Regensburg, RO 5 K 00.30162, 23 March 2000

71 Aleinikoff, *Ibid.*, at page 27 citing *Gender and Refugee Status*, Aldershot, 2000, page 115.

constitute a particular social group".⁷² As noted by Kosar "

...while the results in Dutch cases are consistent with results in social group cases elsewhere, theoretical and doctrinal analysis of the category remains underdeveloped in the Dutch jurisprudence"⁷³.

ix. Italy

In Italy it would appear that it is the persecutor who determines whether a person is a member of a PSG⁷⁴.

x. Norway

Ms. Rosenberg notes in her 2002 *Report* that MPSG has limited applicability because a claimant in considerable danger to life or of inhuman treatment may be eligible on that basis alone, thereby circumventing the need of establishing a nexus.

The Canadian Council of Refugees notes that in Norwegian practice, gender-related persecution is recognized as a valid basis for seeking asylum. Guidelines effective from January 15, 1998 specifically mention gender-related persecution, exemplified as situations where women through their actions, omissions and statements violate written and unwritten social rules that affect women particularly, regarding dress, the right to employment, etc. If violations of these rules are punished with sanctions, then those sanctions can be seen as persecution in accordance with the 1951 Convention, and asylum should be granted⁷⁵.

xi. Spain

Mr. Haines indicates in his paper that he was unable to discern any decision made on the basis of MPSG⁷⁶.

xii. Sweden

Ms. Rosenberg notes in her 2002 Report that MPSG has not been used as a ground in Sweden.

⁷² Cited in Aleinikoff; *Ibid*, at page 28.

⁷³ Kosar; *Ibid*, at page 63.

⁷⁴ Haines; *Ibid*, at paragraph 9

⁷⁵ The Canadian Council of Refugees website for this information is found at: <http://www.web.net/~ccr/news/gend.htm#DENMARK>

⁷⁶ Haines; *Ibid*, at paragraph 9

The Canadian Council of Refugees notes that Sweden has chosen not to identify women as a social group. Instead, a new paragraph was introduced into the law in 1997 which was supposed to offer protection to women facing gender-related persecution. The Council states that it has hardly been used⁷⁷.

xiii. Switzerland

In Switzerland MSPG requires the existence of common social characteristics⁷⁸.

6. The Common Law World

i. The USA

a. The Structure of Decision Making

In US law a *refugee* claimant is one who applies for refugee status while outside the USA; applications are governed under the *Refugee Act* of 1980. An applicant for protection within or at the US border is referred to as an *asylum* claimant.

US Domestic law has incorporated the definition of a Convention refugee with some important modifications. Section 101 (a) (42) of the *Immigration and Nationality Act* defines “refugee” as:

(A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B) in such circumstances as the President after appropriate consultation (as defined in *section 207(e)* of this Act) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term “refugee” does not

⁷⁷ Cite found at: <http://www.web.net/~ccr/newsgend.htm#DENMARK>

⁷⁸ Haines; *Ibid*, at paragraph 9

include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

However, the US *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* amended the definition of “refugee” contained in the *Immigration and Nationality Act 1952*. Specifically, § 601(a) of the 1996 Act added the following sentence to the end of INA § 101(a) (42)’s definition of refugee:

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control programme, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal or resistance shall be deemed to have a well founded of persecution on account of political opinion.⁷⁹

Apart from the obvious additions, it is to be noted that “persecution” is backward, rather than forward looking, “on account of” has replaced “for reasons of” and it is membership “in” rather than “of” a PSG. It may be, particularly with respect to the backward looking aspect of persecution, that this accounts for some of the differences in interpretation of MPSG between the US and other common law countries.

The responsibility for the asylum program is shared between the U.S. Citizenship and Immigration Services (USCIS)⁸⁰ in the Department of Homeland Security (DHS), and the Executive Office for Immigration Review (EOIR), an agency of the Department of Justice.

A person may claim asylum at a port of entry (POE) or at any U.S. Citizenship and Immigration Services (USCIS) office. A claimant has one year from entry into the US to submit what is called an *affirmative application* for asylum. If he or she does not do so within the one year time limit then the process defaults into removal or deportation proceedings. If the process reaches this stage, the individual may file a *defensive application* for asylum to avoid removal/deportation. The alien, however, has to show extraordinary circumstances that prevented him or her from filing a timely asylum claim. The primary adjudication for an affirmative allocation is carried out by

⁷⁹ Haines; *Ibid*, paragraph 59.

⁸⁰ On March 1, 2003 USCIS replaced the Immigration and Naturalization Service (INS)

an Asylum Officer (AO) who has discretion to either accept the claim or reject it. Generally these decisions are made on the basis of an interview with the claimant. Moreover, the asylum officer will consider country condition information from reliable sources as well as the relevant law found in the *Immigration and Nationality Act*, the regulations found in Title 8 of the *Code of Federal Regulations*, and case law. Where the claim is denied or the claim is initiated as a *defensive* application the claim is referred to an Immigration Judge (IJ) at the EOIR.

The Executive Office for Immigration Review operates under the aegis of the US Department of Justice. It provides more than 200 Immigration Judges (IJ) in 52 locations throughout the country⁸¹.

The Immigration Judge hears the claim for asylum *de novo*. If the decision is negative the alien may appeal the Immigration Judge's decision to the Board of Immigration Appeals (BIA) which is the final level of administrative appeal. Since 2002 the role of the BIA in hearing these appeals has been changed. Its powers of review have been brought into line with those of appellate courts – namely it must defer to the factual assessments made by Immigration Judges (not USCIS Asylum Officers) unless they were “clearly erroneous”. Decisions of the BIA are final and binding unless overruled by the US Attorney General or appealed successfully to a federal circuit court of appeal. Refugee cases can reach the United States Supreme Court on the basis of a grant of *certiorari*, though there have been few of these.

Consequently, the governing law on matters of asylum is created by the Circuit Courts of Appeal of which there are 13⁸² and by the BIA. This creates an odd situation in that the BIA is a national tribunal which develops legal positions which can be overturned by each Circuit Court of Appeal. As might be expected these Circuit Courts do not always interpret the *Convention* in the same manner, leading to a divergence in analysis which cannot be resolved through an appeal to the US Supreme Court as would be the case in Canada (Supreme Court) or the UK (House of Lords) or Australia (High Court).

81 See the website for the EOIR at: <http://www.usdoj.gov/eoir/ocijinfo.htm>

82 See Appendix 1 for a map of the Circuit Courts of Appeal.

b. The Law

This was the subject of the MPSG Working Party paper given in Stockholm in 2005⁸³ so it will be abbreviated here and updated so as to place it in context with other common law jurisdiction interpretations.

The starting point for the interpretation of MPSG in the USA is the 1985 decision of the Board of Immigration Appeals (BIA) in the case of *A Matter of Acosta*⁸⁴. The BIA held that persecution on account of MPSG is persecution directed toward a person who is a member of a group of persons, all of whom share a common, immutable characteristic. The BIA noted that the shared characteristic might be an innate one such as sex, color, or kinship ties, or in some cases shared past experiences. The BIA held that whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Over the course of approximately 20 years the various Circuit Courts of Appeal have grappled with the interpretation of this *Convention* category. An argument can be made that a Circuit by Circuit analysis is not useful as most of the interpretations in the Circuits are converging. However, there are still some significant differences and by taking this approach one gets a better feel for the development of the law as the various Circuit Courts interact with each other. Here is a brief summary.

First Circuit

The First Circuit appears to have followed the *Acosta* approach by adopting the common, “immutable” characteristic test⁸⁵ as well as the “mutable” characteristic test where a change in that characteristic would not be justified⁸⁶. Beyond this the court did find that “deported Haitian nationals with criminal records in the United States” are not members of a social group, as to recognize them would be unsound policy. In arriving at this conclusion the Court followed the analysis set out in the BIA decision⁸⁷. As well, the court found that Haitian youth with pro-Aristide views are not a social group but merely “a general demographic segment of the troubled Haitian population”⁸⁸. The issue as to the dividing line between a “demographic” group and a “social group” is one which recurs in the jurisprudence in the USA and other countries⁸⁹.

83 Osuna, Juan; Membership in a Particular Social Group: Selected Decisions from the United States Courts of Appeal; Presented to the 6th World Conference in Stockholm, April 2005. Mr. Osuna is currently the Acting Chair of the BIA.

84 19 I&N Dec. 211, at 233. This definition was adopted and amplified by the Canadian Supreme Court in the Ward decision.

85 *Ananeh-Firemong v. INS*, 766 F.2d 621 (1st Cir. 1985) and *Gebremichael v. INS*, 10 F.3d 28, (1st Cir. 1993)

86 *Meguenine v. INS*, 139 F.3d 25 (1st Cir. 1998)

87 *Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004)

88 *Civil v. INS* 140 F.3d 52 (1st Cir. 1998). Of course, this PSG demonstrates that often the categories of the Convention can overlap; as here a member of this putative PSG could just as easily be recognised as a claimant with a political opinion.

89 In particular see the 1st and 9th USCCA and Australia

Second Circuit

In *Gomez v. INS*⁹⁰ the Second Circuit placed particular importance on whether the alleged “group” – women battered and raped by Salvadoran guerillas – was a cognizable group; whether in the eyes of the outside world or the persecutor, members of this group would distinguish themselves from others. The court held that the group attributes need be discrete and not simply broadly-based characteristics such as youth and gender. It also held that the group cannot be defined solely by the persecution suffered. Aleinikoff sees this case as charting an approach somewhere between the “protected characteristics” approach of *Acosta* and the “voluntary association” test in *Sanchez-Trujillo*. He refers to it as a “sociological” test⁹¹.

In a later case the court held that a PSG

“...encompasses a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”⁹²

Third Circuit

In *Fatin v. INS*⁹³ the Third Circuit has also followed *Acosta* and noted in *Lukwago v. Ashcroft*⁹⁴ that the “group” must exist prior to and independently of the persecution. It accepted that “former child soldiers who have escaped LRA enslavement” do constitute a PSG⁹⁵. However, in *Escobar v. Gonzales*⁹⁶ the 3rd Circuit appears to have adopted a new test which limits the size of social groups. In *Escobar*, a case involving a Honduran street child, the 3rd circuit refused to recognise the PSG ‘Honduran street children’ stating that such a condition (being a child) was not permanent, the group was too large, and could not be differentiated from other street children around the world. This decision has been criticized in *Escobar v. Gonzalez: A Backwards Step for Child Asylum Seekers and the Rule of Law in particular Social Group Asylum Claims*⁹⁷.

Escobar has gone beyond all other circuits by adding a “permanency” condition. This is odd because persecution is to be determined at the time of the asylum hearing at which point Eldin was still a child and quite incapable of altering this characteristic. Also of great interest is the court’s

90 *Gomez v. INS*, 947 F.2d 660 (2nd Cir. 1991)

91 Aleinikoff; *Ibid*, at pages 22 – 23

92 Saleh v. United States Dep’t of Justice, 962 F.2d 234, at page 240 (2nd Cir. 1992)

93 *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *Singh v. Gonzales*, 406 F.3d 191 (3d Cir. 2005)

94 *Lukwago v. Ashcroft*, 329 F.3d 157 at page 172(3rd Cir. 2003)

95 *Lukwago v. Ashcroft*, 329 F.3d 157 at page 178(3rd Cir. 2003)

96 *Escobar v. Gonzalez*, 417 F.3d. 363 (3rd Cir. 2005). Case may be found at: <http://www.ca3.uscourts.gov/opinarch/042999p.pdf>.

97 We have been unable to locate a reference for this paper

apparent concern with the “floodgates” argument. As has been noted by several courts throughout the world⁹⁸ limiting the classes of potential refugees is the proper province of the government which always retains this power through legislative change.

Perhaps even more troubling is the apparent curial deference to the legislative and executive branches of the state. As the court put it:

Unlike procedural due process in immigration proceedings, an area in which the Courts may assert some expertise, the choice of those aliens who shall be permitted to enter or remain in the country is a matter of policy within the special competence of the legislative and executive branches.⁹⁹

From the decision it appears that the court is declining to interpret the legislation in favour of what it views as the government’s intention.

Fourth Circuit

The 4th Circuit in *Lopez-Soto v. Ashcroft*¹⁰⁰ has also adopted the immutable characteristic test in *Acosta*. In the same case the court has held that “family” can be a PSG¹⁰¹ and in *Basma v. U.S. INS* that being part of a group that is wealthy is not a PSG because being wealthy is not a characteristic that is so fundamental to a person that he should not be required to change it¹⁰².

Fifth Circuit

The Fifth Circuit has analysed MPSG and appears to have held that persecution should be based upon what one is and not what one does. In this case it held that the alleged PSG – being a member of the Esubete royal family – was not the cause of the persecution; rather it was a disagreement because this member of the royal family refused to accept a leadership position¹⁰³. Nevertheless the 5th Circuit in *Ontunez-Tursios v. Ashcroft*¹⁰⁴ has also adopted *Acosta*.

98 See the Supreme Court of Canada in *Chan v. Canada* (Minister of Employment and Immigration), [1995] 3 S.C.R. 593, at paragraph 57.

99 *Escobar v. Gonzalez*, 417 F.3d See the penultimate paragraph.

100 *Lopez-Soto v. Ashcroft*, 383 F.3d 228 at page 235 (4th Cir. 2004)

101 *Lopez-Soto v. Ashcroft*, 383 F.3d 228 at page 235 (4th Cir. 2004)

102 *Basma v. U.S. INS*, 155 F.3d 557 (4th Cir. 1998)

103 *Adebisi v. INS*, 952 F.2d 910 at page 913 (5th Cir. 1992)

104 *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341 at page 352 (5th Cir. 2002)

Sixth Circuit

In *Castellano-Chacon v. INS*¹⁰⁵ The Sixth Circuit has adopted the test in *Acosta* but rejected groups based upon having tattoos¹⁰⁶ or being targeted by organized crime because of their wealth¹⁰⁷.

Seventh Circuit

In *Lwin v. INS*¹⁰⁸ The Seventh Circuit has adopted the test in *Acosta* but has rejected the “external perception” test of the Second Circuit¹⁰⁹ and the “voluntary associational” test of the Ninth Circuit¹¹⁰. It has accepted that a family can be a PSG¹¹¹, and that protection cannot be extended to victims of crime¹¹². In *Yadegar-Sargis v. INS*¹¹³ the court also specifically rejected the rationale in both the Third¹¹⁴ and Eighth Circuit¹¹⁵ that a person’s refusal to wear Muslim garb must be so profound that he or she would suffer the consequences. In doing so it stated that although

“...it would seem appropriate to require that the government-imposed requirement be one that affects a deeply held belief, it is unclear why the victims must be willing to suffer whatever consequence may be visited on them as a prerequisite to claiming protection”¹¹⁶.

This of course goes to the evidentiary rather than the MPSG aspect of the case.

Eighth Circuit

In *Bernal-Rendon v. Gonzales*¹¹⁷ The Eighth Circuit has accepted the *Acosta* test but, as noted above, has added to it the qualification that a PSG “... implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”¹¹⁸ In this case involving an Iranian woman the court found that because she did not completely refuse to follow Islamic mores her aversion to them was not sufficiently profound. Later¹¹⁹ the court rejected an alleged PSG of mentally ill Jamaican women as not

105 *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003)

106 *Castellano-Chacon v. INS*. At page 549

107 *Dombov v. INS*, 165 F.3d 27 (6th Cir. 1998)

108 *Lwin v. INS*, 144 F.3d 505 at page 512 (7th Cir. 1998).

109 *Lwin v. INS*, at page 512.

110 *Lwin v. INS*, at page 512.

111 *Iliev v. INS*, 127 F.3d 638 (7th Cir. 1997)

112 *Bastanipour v. INS*, 980 F.2d 1129 at page 132 (7th Cir. 1992)

113 *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002)

114 *Fatin*, *Supra*

115 *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994).

116 *Yadegar-Sargis v. INS*, at page 604.

117 *Bernal-Rendon v. Gonzales*, 419 F.3d 877 (8th Cir. 2005)

118 *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994); at 640.

119 *Raffington v. INS*, 340 F.3d 720 (8th Cir. 2003).

being “closely affiliated with each other”¹²⁰ and the other alleged PSG of the mentally ill as being “too large and diverse a group to qualify”¹²¹.

Ninth Circuit

The Ninth Circuit – along with the First Circuit – one of the first to deal with MPSPG, took a different approach. In *Sanchez-Trujillo v. INS*¹²², the court dismissed an alleged PSG comprising young, urban, working-class males of military age who had maintained political neutrality. The court stated:

...the phrase ‘particular social group’ implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete group.¹²³

Rather the court found the alleged PSG to be simply a “sweeping demographic division”¹²⁴.

In *Hernandez-Montiel*¹²⁵ the court adopted a modified test, incorporating both the *Sanchez-Trujillo* and *Acosta* tests; in other words a PSG could be determined following either approach¹²⁶. Aleinikoff referred to this formulation as

“...a capitulation to the *Acosta* standard without a willingness to admit defeat”¹²⁷.

[A PSG]...is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.¹²⁸

In this case the court found gay men with female sexual identities in Mexico to be a PSG. The court also found some families (with a sufficiently

120 *Raffington v. INS*, at page 723.

121 *Raffington v. INS*, at page 723.

122 *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986)

123 *Sanchez-Trujillo v. INS*, at page 1576.

124 *Sanchez-Trujillo v. INS*; at page 1577.

125 *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

126 See also *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005) where the court re-iterated its adoption of both the *Acosta* and *Sanchez-Trujillo* tests and again refused to accept what it referred to as a too broad a demographic group. See paragraph 5 under the Analysis section.

127 *Aleinikoff*; *Ibid*, at page 21

128 *Hernandez-Montiel v. INS*, at page 1093.

strong and discernible bond) to be PSGs,¹²⁹ homosexuals to be PSGs¹³⁰ as well as victims of female genital mutilation¹³¹. In the latter case it analogized the persecution to be a continuing harm just as forced sterilization is¹³².

This past summer in *Thomas v. Gonzales*¹³³ the 9th Circuit adopted the definition of a nuclear family as outlined in *Acosta* and brought itself into line with all other Circuit Courts of Appeal in accepting that a family was a prototypical example of a PSG.¹³⁴ In its recent decision in *Fornah* the House of Lords unanimously accepted that a family could be a PSG.

Tenth Circuit

The 10th Circuit has also adopted the *Acosta* test in *Niang v. Gonzales*¹³⁵ where the court also found that either gender can comprise a PSG.

The Eleventh Circuit

The 11th Circuit has accepted the *Acosta* formulation¹³⁶.

The BIA

It is worth noting the most recent decision of the BIA to affirm the *Acosta* standard: *In re C-A-*, decided June 2006¹³⁷. While the Board affirms the *Acosta* standard it raises questions about “voluntary associations”. In that case a Columbian citizen reported doings of the Cali Drug Cartel to the authorities and was targeted as a result by the Cartel. The Board makes the remark that someone taking on such a risk “...is not in a position to claim refugee status should such risks materialize”¹³⁸. Why the Board arrived at this position is not clearly articulated.

c. Proposed Regulation on MPSG

On December 7, 2000 the Attorney General proposed a new *Regulation*¹³⁹ to the *Immigration and Naturalization Act (INA)* to address concerns arising out of the BIA’s decision *In re R-A*¹⁴⁰, with respect to victims of domestic

129 Aguirre-Cervantes v. INS, 242 F.3d 1169 (9th Cir. 2001); Chen v. Ashcroft, 289 F.3d 1113 (9th Cir. 2002); Lin v. Ashcroft, 377 F.3d 1014 (9th Cir. 2004); Thomas v. Ashcroft, 359 F.3d 1169 (9th Cir. 2004).

130 Karouni v. Gonzales, 400 F.3d 785 (9th Cir. 2005).

131 Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005).

132 Mohammed v. Gonzales, at page 799.

133 Thomas v. Gonzales; 359 F.3d 1169 (9th Cir.2004); reversed on other grounds by the USSC on April 17, 2006

134 *Ibid*; paragraph 9.

135 Niang v. Gonzales, 422 F.3d 1187, (9th Cir. 2005) at 1198.

136 Garcia v. United States AG, 143 Fed Appx. 217 at page 222 (11th Cir. 2005)

137 *In re C-A-*, 231&N Dec 951.

138 *Ibid* at page 958.

139 The Proposed Regulation on Gender and PSG can be found at: http://www.gbls.org/immigration/2001_Gender_and_Social_Group_Proposed_Regulations.pdf

140 *In re. R-A-*, Interim Decision 3403, BIA 1999

violence. The Attorney General had intervened after this decision to overrule it. The Attorney General was concerned with the varying approaches to MPSG that were being taken throughout the various circuit courts of appeal and the BIA and wanted to bring some consistency to bear. The proposed *Regulation* reads as follows:

Membership in a Particular Social Group

(1) A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. The group must exist independently of the fact of persecution. In determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant's individual circumstances and country conditions information about the applicant's society.

(2) When past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.

(3) Factors that may be considered in addition to the required factors set forth in paragraph (b) (2) (i) of this section, but are not necessarily determinative, in deciding whether a particular social group exists include whether:

- (i) The members of the group are closely affiliated with each other;
- (ii) The members are driven by a common motive or interest;
- (iii) A voluntary associational relationship exists among the members¹⁴¹;
- (iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
- (v) Members view themselves as members of the group; and
- (vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society¹⁴².

141 Proposed Regulation on Gender and PSG, at page 13. These first three qualifications are added to reflect the 9th Circuit's decision in *Sanchez-Trujillo*.

142 Proposed Regulation on Gender and PSG at page 13. These latter 3 qualifications are meant to reflect the BIA's decision in *In re R-A-*

The new *Regulation* was also to provide guidance on the meaning “on account of”. The BIA had interpreted this to mean that “at least part” of the motivation for the persecution must be “on account of” MPSPG. The *Regulation* proposed changing this so that the “on account of” is the “central” motivation.¹⁴³ While strictly a question of nexus it is included here as it is closely interwoven with MPSPG.

Comment on the proposed *Regulation* was sought and obtained. However, after a change of government, further action appears not to have been taken. A letter¹⁴⁴ from the Harvard Immigration and Refugee Clinic of the Greater Boston Legal Services, Inc. and Harvard Law School (the “Harvard Group”) dated August 5, 2005 and addressed to the Secretary of the Department of Homeland Security (DHS) urged the Secretary to implement the *Regulation* with the suggested changes made to it by the group in 2001¹⁴⁵.

It appears that the proposed *Regulation* would incorporate the interpretations propounded by the various circuit courts of appeal and the BIA. Perhaps somewhat optimistically the notes accompanying the proposed Regulation state that with regard to the “not necessarily determinative” characteristics outlined in paragraph 3, the *Regulation* “resolves those ambiguities by providing that, while these factors may be relevant in some cases, they are not requirements for the existence of a particular social group.”¹⁴⁶

It is certainly not clear how the ambiguities are resolved. Paragraph 1 of the *Regulation* clearly makes the *Acosta* characteristics necessary in the sense that a PSG *must* have these factors. Paragraph 2 is meant to weed out unmeritorious claims based on a past experience the consequences of which cannot be changed – such as having joined a street gang when young. With this limitation such a claim could be rejected on the basis that a claimant should not have chosen to join such a gang at the time. In this sense the *Regulation* anticipates the decision of the BIA in *Matter of C-A-*. The clauses in paragraph 3 are meant to be factors which may be relevant in some cases but not determinative of the existence of a PSG.

It is hard to see what the additional factors in paragraph 3 add to the analysis of MPSPG other than muddle them and lead to yet another potential *ejusdem generis* analysis. In fact the Harvard Group suggested in its response that paragraph 3 be struck for the likelihood of its causing confusion. With respect to paragraph 2 they also recommended striking

143 Proposed Regulation on Gender and PSG, at page 8

144 The letter can be found at: http://www.gbpls.org/immigration/Final_Letter_To_Chertoff.pdf

145 Comment from the Harvard Immigration and Refugee Clinic of the Greater Boston Legal Services, Inc. and Harvard Law School can be found at: http://www.gbpls.org/immigration/HIRC_and_Coalition_Comments_-_2001_Gender_and_Social_Group_Proposed_Regulations.pdf

146 Proposed Regulation on Gender and PSG, at pages 13 – 14

this as being contrary to domestic and international case law. The Harvard Group also disagreed with the *Regulation's* intent to make the “on account of” “central” as being contrary to case law and as requiring too high an evidentiary burden upon claimants.

However, they strongly supported the first paragraph which gave primacy to the *Acosta* test for MPSC.

Summary

In their article Muller, Anker and Rosenberg note that with the exception of the 2nd and 3rd Circuits all the other courts have accepted the *Acosta* test of immutable characteristics. The 2nd seems to be sticking with the need for a close association along the lines of the old *Sanchez-Trujillo* test. The 3rd, although on board in the past, seems to be adding a limiting factor with respect to the size of PSGs.¹⁴⁷

ii. *Canada*¹⁴⁸

a. The Structure of Decision Making

Before moving to a discussion of developments in this area it is useful to lay out the structure of refugee decision-making in Canada. The Refugee Protection Division (RPD) is one of three decision-making divisions within the Immigration and Refugee Board (IRB)¹⁴⁹. The Board is an independent tribunal. The RPD makes the initial decision on who is a Convention refugee or a person in need of protection pursuant to the *Immigration and Refugee Protection Act*¹⁵⁰. It is worth noting that Canada is the only country that has the first level of decision making done by an independent tribunal. In all other countries the initial decision is made by a government official¹⁵¹. However, by contrast with most other countries, there is no appeal on the merits of this initial decision¹⁵². There is with leave – granted in approximately 10% of cases appealed¹⁵³ – a review to the Federal Court – Trial Division (FCTD). The court may send the case back for re-determination by the RPD but may not substitute its own decision. If the Federal Court certifies a question of general importance then the case can proceed to the Federal Court of Appeal (FCA). With leave, a case can go to the Supreme Court of Canada (SCC). With respect to the issue of Membership

147 *Escobar v. Gonzalez: A Backwards Step for Child Asylum Seekers and the Rule of Law in Particular Social Group Asylum Claims*

148 **The Immigration and Refugee Board (IRB) publishes** Interpretation of the Convention Refugee Definition in the Case Law. It may be found at: http://www.irb-cisr.gc.ca/en/references/legal/rpd/crdef/index_e.htm

149 **The Home page of the IRB is:** <http://www.irb-cisr.gc.ca/index.htm>

150 2001; C-27.

151 **Showler, Peter**, *Refugee Sandwich: Stories of Exile and Asylum*, McGill – Queen’s University Press, 2006; page 223.

152 The IRPA contains a section introducing an appeal to a Refugee Appeal Division (RAD) however, it has not been proclaimed.

153 **Showler, Peter**, *Refugee Sandwich: Stories of Exile and Asylum*, McGill – Queen’s University Press, 2006; page 227.

in a Particular Social Group (MPSG)¹⁵⁴ only two cases have gone to the Supreme Court – *Ward*¹⁵⁵ [1993] and *Chan*¹⁵⁶ [1995].

b. The Law

A “refugee” is defined in S. 96 of *IRPA* as:

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 [sic] countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves [sic] of the protection of each of those countries; or

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

The Supreme Court of Canada in the case of *Ward* laid out the law with respect to MPSG¹⁵⁷. In *Ward* the court generally followed the Hathaway¹⁵⁸ and *Matter of Acosta*¹⁵⁹ approach by employing the *ejusdem generis* method in interpreting the meaning of MPSG in the definition of a Convention refugee. LaForest, J, writing for the court, stated:

The meaning assigned to “particular social group” in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers, supra*, *Cheung, supra*, and *Matter of Acosta, supra*, provide a good working rule to achieve this result. They identify three possible categories:

1. groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and

154 It should be noted that in Canada and the United States this ground is referred to as Membership *in* a Particular Social Group rather than as Membership *of* a Particular Social Group. Nothing appears to turn on this difference.

155 Patrick Francis Ward v. The Attorney General of Canada [1993] 2 S.C.R. 689. Heard March 25, 1992 and decided June 30, 1993.

156 Chan v. Canada (Minister of Employment and Immigration) [1995] 3 S.C.R. 593. Heard January 31, 1995 and decided October 19, 1995.

157 Which, presumably, was a good thing as Maryellen Fullerton, *Ibid*, commented on the state of the law as represented by the Federal Court of Appeal in *M.E.I. v. Marcel Mayers* [a-544-92, Nov 5, 1992] as “Delphic”. See paragraph 28 of the judgment.

158 Hathaway, James C, *The Law of Refugee Status*. Toronto. Butterworths, 1991

159 *Matter of Acosta*, Interim Decision 2986, 1985 WL 56042 (B.I.A.)

3. groups associated by a former voluntary status, unalterable due to its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.¹⁶⁰

In the subsequent case of *Chan*¹⁶¹ Mr. Justice LaForest, who wrote the judgment in *Ward*, returned to this issue in his dissenting opinion, which was agreed to by two other judges. It should be noted that the dissent was on grounds other than PSG and Mr. Justice Major, who wrote for the three other judges, did not comment on PSG as in his view the factual basis for the claim had not been made out¹⁶². Consequently, while technically the issue is still open, Justice LaForest's decision carries considerable force and no subsequent decisions – with one exception¹⁶³ – have gone against his clarification of *Ward* category 2 as expressed in *Chan*.

In *Chan*, Justice LaForest clarified what he meant by a “voluntary” association. Some circuit courts of appeal in the US interpreted a voluntary association in the narrow sense meaning that people would join with other people to form an association and thereby know each other. Justice LaForest made it clear that the “voluntary” aspect meant only that a person could choose whether or not to affiliate himself to a group – not that he knew each member of that group and that they “socialize”. In Justice LaForest's view the “social” in social group meant a grouping of persons in a society by their common characteristics and not a group which socializes together.

160 *Ward*, at page 739 or at paragraph 70. The judgment may be found at: <http://scc.lexum.umontreal.ca/en/1993/1993rcs2-689/1993rcs2-689.html>

161 *Chan v. Canada* (Minister of Employment and Immigration), [1995] 3 S.C.R. 593.

162 *Chan*, at paragraph 150. He did, however, comment on the ill advised practice of appeal courts speculating on the law when there are no facts to underpin the discussion:

This conclusion is decisive of the appeal as the appellant has failed to establish on the evidence presented an essential component of the definition of Convention refugee. In the absence of the appellant's meeting the burden of establishing a proper fact foundation on a balance of probabilities, appellate courts are handicapped in attempting to determine legal issues not grounded on the facts and should not attempt to do so. Therefore, the question of whether Cheung should be followed in light of the decision of this Court in Ward should await a case in which the necessary facts have been established in the refugee determination hearing.

163 *In Soberanis*, [1996] FC No. 1282, Mme. Justice Tremblay-Lamer stated:

The panel found that the small business proprietors in Guatemala could not be considered as a particular social group. In coming to that conclusion, they applied the criteria elaborated by the Supreme Court of Canada in Canada (Attorney-General) v. Ward. It was noted that there had been no voluntary association of any sort between the victimized small merchants. The Refugee Division stated that a particular social group cannot be defined solely by the fact that a group of persons are victims of persecution. ...First, in my view, it is clear that the applicant does not fall within categories (a) or (c). Further, the absence of any voluntary association whatsoever is, in my opinion, fatal to the argument that he would fall within category (b). The Refugee Division's interpretation of the "Convention Refugee" definition contained in section 2(1) of the Immigration Act cannot be said to be unreasonable.

It should be noted that this case was decided after Mr. Justice LaForest's decision in *Chan*. However, there is no indication in the reported case that the meaning of voluntary association, as defined in *Chan*, was considered.

A further issue calls for clarification. The majority of the court below rejected the appellant's claim that he was a member of a particular social group under the second working rule on the basis that there was no evidence of voluntary, active, association. Upon reflection, it is apparent that it may seem possible to conclude that for a refugee to fall within the parameters of the second *Ward* category, such claimant would have to establish some type of voluntary association with a specific group. In order to avoid any confusion on this point let me state incontrovertibly that a refugee alleging membership in a particular social group does not have to be in voluntary association with other persons similar to him-or herself. Such a claimant is in no manner required to associate, ally, or consort voluntarily with kindred persons¹⁶⁴.

Once the case has been made that a PSG exists the inquiry moves on to whether the claimant is a member and, if so, whether the persecution is as a result – at least partially¹⁶⁵ – of that membership. Although this enquiry is essentially an enquiry into the nexus to the Convention it is tied closely enough to merit attention. A certain tension exists at this stage, as it is likely that the PSG argued for will, as a matter of course, include the claimant. If this is the case then the inquiry really is about whether the persecution resulted from the membership. In *Ward LaForest, J* included the “is” versus “does” distinction indicating that with respect to nexus one needed to be persecuted because of what one “was” – i.e., a member of a PSG – rather than because of what one “did”. As he put it in *Ward*:

Perhaps the most simplified way to draw the distinction is by opposing what one *is* against what one *does*, at a particular time. For example, one could consider the facts in *Matter of Acosta*, in which the claimant was targeted because he was a member of a taxi driver cooperative. Assuming no issues of political opinion or the right to earn some basic living are involved, the claimant was targeted for what he was *doing* and not for what he *was* in an immutable or fundamental way.¹⁶⁶

164 Chan, at pages 644 – 645 or at paragraph 87.

165 See *Randhawa*, IMM-2474-97. Case law in the USA also follows this notion of “partially” on account of. Note that Australia has legislated that the persecution must be primarily because of membership in that particular social group.

166 *Ward*, pages 738 – 739 or at paragraph 69.

Applying this distinction to Ward himself LaForest, J. stated:

Moreover, I do not accept that Ward's fear was based on his membership. Rather, in my view, Ward was the target of a highly individualized form of persecution and does not fear persecution because of his group characteristics. Ward feels threatened because of what he did as an individual, and not specifically because of his association. His membership in the INLA placed him in the circumstances that led to his fear, but the fear itself was based on his action, not on his affiliation.¹⁶⁷

LaForest, J. later clarified his comments on the "is" versus "does" distinction in *Chan*.

The distinction between what one fundamentally is as opposed to what one merely does offers, as was explained, the most simplified way of discerning when Canada's obligations to refugees should be able to be invoked. Such an inquiry only comes after a consideration of whether an issue exists concerning basic human rights has been undertaken. This simplified distinction was never intended to replace the Ward categories. It is still necessary under the second category to consider whether an association exists that is so fundamental to members' human dignity that they should not be required to forsake it. To apply this simplified distinction without proper consideration of the context in which it arose can lead to ludicrous results. Accepting that the appellant's own particular social group has yet to be yielded by my analysis up until this point of my reasons, I find it difficult to conceive that the associative qualities of having children may be considered so sufficiently analogous to the associative qualities of being a member of a taxi driver cooperative to warrant any meaningful comparison. Moreover, if the distinction was treated as a hurdle claimants are obliged to pass, behaviour fundamental to one's basic humanity, such as having children, could always be classified out of context as something one merely does rather than something one actually is. To pursue this example, however, surely it is nonsensical to find other than that one fundamentally is a parent. Parenting cannot be considered an activity that one merely does, as interchangeable as a particular occupation, without distorting the primary focus of refugee law: the assurance that basic human rights are not fundamentally violated without international recourse.¹⁶⁸

¹⁶⁷ Ward, at page 745 or at paragraph 79.

¹⁶⁸ Chan, at pages 643 – 644 or at paragraph 86.

Canadian courts have also dealt with the potential size of the group and have not found this an impediment. As LaForest, J. stated in *Chan*:

I am mindful that the possibility of a flood of refugees may be a legitimate political concern, but it is not an appropriate legal consideration. To incorporate such concerns implicitly within the Convention refugee determination process, however well meaning, unduly distorts the judicial-political relationship. To alter the focus of refugee law away from its paramount concern with basic human rights frustrates the possibility that foreign persecution may be eventually halted by international pressure. To accept at the judicial level that fundamental human rights violations do not serve to grant Convention refugee status minimizes one of the principal incentives the international community has to denounce foreign persecution and attempt to affect change abroad: to avoid a flood of refugee claimants¹⁶⁹.

Canadian courts have, by and large, interpreted the *Convention* as being concerned fundamentally with anti-discrimination principles. However, as noted by Daley and Kelley,¹⁷⁰ the court decisions after *Ward* do not generally disclose a clear analytic approach. LaForest, J. in *Ward* makes it clear that the underpinning of PSG lies in its focus on anti-discrimination principles.

Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention.¹⁷¹

¹⁶⁹ Chan, at paragraph 57. Note the recent deference of the US 3rd Appeals Circuit in the case of Escobar toward the executive and legislative branches of the government.

¹⁷⁰ Daley, Christa and Kelly, Ninette; Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence, 12 Int'l J. Ref. L. 148 (2000), at page 165.

¹⁷¹ Ward, at paragraph 63

To protect discrimination against fundamental rights is not to be equated with humanitarian principles *per se*.

As explained earlier, international refugee law was meant to serve as a “substitute” for national protection where the latter was not provided. For this reason, the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. The need for “persecution” in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.¹⁷²

As to the analytic approach to be taken firstly, a PSG would have to be made out. Secondly, it would have to be established that the persecution was at least partially because of the claimant’s membership in that PSG. Interesting decisions are made in this regard. For instance “landowners” have been determined not to be a PSG in two cases¹⁷³. It is clear in *Ward* that category three may have been devised with just such a group in mind (capitalists)¹⁷⁴. It is also important to draw a distinction in these cases between the persecutor (state) and non-state actors as well as between persecution on the basis of what one was (former landowner who cannot change that status) and current landowner (who may be expected to change that status).

172 Ward, at paragraph 60

173 In *Morera*, 1993] FCJ No. 1319, wealthy Filipino landlords were held not to be a PSG although the court acknowledges that at the time the definition was introduced capitalists or business class persons were thought to comprise PSGs. In *Moali de Sanchez* [2001] FCJ No. 375 the court, with respect to Peruvian landowners stated:

The status of a landed proprietor does not in any way fall within the “general underlying themes of the defence of human rights and anti-discrimination” (Ward, supra, at 739) and is not a “characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs”.

174 Ward, at paragraph 59.

C. Examples of Particular Social Groups Discussed by the Courts¹⁷⁵

Canadian courts have identified the following groups as constituting PSGs:

- the family, though not if the principal target of the persecution was not targeted for a Convention reason;¹⁷⁶
- homosexuals (sexual orientation);¹⁷⁷
- trade unions;¹⁷⁸
- the poor;¹⁷⁹
- wealthy persons or landlords were found by the Trial Division not to be particular social groups.¹⁸⁰ The Court focused on the fact that these groups were no longer being persecuted although they had been in the past.¹⁸¹

¹⁷⁵ These examples are drawn from the Canadian IRB's Interpretation of the Convention Refugee Definition in the Case Law. 176 *Al-Busaidy, Talal Ali Said v. M.E.I. (F.C.A., no. A-46-91)*, Heald, Hugessen, Stone, January 17, 1992. Reported: *Al-Busaidy v. Canada (Minister of Employment and Immigration)* (1992), 16 Imm. L.R. (2d) 119 (F.C.A.); *Pour-Shariati v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 767 (T.D.), at 774-775; *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (T.D.). In *Calero, Fernando Alejandro (Alejandro) v. M.E.I. (F.C.T.D., no. IMM-3396-93)*, Wetston, August 8, 1994, the Court found no nexus for two families fleeing death threats from drug traffickers; but see *Velasquez, Liliana Erika Jaramillo v. M.C.I. (F.C.T.D., no. IMM-4378-93)*, Noël, December 21, 1994, which suggests, possibly, a different conclusion may be warranted. In *Rodriguez, Ana Maria v. M.C.I. (F.C.T.D., IMM-4573-96)*, Heald, September 26, 1997, the claimant was threatened with harm because her husband was involved in the mafia's drug related business. The Court held that the CRDD did not err in holding that the difficulties experienced by family members of those persecuted for non-Convention reasons – if those difficulties are solely by reason of their connection with the principal target – are not covered by the Convention. This rationale was followed in *Klinko, Alexander v. M.C.I. (F.C.T.D., no. IMM-2511-97)*, Rothstein, April 30, 1998, where the Court held that when the primary victim of persecution does not come within the Convention refugee definition, any derivative Convention refugee claim based on family group cannot be sustained (*Klinko* was overturned by the Federal Court of Appeal on other grounds: *Klinko, Alexander v. M.C.I. (F.C.A., A-321-98)*, Létourneau, Noël, Malone, February 22, 2000). See also *Serrano, Roberto Flores v. M.C.I. (F.C.T.D., no. IMM-2787-98)*, Sharlow, April 27, 1999, where the Court agreed to certify a question on the topic and *Gonzalez, Brenda Yojuna v. M.C.I. (F.C.T.D., no. IMM-1092-01)*, Dawson, March 27, 2002: 2002 FCT 345, where the Court certified the same question as no appeal was filed in *Serrano*. The question reads: "Can a refugee claim succeed on the basis of a well-founded fear of persecution for reason of membership in a particular social group that is family, if the family member who is the principal target of the persecution is not subject to persecution for a Convention reason?"

¹⁷⁷ *Pizarro, Claudio Juan Diaz v. M.E.I. (F.C.T.D., no. IMM-2051-93)*, Gibson, March 11, 1994, at 3-4; this case applied *Ward, supra*, footnote 1. See also *Gomez-Rejon, Bili v. M.E.I. (F.C.T.D., no. IMM-470-93)*, Joyal, November 25, 1994; and *Tchernilevski, Taras v. M.C.I. (F.C.T.D., no. IMM-5088-94)*, Noël, June 8, 1995. Reported: *Tchernilevski v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 67 (F.C.T.D.).

¹⁷⁸ *Rodriguez, Juan Carlos Rodriguez v. M.E.I. (F.C.T.D., no. IMM-4109-93)*, Dubé, October 25, 1994, at 2 (*in obiter*).

¹⁷⁹ *Sinora, Frensel v. M.E.I. (F.C.T.D., no. 93-A-334)*, Noël, July 3, 1993.

¹⁸⁰ *Mortera, Senando Layson v. M.E.I. (F.C.T.D., no. A-1084-92)*, McKeown, December 8, 1993, at 2. See also *Wilcox, Manuel Jorge Enrique Tataje v. M.E.I. (F.C.T.D., no. A-1282-92)*, Reed, November 2, 1993; *Karpounin, Maxim Nikolajevitch v. M.E.I. (F.C.T.D., no. IMM-7368-93)*, Jerome, March 10, 1995; *Bhowmick, Sankar v. M.C.I. (F.C.T.D., no. IMM-3889-94)*, Tremblay-Lamer, May 1, 1995; *Vetoshkin, Nikolay v. M.C.I. (F.C.T.D., no. IMM-4902-94)*, Rothstein, June 9, 1995; and *Montchak, Roman v. M.C.I. (F.C.T.D., no. IMM-3068-98)*, Evans, July 7, 1999. However, in *Randhawa, Sarbjit v. M.C.I. (F.C.T.D., no. IMM-2474-97)*, Campbell, February 2, 1998, it was held that "considering the extensive evidence of persecution of Sikhs in India the CRDD made an erroneous finding of fact in compartmentalizing the [claimant] as a Sikh from the fact that he is a prominent wealthy person", and directed the Board to consider the claim on the basis of membership in the social group of "prominent wealthy Sikhs".

¹⁸¹ In *Ward, supra*, at 731, the Court said: "The persecution in the 'Cold War cases' was imposed upon the capitalists not because of their contemporaneous activities but because of their past status as ascribed to them by the Communist leaders." Thus, in *Lai, Kai Ming v. M.E.I. (F.C.A., no. A-792-88)*, Marceau, Stone, Desjardins, September 18, 1989. Reported: *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.), at 245-246, the Court implicitly accepted that "persons with capitalist backgrounds" constitute a particular social group in the context of China. In *Karpounin, supra*, however, the Court stated at 4: "... it does not necessarily follow that, merely because the historical underpinning of including the use of the term 'particular social group' as found in the Convention, was based on the desire to protect capitalists and independent businessmen fleeing Eastern Bloc persecution during the cold war, should it lead to the conclusion that the [claimant] in this case was persecuted for that very reason." The CRDD had found that the claimant, an independent businessman, was targeted because of the size of his bank account and not because of his choice of occupation or the state of his conscience. See also *Soberanis, Enrique Samayoa v. M.C.I. (F.C.T.D., no. IMM-401-96)*, Tremblay-Lamer, October 8, 1996, where "small business proprietors victimized by extortionists acting in concert with police authorities" was found not to be a particular social group.

- women subject to domestic abuse;¹⁸²
- women forced into marriage without their consent;¹⁸³
- women who have been subjected to exploitation resulting in the violation of the person and who, in consequence of the exploitation have been tried, convicted and sentenced to imprisonment.¹⁸⁴
- new citizens of Israel who are women recently arrived from elements of the former Soviet Union and who are not yet well integrated into Israeli society, despite the generous support offered by the Israeli government, who are lured into prostitution and threatened and exploited by individuals not connected to government, and who can demonstrate indifference to their plight by front-line authorities to whom they would normally be expected to turn for protection;¹⁸⁵
- women subject to circumcision;¹⁸⁶
- persons subject to forced sterilization;¹⁸⁷
- children of police officers who are anti-terrorist supporters;¹⁸⁸
- former fellow municipal employees terrified and terrorized by what they know about the ruthless, criminal mayor;¹⁸⁹
- educated women.¹⁹⁰

There are two areas in Canadian law on MPSG which show some potential for development. Firstly, what is the meaning of a “characteristic”; and secondly, what is meant by Justice LaForest’s notion of expandable categories.

182 In *Narvaez, supra*, Mr. Justice McKeown referred extensively to *Ward, supra*, and to the IRB Chairperson’s Gender Guidelines in finding “women subject to domestic abuse in Ecuador” to constitute a particular social group; the judgment did not address the issue of whether the group can be defined by the persecution feared. (In *Ward, supra*, at 729-733, the Court rejected the notion that “particular social group” could be defined solely by the persecution feared, i.e., the common victimization.) The reasoning in *Narvaez, supra*, was explicitly adopted in the decision of *Diluna, Roselene Edyr Soares v. M.E.I.* (F.C.T.D., no. IMM-3201-94), Gibson, March 14, 1995. Reported: *Diluna v. Canada* (Minister of Employment and Immigration) (1995), 29 Imm. L.R. (2d) 156 (F.C.T.D.), where the Court held that the CRDD erred in not finding that “women subject to domestic violence in Brazil” constitute a particular social group.

183 *Vidhani v. Canada* (Minister of Citizenship and Immigration), [1995] 3 F.C. 60 (T.D.), where the Court held that such women have suffered a violation of a basic human right (the right to enter freely into marriage) and would appear to fall within the first category identified in *Ward, supra*.

184 *Cen v. Canada* (Minister of Citizenship and Immigration), [1996] 1 F.C. 310 (T.D.), at 319, where the Court stated the group “might be” so defined.

185 *Litvinov, Svetlana v. S.C.C.* (F.C.T.D., no. IMM-7488-93), Gibson, June 30, 1994, at 4. Note that Justice Gibson indicated that the “group might be defined” in this way.

186 *Annan v. Canada* (Minister of Citizenship and Immigration), [1995] 3 F.C. 25 (T.D.), where the Court implicitly seemed to accept that the claim was grounded.

187 *Cheung, supra*, at 322, (“women in China who have one child and are faced with forced sterilization”). But note *Liu, Ying Yang v. M.C.I.* (F.C.T.D., no. IMM-4316-94), Reed, May 16, 1995, where the Court found that the claimant had shown no subjective fear of persecution as a result of the threat of sterilization and there was no evidence she objected to the government policy. See also *Chan (S.C.C.)*, *supra*, at 644-646, where La Forest J. (dissenting) formulates the group under *Ward*’s second category as an association or group resulting from a “common attempt by its members to exercise a fundamental human right” (at 646), namely, “the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children.” (at 646).

188 *Badran, Housam v. M.C.I.* (F.C.T.D., no. IMM-2472-95), McKeown, March 29, 1996.

189 *Reynoso, Edith Isabel Guardian v. M.C.I.* (F.C.T.D., no. IMM-2110-94), Muldoon, January 29, 1996. Mr. Justice Muldoon stated that the claimant’s group was defined by an innate or unchangeable characteristic; the Court acknowledged that this characteristic was one acquired later in life.

190 *Ali, Shaysta-Ameer v. M.C.I.* (F.C.T.D., no. IMM-3404-95), McKeown, October 30, 1996. Reported: *Ali v. Canada* (Minister of Citizenship and Immigration) (1996), 36 Imm. L.R. (2d) 34 (F.C.T.D.) (the country of origin was Afghanistan).

Innate or Unchangeable Characteristic

In *Reynoso*¹⁹¹, the claimant stated that through her employment she became privy to knowledge of the mayor's complicity in criminal conduct, including blackmail, corruption, and self-enrichment. She alleged that she and a small coterie of fellow-employees were persecuted by the mayor and his henchmen because of their knowledge. She alleged that her knowledge was unchangeable and so fit within one or other of the *Ward* categories. The CRDD¹⁹² found that the group of people, including the applicant, did not constitute a "particular social group" for the following reasons:

The panel does not believe that those, such as the adult claimant, aware of the corrupt practices of a municipal politician, fall within the ambit of any one of the three categories defined by the SCC. For her to do so would mean that anyone, anywhere, with knowledge of anything, would be a member of a particular social group. The panel also notes that the SCC, held that an association of people defined solely by their "common victimization as the objects of persecution" cannot be a particular social group

The court disagreed for the following reasons:

The applicant's group is a small number of former fellow municipal employees terrified and terrorized by what they know about the ruthless, criminal mayor. Unless or until those people, including the applicant suffer feeble mindedness, as from Alzheimer's disease, they could not, and cannot shake that terrible knowledge which they all shared and which the survivors still share. It puts them all in awful jeopardy from the thugs ("body guards") of the mayor, at least as long as he holds municipal office and wields State power, whether or not being "audited" by another organ of State. The applicant's group, then, is clearly "defined by an innate or unchangeable characteristic". To be sure the characteristic of this group is not ancestry or racial origin. They all acquired it later in life. If only they could persuade their tormentor that they have all just truly forgotten that which they know, they would be delighted – thankful, indeed, to do so. They all "know too much" and live in the fear and objective risk of "liquidation". It is surely an unchangeable characteristic.

191 *Reynoso*, [1996] FCJ No. 117, FCTD

192 The Convention Refugee Determination Division (CRDD) was the precursor to the RPD.

This is the only case in Canadian jurisprudence, of which we are aware, that has taken this analytic approach to an “unchangeable” characteristic. No analysis is done of what anti-discrimination or fundamental rights are at stake although, perhaps, security of the person comes to mind. That ground, however, would appear to apply to anyone one who is being persecuted, taking us back to the circular argument. We are not aware of any other courts that have followed this interpretation. If *Reynoso* is followed, it would certainly broaden the scope of what would fall within *Ward*’s first or third category. In *Guzman*¹⁹³, Mme Justice Reed commented on the decision of the CRDD, which declined to follow *Reynoso* on the grounds that it was inconsistent with other federal court decisions. She held that the CRDD misunderstood the law. However, it is clear in that case that Mme. Justice Reed was commenting on Reynoso’s analysis of perceived political opinion rather than on its findings on MPSG.

Expandable Categories

In *Serrano*¹⁹⁴, drug traffickers targeted the claimants. The case is interesting because of its remarks that the three categories in *Ward* may be expandable. As Mme. Justice Sharlow put it:

I agree with counsel for the applicants that the quoted passage from the *Ward* decision is intended only as guidance, a working rule as La Forest J. called it, that does not preclude the acceptance of additional categories of “particular social group.” La Forest J. said as much in his dissenting judgment in *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 at 642. However, any such expansion must respect the object of the definition, described by La Forest J. in *Ward* (at page 739) as “the underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.”

It does not appear that any Canadian lower courts have chosen to expand *Ward*’s 3 categories to this point.

D. Introduction of the IRPA

On June 28, 2002 the Immigration Act of Canada was repealed and replaced with the Immigration and Refugee Protection Act (IRPA). Specifically, while the right to apply as a Convention refugee was continued under s. 96, the new statute added the following section:

193 *Guzman*, [1999] FCJ No. 1869, FCTD

194 *Serrano*, [1998] IMM-2787-98

97. (1) A person in need of protection is a person in Canada whose removal to their [sic] country or countries of nationality or, if they [sic] do not have a country of nationality, their [sic] country of former habitual residence, would subject them personally

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

(b) to a risk to their [sic] life or to a risk of cruel and unusual treatment or punishment if

- (i) the person is unable or, because of that risk, unwilling to avail themselves [sic] of the protection of that country,
- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Persons in need of protection are therefore those who may face torture as described in Article 1 of the *Convention Against Torture* or who may face a “risk” as identified in the subsections of s. 97 of the IRPA.

The addition of the “risk” section has had great significance with regard to the arguments counsel adduce under the rubric of MPSPG. Frequently, under the old Act, counsel resorted to elaborate arguments to convert “victims of crime” (for instance) into a particular social group. Case law was generally against such a group as it failed to fall under any of the *Ward* categories. The phrase most generally used in the case law was to the effect that victims of crime do not *generally* fall within the *Convention* framework. The use of the term “generally” brought inspiration to counsel.

With the addition of the “risk” ground it was no longer necessary for counsel to artificially contort groups – such as victims of crime – into a heading under the *Convention* as all one has to do is to establish that the claimant faces a risk as defined in s. 97; in particular a risk to their lives. Because of this, Canada has seen little development in the MPSPG definition since 2002 as the need to establish a nexus was bypassed.

When the new *Act* came into force the Board adopted the same standard of proof for “risk” as for “persecution”. That standard was set down in the

FCA case of *Adjei*¹⁹⁵. In order to establish persecution the court adopted a standard of a “reasonable” or “serious possibility”¹⁹⁶ rather than the “balance of probabilities” test common in civil suits. However, in 2005 the courts adopted a different test – namely the civil standard of “on the balance of probabilities”¹⁹⁷. The practical effect of this has been that counsel now has a more difficult case to make under “risk” than under the MPSPG in the *Convention*. It may well be that this standard of proof will re-invigorate the discussion around MPSPG in Canadian law.

iii. New Zealand

A. The Structure of Decision Making

In New Zealand a person can claim for protection under the *Immigration Act 1987* as amended by the *Immigration Amendment Act 1999*. S.129D of the *Act* simply directs Refugee Status Officers and the RSAA to act in a manner that is consistent with New Zealand’s obligations under the *Refugee Convention* which, along with the Protocol is appended. The first instance decision is made by a Refugee Status Officer (RSO) in the Refugee Status Branch of the New Zealand Immigration Service. From this decision there is a right of appeal to the Refugee Status Appeals Authority (RSAA).

The RSAA is an independent body and was initially established in 1991 under the prerogative powers of the Executive (Cabinet) of the New Zealand Government. The RSAA was later given statutory basis pursuant to the *Immigration Amendment Act 1999*, which came into force on 1 October 1999. Appeal proceedings are conducted by way of a confidential *de novo* hearing.

The RSAA currently comprises a Chairperson and 12 Members (part-time and full-time), all of whom are either legal practitioners or retired judges. They come from wide and varied legal, cultural and ethnic backgrounds, and are appointed by the Governor General of New Zealand on the advice of the Minister of Immigration. Section 129N(3) of the *Immigration Act 1987* provides that RSAA Members must be barristers or solicitors of the High Court of New Zealand who have held Practising Certificates for at least 5 years, or have other equivalent or appropriate experience (whether in New Zealand or overseas).¹⁹⁸

195 *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.)

196 *Ibid* at page 683

197 *Li, Yi Mei v. M.C.I.* (F.C.A., no. A-31-04), Rothstein, Noël, Malone, January 5, 2005; 2005 FCA 1. Reported: *Li. V. Canada (Minister of Citizenship Immigration)*, [2005] 3 F.C.R. 239 (F.C.A.).

198 http://www.nzrefugeeappeals.govt.nz/Pages/ref_aboutus.aspx

The decision of the RSAA is final, subject only to review by the High Court¹⁹⁹. The proceedings must be commenced within three months after the date of the decision, unless the High Court decides that, by reason of special circumstances, further time should be allowed.

If a judicial review is requested it will decide whether or not the claimant is entitled to have the RSAA re-hear the case. If the judicial review decides that the case should be re-heard an appeal of the initial decision must be made within 10 working days with the RSAA, and that process will start again.

There is also a further right of appeal to the New Zealand Court of Appeal with leave²⁰⁰ and since January 1, 2004 a final appeal with leave to the New Zealand Supreme Court which replaced the Judicial Committee of the Privy Council in London as the final court of appeal for New Zealand decisions.

B. The Law

Ms. Rosenberg notes in her 2002 *Report*, as does Professor Aleinikoff in his paper, that Mr. Haines has developed fully the considerations under MPSG in *Refugee Appeal No. 71427/99 (2000)*.²⁰¹ Essentially New Zealand has adopted the *Ward/Acosta* approach with their emphasis on anti-discrimination principles in the *Convention* and has rejected the social perception test developed in Australia as being so broad that it might encompass anybody or group.²⁰² In *Refugee Appeal No. 71427/99 (2000)*, the RSAA provided a thorough analysis of MPSG:

[90] While on one view the holding we have just made as to the religion and political opinion grounds makes it unnecessary to examine the social group category, the point which must be made is that it is possible for Convention grounds to overlap. Because there is an overriding need to establish a nexus between the Convention ground and the anticipated serious harm, it is best to identify the principal or strongest ground in relation to which the “for reason of” inquiry is to be conducted.

[91] In the present context our view is that while the Iranian laws earlier discussed are designed, with supposed Islamic justification, to maintain political power, the overarching characteristic of the disenfranchised is their gender, that is the fact that they are women. This leads to the question whether Iranian women are a particular social group as that term is understood in Article 1A(2) of the Refugee Convention.

199 The High Court, which was established in 1841 and known as the Supreme Court until 1980, has general jurisdiction and responsibility, under the Judicature Act 1908, for the administration of justice throughout New Zealand.

200 The Court of Appeal has existed as a separate court since 1862 but, until 1957, it was composed of judges of the Supreme Court (as the High Court was known then) sitting periodically in panels. In 1957 the Court of Appeal was reconstituted as a permanent court separate from the Supreme Court.

201 One can search cases at: <http://www.nzrefugeeappeals.govt.nz/srchres.aspx>

202 Re GJ, Refugee Appeal No. 1312/93, 1 N.L.R. 387 (1995)

[92] The leading New Zealand case on the social group category is *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995); [1998] INLR 387, a decision cited with approval by Lord Steyn (Lords Hope and Hutton agreeing) in *R v Immigration Appeal Tribunal; Ex Parte Shah* [1999] 2 AC 629, 643E, 644G-H (HL).

[93] As indicated, the social group ground has been interpreted in recent years by the highest courts of Canada, Australia and the United Kingdom in *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (SC:Can); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (HCA) and *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL). A large measure of consensus has emerged.

[94] First, the ambit of this element of the definition must be evaluated on the basis of the basic principles underlying the Refugee Convention. International refugee law was meant to serve as a “substitute” for national protection where the latter was not provided. The Convention has built-in limitations to the obligations of signatory states. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals: *Ward* 731-732. The following passage is at 732:

“... the drafters of the Convention limited the included bases for a well-founded fear of persecution to ‘race, religion, nationality, membership in a particular social group or political opinion. Although the delegates inserted the social group category in order to cover any possible lacuna left by the other four groups, this does not necessarily lead to the conclusion that any association bound by some common thread is included. If this were the case, the enumeration of these bases would have been superfluous; the definition of ‘refugee’ could have been limited to individuals who have a well-founded fear of persecution without more. The drafter’s decision to list these bases was intended to function as another built-in limitation to the obligations of signatory states.”

[95] See also *Applicant A* at 247-248, 274, 283 and *Shah* at 638G-639D, 658H.

[96] Second, the particular social group category is limited by anti-discrimination notions inherent in civil and political rights: *Ward* 733, 739. Underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination: *Ward* 733. This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates who negotiated the terms of the Convention. It sets out, in a general fashion, the intention of the drafters and

thereby provides an inherent limit to the cases embraced by the Convention. In distilling the contents of the head of “particular social group” therefore, it is appropriate to find inspiration in discrimination concepts. The manner in which groups are distinguished for the purposes of discrimination law can be appropriately imported into this area of refugee law: *Ward* 735. In short, the meaning assigned to “particular social group” should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative: *Ward* 739. See also *Applicant A* at 232 & 257 and *Shah* at 639C-D, 651A-D, 656E, 658H.

[97] Third, the *ejusdem generis* approach developed by the US Board of Immigration Appeals in *Re Acosta* 19 I & N, Dec. 211, 233 (BIA 1985) provides a good working rule in that it properly recognises that the persecution for reason of membership of a particular social group means persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. That characteristic must be either beyond the power of an individual to change, or so fundamental to individual identity or conscience that it ought not be required to be changed. What is excluded by this definition are groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights: *Ward* at 736-737. See also *Shah* at 643C & 644D, 651E, 656F & 658E, 658H.

[98] Fourth, while the social group ground is an open-ended category which does not admit of a finite list of applications, three possible categories can be identified (*Ward* 739):

- (a) Groups defined by an innate or unchangeable characteristic;
- (b) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (c) Groups associated by a former voluntary status, unalterable due to its historical permanence.

[99] The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one’s past is an immutable part of the person.

[100] Fifth there is a limitation involved in the words “particular social group”. Membership of a particular social group is one of only five categories. It is not an all encompassing category. Not every association bound by a common thread is included: *Ward* at 728-232, *Applicant A* at 242, 260 and *Shah* at 643B-C, 656D, 658H.

[101] Sixth, there is a general principle that there can only be a particular social group if the group exists independently of, and is not defined by, the persecution. Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society: *Ward* at 729, *Applicant A* at 242, 263-264, 285-286 and *Shah* at 639G-H, 645E, 656G, 658H, 662B.

[102] Seventh, cohesiveness is not a requirement for the existence of a particular social group. While cohesiveness may be helpful in proving the existence of a social group, the meaning of “particular social group” should not be limited by requiring cohesiveness: *Ward* at 739; *Shah* at 642A-643G, 651G, 657F, 658H, 661D.

[103] All of these principles are well established in the Authority’s social group jurisprudence. See particularly *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995); [1998] INLR 387 and *Refugee Appeal No. 2039/93 Re MN* (12 February 1996).

[104] What the Authority has stressed is the need for members of the particular social group to share an internal defining characteristic. It is not every group in society which is a particular social group for the purposes of the Refugee Convention. The following quote is taken from *Refugee Appeal No. 1312/93 Re GJ* at 56-57; [1998] INLR 387, 422:

“The mere fact that a person fears persecution by reason of a characteristic that he or she has in common with another person who also fears persecution, does not establish that the two are members of a particular social group for the purpose of the Convention.

Herein lies the significance of the interpretative approach to the Refugee Convention discussed at length earlier in this decision and which recognises that the grounds of race, religion, nationality and political opinion focus on the claimant’s civil and political rights. The *Acosta ejusdem generis* interpretation of “particular social group” firmly weds the social group category to the principle of the avoidance of civil and political discrimination. In this way, the potential breadth of the social group cate-

gory is purposefully restricted to claimants who can establish a nexus between who they are or what they believe and the risk of serious harm: *Ward* 738-739; Hathaway, *The Law of Refugee Status* (1989) 137. For the nexus criterion to be satisfied, there must be an internal defining characteristic shared by members of the particular social group. In the *Acosta* formulation, this occurs when the members of the group share a characteristic that is beyond their power to change, or when the shared characteristic is so fundamental to their identity or conscience that it ought not be required to be changed. In the very similar *Ward* formulation, the nexus criterion is satisfied where there is a shared defining characteristic that is either innate or unchangeable, or if voluntary association is involved, where that association is for reasons so fundamental to the human dignity of members of the group that they should not be forced to forsake the association.

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

[105] To similar effect see *Applicant A* at 264 per McHugh J:

"The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the "particular social group" category is the notion of "membership" expressly mentioned. The use of that term in conjunction with "particular social group" connotes persons who are defined as a distinct *social* group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group".

[106] As can be seen from these principles it is indisputable that gender can be the defining characteristic of a social group and that "women" may be a particular social group. Depending on the facts, it may be unnecessary to define the group any further as in "women in Iran" because the "in Iran" element goes not to the identification of the group but to the identification of those in the group who face a real risk of harm.

Whether the Appellant is a Member of a Particular Social Group

[107] It now remains for these principles to be applied to the facts as we have found them.

[108] For the reasons given, the evidence relating to Iran establishes that the overarching characteristic of those fundamentally disenfranchised and marginalised by the state is the fact that they are women. This is a shared, immutable, internal defining characteristic. Applying the principles identified, we find that the particular social group is therefore women.

[109] In so formulating the group our findings mirror those made by the majority in *Shah*. See especially Lord Steyn at 644E-F and Lord Hoffmann at 652C. We acknowledge that on one view, the group so defined may be seen as a large and general one. However, two points must be made. The size of the group cannot be a limiting factor given the breadth of application of the other four Convention categories. Second, our finding is country specific. Particular Islamic regimes such as Iran and Pakistan present an extreme picture of discrimination against women.

[110] However, whether the appellant is a member of a particular social group is not the same question as whether the anticipated harm in Iran will be *for reason of* her membership of that group²⁰³.

*iv. Australia*²⁰⁴

A. The Structure of Decision Making²⁰⁵

The Parliament has effectively drawn into municipal law the definition of “refugee” contained in Article 1 of the *Convention and Protocol* through s.36 of the *Migration Act, 1958*²⁰⁶. Subsection (1) creates Protection Visas and subsection (2) provides that a criterion for a Protection Visa is that the applicant is a non-citizen in Australia “to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol”.²⁰⁷

203 The case may be found at: <http://www.refugee.org.nz/Casesearch/Fulltext/71427-99.htm>

204 Australian case law may be found at: <http://www.austlii.edu.au/>. The Home page for the Refugee Review Tribunal (RRT) is: <http://www.rrt.gov.au/>. The RRT publishes a Guide to Refugee Law in Australia which can be found at: <http://www.rrt.gov.au/guidereflaw.htm>. The section on MSPG may be found at: <http://www.rrt.gov.au/publications/guidereflaw/5grounds.pdf>

205 Information contained in this section has largely been drawn from the Guide to Refugee Law in Australia.

206 The statute may be found at: http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/

207 Section 36(2) has been held to be a valid law under available heads of constitutional power, including s.51(xix) (“naturalisation and aliens”) and (xxvii) (“immigration and emigration”): *NAGV & NAGW of 2002 v MIMIA & Anor* (2005) 213 ALR 668 per Kirby J at [69].

The Protection Visa is thus the mechanism by which Australia offers protection to persons who are “refugees” within the meaning of the *Refugees Convention*.²⁰⁸ However, it should be noted that the *Act* does not incorporate into municipal law the *Convention* in its entirety. The phrase “to whom ... *Australia has protection obligations under [the Convention]*” in s.36 describes no more than a person who is a refugee within the meaning of Article 1.²⁰⁹ Applications for Protection Visas are at first instance assessed and determined by the delegates of the Minister for Immigration and Multicultural Affairs (MIMA). Applicants may, within 28 days of notification of the decision, apply to the Refugee Review Tribunal (RRT) for a full merits review of their case. Subject to exceptions, if a valid application is made for review of a decision to refuse to grant a Protection Visa, the Refugee Review Tribunal must review the decision.²¹⁰

Where the Refugee Review Tribunal declines an application for review, the applicant may make an application for the judicial review of that decision to the Federal Magistrates Court of Australia. This review may be sought only on a point of law, including procedural fairness. Where the Federal Magistrates Court allows a judicial review, the case will be remitted back to the RRT for re-hearing before a differently constituted panel. Where the Federal Magistrates Court dismisses a judicial review, an applicant may seek leave to appeal to the Federal Court of Australia as well as, with leave, to the High Court of Australia.

208 See Explanatory Memorandum to the Migration Reform Bill 1992 (Cth) at [26]. See also *SAAP v MIMIA* [2005] HCA 24 (Gleeson CJ, McHugh, Gummow, Kirby & Hayne JJ, 18 May 2005) per Kirby J at [143].

209 *NAGV & NAGW of 2002 v MIMIA* (2005) 213 ALR 668 at [42]. The High Court has elsewhere emphasized that the Act is not concerned to enact in Australian municipal law the various protection obligations of Contracting States found in Chapters II, III and IV of the Convention, but rather focuses upon the definition in Article 1: see eg *MIMA v Khawar* (2002) 210 CLR 1 per McHugh & Gummow JJ at [45]. In *SAAS v MIMA* (2002) 124 FCR 182 Mansfield J at [41] observed that “[w]hilst it is clear that the Legislature has sought to give effect to the obligations the Executive assumed as a matter of international law by ratifying the Convention, it is equally clear that it has not done so solely by adopting the Convention into domestic law in its entirety and unchanged”. Note that a line of Australian cases decided prior to the High Court’s decision in *NAGV & NAGW* considered the criterion in s.36(2) by reference to Article 33, often referred to as the principal obligation under the Convention: see e.g. *MIMA v Thiyagarajah* (1997) 80 FCR 543, *MIMA v Al-Sallal* (1999) 94 FCR 549, *NAGV v MIMIA* (2003) 130 FCR 46. However the High Court’s decision in *NAGV & NAGW* makes it clear that the approach taken in these cases is incorrect.

210 Section 411, 412, 414 of the Act. The Tribunal also has jurisdiction to review refugee related decisions made before 1 September 1994 when the protection visa was created, and decisions to cancel protection visas: s.411(1)(a), (b) and (d) respectively. The exceptions are that the Tribunal cannot review decisions made in relation to a person who is not physically in Australia when the decision is made, or decisions in relation to which the Minister has issued a conclusive certificate: s.411(2), or decisions relying on Article 1F, 32 or 33(2) of the *Refugees Convention*: s.500.

b. *The Law*

Role of the Vienna Convention

In *Applicant A & Anor v MIEA & Anor*²¹¹ the High Court considered that the *Refugee Convention* should be interpreted in accordance with the principles of international treaty interpretation as set out in the *Vienna Convention*).²¹² The general rule of interpretation of treaty provisions appears in Article 31 of the *Vienna Convention*, paragraph 1 of which provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The High Court noted that Art 31 calls for a wholistic approach in which “[p]rimacy is to be given to the written text of the [Vienna] Convention but the context, object and purpose of the treaty must also be considered”.²¹³ While the text of a treaty may assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources.²¹⁴ As noted earlier, where the Australian High Court may be seen to be emphasising the earlier part of the sentence (*in accordance with the ordinary meaning to be given to the terms of the treaty*) the Canadian and UK courts have laid more emphasis on the latter part (*in their context and in the light of its object and purpose*).

211 (1997) 190 CLR 225.

212 *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 239-240 per Dawson J, at 252 per McHugh J (Brennan CJ agreeing) and at 277 per Gummow J. That case concerned earlier statutory provisions which defined “refugee” as having “the same meaning as it has in Article 1 of [the Convention]”; however the discussion of the applicable principles of interpretation would be equally relevant to s.36(2)(a) as that provision is to be understood: see *NAGV & NAGW of 2002 v MIMIA & Anor* (2005) 213 ALR 668 at [37]-[42]. On the relevance of the Vienna Convention to the interpretation of the Refugees Convention, see also *MIMA v Savvin* (2000) 98 FCR 168 per Drummond J at [14]-[15], Katz J at [93]-[94].

213 *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 per McHugh J at 254 following Zeika J in *Golder v United Kingdom* (1975) 1 EHRR 524 and Murphy J in the *Commonwealth v Tasmania* (1983) 158 CLR 1 at 177; see also the discussion of the principles and the authorities by McHugh J at 251-6, and Brennan CJ at 231, Dawson J at 240, Gummow J at 277 and Kirby J at 292-6. In *Morrison v Peacock* [2002] HCA 44, Gleeson CJ, McHugh, Gummow, Kirby & Hayne JJ explained at [16]: “The need to give the text primacy in interpretation results from the tendency of multilateral treaties to be the product of compromises by the parties to such treaties. However, treaties should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation.”

214 *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 per Brennan CJ at 231.

Membership of a Particular Social Group

The leading case is *Applicant A & Anor v MIEA & Anor*²¹⁵ but *Applicant S v MIMA*,²¹⁶ *Morato v MILGEA*,²¹⁷ and *Ram v MIEA & Anor*²¹⁸ are also important. The emphasis is upon whether or not a particular social group exists in the context of a *particular* society.

Applicant A's case remains the leading judgment on particular social group. After reviewing statements made in that case, Gleeson CJ, Gummow and Kirby JJ in the joint judgment in *Applicant S v MIMA* stated the following:

The determination of whether a group falls within the definition of “particular social group” in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a “social group” and not a “particular social group”. As this Court has repeatedly emphasised, identifying accurately the “particular social group” alleged is vital for the accurate application of the applicable law to the case in hand.²¹⁹

McHugh J in *Applicant S* also summarised the issue in broadly similar terms:

To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle.²²⁰

215 (1997) 190 CLR 225.

216 (2004) 217 CLR 387.

217 (1992) 39 FCR 401.

218 (1995) 57 FCR 565.

219 *Applicant S v MIMA* (2004) 217 CLR 387 at [36] per Gleeson CJ, Gummow & Kirby JJ. In *STXB v MIMIA* [2004] FCA 860 (Selway J, 8 July 2004) Selway J at [25] to [27] in considering this test stated that there is one clear difference and another possible difference to the test identified by the Full Court of the Federal Court in *MIMA v Zamora* (1998) 85 FCR 458. The clear difference relates to the third proposition in both tests and pertains to the High Court rejecting that aspect of the third proposition stated by the Full Court, that society must recognise that the group is ‘set apart’. The possible difference between the tests pertains to the use by the High Court of the word ‘distinguish’ whilst the Full Court used the words ‘set apart’. However after considering a hypothetical example of ‘left handed persons’ in Australia, his Honour concluded that the High Court used the word ‘distinguish’ in the same sense in which the Full Court used the word ‘set apart’.

220 *ibid.*, at [69] per McHugh J.

Applicant S establishes that although relevant, there is no requirement of a recognition or perception *within the relevant society* that a collection of individuals is a group that is set apart from the rest of the community.²²¹ It was stated in *Applicant A*:

The adjoining of “social” to “group” suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word “particular” in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.²²²

The use of [the term “membership”] in conjunction with “particular social group” connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. Those indiscriminately killed or robbed by guerillas, for example, are not a particular social group.²²³

²²¹ That is, the third Zamora criterion. In *MIMA v Zamora* (1998) 85 FCR 458 the Full Federal Court stated at 464 that *Applicant A's case* was authority for the proposition that “[t]o determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community.” However the High Court held that the third of these propositions was incorrect. A number of Court decisions have required the third Zamora criterion to be satisfied. See for example, *MIMA v Applicant Z* (2001) 116 FCR 36 (Sackville, Kiefel & Hely JJ, 19 December 2001) at 40, (“able bodied Afghan men”); *MIMA v Applicant M* [2002] FCAFC 253 (Whitlam, North & Stone JJ, 23 August 2003) at [21], (conscientious objectors in Afghanistan); *MIMIA v VFAY* [2003] FCAFC 191 (French, Sackville & Hely JJ, 22 August 2003) at [100], (unaccompanied children in Afghanistan), *SGGB & SGHB v MIMIA* [2002] FMCA (Barnes FM, 1 May 2003) at [30], (feminist women in Afghanistan), *VBAL v MIMIA* [2003] FMCA 120 (Hartnett FM, 7 April 2003) at [30] to [31], (“informants against the LTTE”), “VAM” v *MIMIA* [2002] FCAFC 125 (Black CJ, Drummond & Kenny JJ, 10 May 2002) at [12] to [14], (ex-policemen targeted for giving information about a gangster in Malaysia). In light of the High Court’s reasoning in *Applicant S v MIMA* (2004) 217 CLR 387 the reliance on the third Zamora principle is no longer good law. In *Fornah*, Lord Craig seems to suggest that it was only McHugh, J who held this position; at paragraph 46. ²²² *ibid.*, at 241 per Dawson J. ²²³ *ibid.*, at 264 -265 per McHugh J.

McHugh J in *Applicant S* stressed the necessity of the group being cognisable within the society in the following statement:

A number of factors points to the necessity of the group being cognisable within the society. Given the context in which the term “a particular social group” appears in Art 1A(2) of the Convention, *the members of the group, claimed to be a particular social group, must be recognised by some persons - at the very least by the persecutor or persecutors - as sharing some kind of connection or falling under some general classification.* That follows from the fact that a refugee is a person who has a “well-founded fear of being persecuted for reasons of ... membership of a particular social group”. A person cannot have a well-founded fear of persecution within the meaning of Art 1A(2) of the Convention unless a real chance exists that some person or persons will persecute the asylum-seeker for being a member of a particular class of persons that is cognisable - at least objectively - as a particular social group. The phrase “persecuted for reasons of ... membership” implies, therefore, that the persecutor recognises certain individuals as having something in common that makes them different from other members of the society. It also necessarily implies that the persecutor selects the asylum-seeker for persecution because that person is one of those individuals.²²⁴

He added that it did not follow that the persecutor or anyone else in the society must perceive the group as “a particular social group”²²⁵ and explained that it is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a “uniting” feature or attribute, and the persons in that class are cognisable objectively as a particular social group.²²⁶

Whether a group is cognisable as a particular social group that is distinguished or set apart from society at large may be ascertained by reference to societal perceptions within the relevant society or by reference to third party perspectives.

One way in which the existence of a particular social group may be determined is by examining whether the society in question perceives there to be such a group.²²⁷ In *Applicant A*, McHugh J stated that if the group is perceived by people in the relevant country as a particular social

²²⁴ *Applicant S v MIMA* (2004) 217 CLR 387 at [64] per McHugh J.

²²⁵ *ibid.*

²²⁶ *ibid.*, at [69] per McHugh J.

²²⁷ *Applicant S v MIMA* (2004) 217 CLR 387 at [27] per Gleeson CJ, Gummow & Kirby JJ.

group, it will usually, but not always, be the case that they are members of such a group.²²⁸ However, contrary to what was suggested by the Full Federal Court in *Zamora*,²²⁹ there is no requirement that there be a perception within the society that the collection of individuals is a group that is set apart from the rest of the society. In *Applicant S*, Gleeson CJ, Gummow and Kirby JJ explained:

[P]erceptions held by the community may amount to evidence that a social group is a cognisable group within the community. The general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished²³⁰ from the rest of the society.²³¹

Consequently, the perception of the relevant society cannot be conclusive of the issue.²³² A “particular social group” may exist although it is not recognised or perceived *as such* by the society in which it exists.²³³ For instance, those living outside that society may easily recognise the individuals concerned as comprising a particular social group.²³⁴ McHugh J commented that such cases are likely to be rare, but that they exist is shown by cases such as *Appellant S395/2002 v MIMA* and *Appellant S396/2002 v MIMA* (2003) 203 ALR 112.

The evidence in those cases suggested that Bangladesh society prefers to deny the existence of homosexuality within that society. However, there was evidence that police, hustlers and others in that society singled homosexuals out for discriminatory treatment amounting to persecution because they were homosexuals. Both the Tribunal and this Court accepted in *Appellant S395/2002* and *Appellant S396/2002* that homosexuals in Bangladesh are a particular social group. Objectively, homosexuals in Bangladesh society comprise ‘a particular social group’, whether or not that society recognises them as such.

The case of *Appellant S395/2002 v MIMA* is an interesting one. The Tribunal and all the courts below had denied the claimants refugee status because they practised their homosexuality in Bangladesh discreetly. McHugh, and Kirby JJ found that those below had fallen into errors of law by wrongly dividing the “genus” “homosexual males in Bangladesh” into

228 *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 264 per McHugh J.

229 *MIMA v Zamora* (1998) 85 FCR 458 at 464.

230 Perhaps “distinguishable” would be the better term.

231 *Applicant S v MIMA* (2004) 217 CLR 387 at [27] per Gleeson CJ, Gummow & Kirby JJ. See also McHugh J at [66] to [68] who came to the same view and stated that to require evidence of a recognition or perception by the society that the collection of individuals in that society comprises “a particular social group” is to impose a condition that the Convention does not require.

232 *Id.*

233 *ibid.*, at [34] per Gleeson CJ, Gummow & Kirby JJ and at [68] per McHugh J.

234 *ibid.*, at [68] per McHugh J.

two subsets: essentially discreet and non-discreet homosexual males in Bangladesh²³⁵. Gummow and Hayne JJ appear to accept this line of reasoning²³⁶. The other three judges (Gleeson, CJ and Callinan and Heydon JJ) rejected the appeal.

The facts as found in the case are agreed to be that Bangladesh society tends to ignore homosexuality. The case is, as noted, evidence for the proposition that a PSG may exist in a society even if members of that society do not see it. However, the persecutors must either see the PSG or persecute MPSG on the basis of this PSG's characteristics. What makes this case unusual is that the majority of the court appear to deny the existence of a PSG such as "homosexual males in Bangladesh who live discreetly" on principle. Given the centrality of the persecutor's view (after all without him we really do not have anything to go on) it is quite possible to envision persecutors in Bangladesh who target "open" homosexuals rather than "discrete" homosexuals. This, in other words, would be the social perception of the persecutors. In that case "homosexual males in Bangladesh who live openly" would appear to be the correct PSG. Significantly, the principled approach of the four judges seems to veer in the direction of the protected characteristics test rather than the social perception test.

In VTAO, Merkel J explained how the reasoning in Applicant S could be applied to the question as to whether parents of children born in breach of China's family planning laws, or parents of "black children", comprised a particular social group:

...Applying the reasoning of Gleeson CJ, Gummow and Kirby JJ in *Applicant S* and, in particular, their Honours' observations at 252 [36] and 255 [50], the issue the RRT was required to consider in the present case was whether, because of the legal and social norms prevalent in Chinese society, parents of children born in breach of China's family planning laws, or parents of "black children", comprised a social group that could be distinguished from the rest of Chinese society. In considering that issue the RRT was entitled to disregard the shared fear of persecution of the parents as an attribute common to all members of the group. Nonetheless, it was required to consider whether, over time, the singling out of parents of "black children" for discriminatory treatment under China's family planning laws might have been absorbed into the social consciousness of the community with the consequence that a combination of legal and social factors (or norms) prevalent in the community indicated that such

²³⁵ At paragraph 60.

²³⁶ At paragraph 90.

parents form a social group distinguishable from the rest of the community.²³⁷

With respect to the issue of whether “persecution” can have a role to play in defining the PSG, McHugh J stated in *Applicant A*.

The concept of persecution can have no place in defining the term “a particular social group”. ... Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the “particular social group” ground to take on the character of a safety-net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of “fear of persecution”, “for reasons of” and “membership of a particular social group” in the definition of “refugee”.²³⁸

Nevertheless, as McHugh J explained in *Applicant A* with his well-known “left-handed men” example, the actions of the persecutors may serve to identify or cause the creation of a particular social group in society:

...while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.²³⁹

What is not Required

The High Court has rejected a number of limiting principles, including principles which have been developed in other jurisdictions. For example:

- There is no requirement of a recognition or perception *within the relevant society* that a collection of individuals is a particular social group that is set apart from the rest of the community.²⁴⁰

237 VTAO v MIMIA [2004] FCA 927 (Merkel J, 19 July 2004) at [32]. VTAO v MIMIA [2004] FCA 927 (Merkel J, 19 July 2004) at [19]. His Honour stated that Applicant A was not concerned with, and did not decide, whether parents who have breached China’s family planning laws can constitute a particular social group. Rather, it was concerned with whether the fear of the consequences of failing to abide by those laws can, alone, be relied upon as a uniting element or characteristic to define a particular social group.

238 Applicant A at page 263.

239 *ibid*, at 264 per McHugh J.

240 Applicant S v MIMA (2004) 217 CLR 387, overruling this aspect of MIMA v Zamora (1998) 85 FCR 458 at 464.

- A group may qualify as a particular social group, even though the distinguishing features of the group do not have a public face. It is sufficient that the public is aware of the characteristics or attributes that, for the purposes of the *Convention*, unite and identify the group. For example, Christians in Roman times were a particular social as well as religious group although they were forced to practise their religion in the catacombs.²⁴¹
- It is not necessary that the group should possess the attributes that they are perceived to have. For example, witches were a particular social group in the society of their day, notwithstanding that the attributes that identified them as a group were often based on the fantasies of others and a general community belief in witchcraft.²⁴²
- Self-identity as a member of a particular group is not a universal prerequisite. For example, many German citizens of Jewish ethnicity did not, in the 1930s, identify themselves as “Jews”. They conceived of themselves as Germans. Yet this did not prevent their being members “of a particular social group” and persecuted for that reason (as well as for reasons of race and religion).²⁴³
- Those who constitute the “group” need not be known as members of the group, even to each other.²⁴⁴
- There is no reason to confine a particular social group to small groups or large ones.²⁴⁵
- The uniting particular need not be voluntary.²⁴⁶ Nor is it necessary for the individual applicant to have been a member of a concerted body or association affirming group identity.²⁴⁷
- A “particular social group” need not necessarily exhibit an inherent characteristic such as an ethnic or national identity or an ideological characteristic such as adherence to a particular religion or the holding of a particular political opinion.²⁴⁸ There is no requirement that a characteristic must be “innate or unchangeable” before it can distinguish a social group.²⁴⁹
- Although cohesiveness may assist to define a particular social group it is not an essential attribute.²⁵⁰

241 Applicant A & Anor v MIEA & Anor (1997) 190 CLR 225, at 265 per McHugh J.

242 *ibid.*

243 *ibid.*, at 296 per Kirby J.

244 *ibid.*, at 301 per Kirby J.

245 *ibid.*, at 241 per Dawson J; *contra* at 266 per McHugh J. McHugh J’s suggestion that a particular social group must be large is not supported by the other judges and should not be relied on. This was confirmed in *MIMA v Khawar & Ors* (2002) 210 CLR 1, at [33] per Gleeson CJ, at [82] per McHugh & Gummow JJ, and at [127] per Kirby J. Although, in *MIMA v Khawar & Ors*, Gleeson CJ stated that in some circumstances the large size of the group might make implausible a suggestion that the group is a target of persecution and might suggest that a narrower definition of the group is necessary (see [30]). See also McHugh J in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 257.

246 Applicant A & Anor v MIEA & Anor (1997) 190 CLR 225 at 241, per Dawson J. See also Callinan J in *MIMA v Khawar & Ors* (2002) 210 CLR 1 at [153].

247 Applicant A & Anor v MIEA & Anor (1997) 190 CLR 225 at 236, per Brennan CJ, and at 301 per Kirby J.

248 *ibid.*, at 234 per Brennan CJ.

249 *ibid.*, at 236 per Brennan CJ.

250 *MIMA v Khawar & Ors* (2002) 210 CLR 1 at [33].

The 'Is/Does' Distinction

Australian Courts have emphasised that the primary focus of this *Convention* ground is on what a person *is* – a member of a particular social group – rather than what a person has done, or may do, or possesses. However, the Courts have also emphasised that this distinction should not be taken too far. In this respect the analysis is similar to the Canadian one.

C. Examples of Particular Social Groups Discussed by the Courts²⁵¹

- Persons Who Have 'Turned Queen's Evidence' in Bolivia
- The Mafia
- Conscripts – Conscientious Objectors
- Able bodied young men
- Groups arising from China's One-Child Policy
- Wealth based groups
- Persons targeted for extortion by the NPA in the Philippines
- Ethnic Chinese in Cambodia
- Ali Sherkhail sub-tribe of the Shinwari tribe in Afghanistan
- Young Tamil males from Jaffna or LTTE-controlled areas in Sri Lanka
- Albanian citizens/men subject to the operation of the Kanun or men in Albania
- Persons who had breached a code of honour / Unmarried fathers / "The living dead" in Albania
- Nepalese couples involved in incestuous relationships
- Persons who breach cast rules in India
- Persons who have incurred deep personal enmity with powerful politicians in India / Hindus who have converted to Islam
- People suffering from an illness or disability
- Homosexuals. The High Court accepted in *Appellant S395/2002 v MIMA and Appellant S396/2002 v MIMA* that homosexuals in Bangladesh are a particular social group.²⁵²

²⁵¹ The list of examples begins at page 32 of the Guide and is replete with case examples by way of illustration. Given space limitations these references will not be shown here.

²⁵² See eg, (2003) 216 CLR 473 at [55] per McHugh and Kirby JJ, [65] per Gummow and Hayne JJ. McHugh and Kirby JJ noted at [55] that if the Tribunal had found that homosexuals in Bangladesh were not a particular social group, its decision would arguably have been perverse. Gummow and Hayne JJ commented at [81]: "It is important to recognise the breadth of the assertion that is made when, as in the present case, those seeking protection allege fear of persecution for reasons of membership of a social group identified in terms of sexual identity (here, homosexual men in Bangladesh). Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense "discreetly") may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality". In *MMM v MIMA* (1998) 90 FCR 324 at 330, Madgwick J stated that "[o]rdinarily, homosexuals would constitute a social group...". See also *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 265 where McHugh J states: "If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status". Other cases based on homosexuality include *F v MIMA* [1999] FCA 947 (Burchett J, 9 July 1999), *Shah v MIMA* [2000] FCA 489 (Tamberlin J, 4 April 2000), "Applicant LSLs v MIMA [2000] FCA 211 (Ryan J, 6 March 2000), *MIMA v B* (2000) 105 FCR 304, and *MIMA v Gui* [1999] FCA 1496 (Heerey, Carr & Tamberlin JJ, 29 October 1999).

- Occupational groups. In appropriate circumstances occupational groups can constitute a particular social group in a society. However this will not always be the case. Australian courts have considered the following occupational groups: “professionally accredited tourist industry workers” or “certified tourist guides with the Ecuadorian Tourist Commission”, “Beauty workers in Algeria”, “Russian seamen who plied their trade on the vessel ‘Krasnopolje’ operating out of the port of Vanino and who used their ready access to Japanese ports to purchase second-hand motor vehicles for importation into Russia and subsequent sale at a huge profit”, a “socially active group of businessmen” or “Russian entrepreneurs”, “business people in Sri Lanka”, and “outspoken journalists in Bangladesh”.
- Entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals

Gender based groups

Gender based groups have been considered in a number of cases, particularly in the context of claims of domestic violence. Australian courts have accepted that “single women in India”, “married women in Tanzania”, “young Somali women”, and “women or divorced women who had converted to Christianity in Nepal” may constitute particular social groups for the purposes of the *Convention*. On the other hand, in *Lek v MILGEA (No.2)* Wilcox J held that “young single women” in China were not a particular social group. In *Jayawardene v MIMA*, Goldberg J doubted that a group such as “single women” or “single women without protection in Sri Lanka” was a proper group for the purposes of the *Refugees Convention*. The Court in *MIMA v Kobayashi & Anor* held that the evidence before the Tribunal provided no basis for finding that “women in Japan” or “unwed mothers in Japan” were persecuted groups in Japan. In *Applicant S469 of 2002 v MIMIA* Bennett J found that it was open on the evidence before the Tribunal to find that females in Thailand did not constitute a particular social group.

In *MIMA v Khawar & Ors*,²⁵³ Gleeson CJ found that it was open to the Tribunal to determine that “women in Pakistan” were a particular social group²⁵⁴ and McHugh and Gummow JJ held that it was open to the Tribunal to determine that there was a social group in Pakistan comprising, at its narrowest, “married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by members of the household”.²⁵⁵ Justice Kirby did

²⁵³ (2002) 210 CLR 1.

²⁵⁴ *ibid.*, at [32] per Gleeson CJ. His Honour went even further and stated that women in any society are a distinct and recognisable group (at [35]).

²⁵⁵ *ibid.*, at [81] per McHugh & Gummow JJ.

not reach any conclusion about whether “women in Pakistan” or “married women in Pakistan” could be a particular social group but observed that material before the Tribunal suggested that there may be a particularly vulnerable group of “married women in Pakistan, in dispute with their husbands’ families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law”.²⁵⁶ In his dissenting judgment, Justice Callinan questioned whether all women in Pakistan of whatever age or circumstances could constitute a particular social group, stating that it seemed an unlikely proposition to regard half of the humankind of a country, classified by their sex, as a particular social group, and that to use the term “particular” reinforces the notion of a specific, readily definable body or group of people forming part of a larger whole.²⁵⁷

In light of *Khawar*, it may be possible to find a particular social group constituted by “women in Indonesia” or “Nepali women without the protection of a male relative”. However, having regard to the principle that a social group cannot be defined by reference to the persecution feared, it is clear that under Australian law “battered wives” cannot be a particular social group for Convention purposes.

Family

It is well established that a family is capable of constituting a particular social group within the meaning of the Refugees Convention.²⁵⁸ Whether members of a particular family do constitute a particular social group will depend upon the circumstances of the relevant case.²⁵⁹ However, where

256 *ibid*, per Kirby J at [128]-[129].

257 *ibid*, at [153].

258 See eg Chan v MIEA (1989) 169 CLR 379 at 396 per Dawson J, Mocan v RRT (1996) 42 ALD 241 at 246, Mahuroof v MIMA (unreported, Federal Court of Australia, Branson J, 13 March 1998) at 9; De Leon v MIMA [1999] FCA 52 (Hill J, 3 February 1999) at [9], Aliparo v MIMA [1999] FCA 79 (O’Connor J, 12 February 1999), Ali v MIMA [1999] FCA 650 (Lehane J, 14 May 1999) and, Sarrazola v MIMA [1999] FCA 101 (Hely J, 17 February 1999), MIMA v Sarrazola (1999) 95 FCR 517, C & Anor v MIMA (1999) 94 FCR 366), Giraldo v MIMA [2001] FCA 113 (Sackville J, 23 February 2001), MIMA v Sarrazola (No. 2) (2001) 107 FCR 184. In Singh v MIMA [1999] FCA 762 (Madgwick J, 8 June 1999) Madgwick J gave the example of “a regicide revolutionary regime persecuting distant members of the erstwhile royal family ‘for reasons of’ such family membership” (at [38]).

259 The family as a particular social group was discussed by the Federal Court in C v MIMA (1999) 94 FCR 366, MIMA v Sarrazola (No. 2) (2001) 107 FCR 184, Mahuroof v MIMA (unreported, Federal Court of Australia, Branson J, 13 March 1998) and Aliparo v MIMA [1999] FCA 79 (O’Connor J, 12 February 1999). In Sarrazola, Merkel J (with Heerey and Sundberg JJ agreeing) stated that the characteristics that usually unite a family and those which will set it apart from the rest of the community will be familial links of the kind described by Wilcox J in C v MIMA (i.e., relationship of blood, marriage etc.). The determination of which of those links apply in a particular case will identify, and thereby define, the relevant group as the particular social group for Convention purposes. His Honour stated that in addressing whether the group is recognised within the society as a group that is set apart from the rest of the community, the question is whether the family unit considered to be a social group is publicly recognised as being set apart as such. It is not whether the particular family is well known as such: at [36]-[37], referring to MIMA v Zamora (1998) 85 FCR 458, at 464. But cf Mahuroof v MIMA (unreported, Federal Court of Australia, Branson J, 13 March 1998), at 9 where the Court applied the reasoning in Applicant A to hold that the applicant’s family was not a particular social group in the circumstances as there “was nothing before the Tribunal which suggested that the applicant’s family is perceived in Sri Lanka as a cognisable group within society”. Similar reasoning was applied by O’Connor J in Aliparo v MIMA [1999] FCA 79 (O’Connor J, 12 February 1999). Please note, however, that the reasoning in these cases may not be reliable in light of the High Court’s decision in Applicant S v MIMA (2004) 217 CLR 387, and in particular, its rejection of the proposition that there must be a perception *within the society* that a group is a particular social group (the third Zamora criterion).

the social group relied upon is membership of a family, it will be necessary also to have regard to s.91S of the *Act* which reads:

91S Membership of a particular social group

For the purposes of the application of this Act and the regulations to a particular person (the *first person*), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:

(a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and

(b) disregard any fear of persecution, or any persecution, that:

- (i) the first person has ever experienced; or
- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.²⁶⁰

Under this provision, a person who is pursued because he or she is a relative of a person who is targeted for a non-*Convention* reason²⁶¹ does not fall within the grounds for persecution covered in the *Convention*²⁶².

The Explanatory Memorandum to the *Migration Legislation Amendment (No.6) Bill 2001* explains that this does not prevent a family, *per se*, being a particular social group for the purpose of establishing a *Convention* reason for persecution. But it prevents the family being used as a vehicle to bring within the scope of the *Convention* persecution that is motivated for non-*Convention* reasons.

²⁶⁰ **Inserted by** Migration Legislation Amendment Act (No. 6) 2001 (No. 131 of 2001) with effect from 1 October 2001. Section 91S was intended to overcome cases such as *MIMA v Sarrazola* (No 2) (2001) 107 FCR 184 where it was held that a relative of a person facing persecution for a non-*Convention* reason, namely, pursuit by criminals for repayment of debts, was herself facing persecution for reasons of membership of a particular social group when the attentions of the agents of persecution turned to her for repayment of the debt.

²⁶¹ **Such as criminal pursuit for repayment of debts as in** *MIMA v Sarrazola* No. 2) (2001) 107 FCR 184, or revenge for a murder as in the Albanian "blood feud" cases such as *SCAL v MIMIA* [2003] FCAFC 301 (Carr, Finn & Sundberg JJ, 18 December 2003).

²⁶² **In the Canadian case of** *Serrano*, IMM-2787-98 the Federal Court rejected the argument that a family member could be persecuted for a *Convention* ground under the rubric of "family" where the principle target of the persecution was not being targeted for a *Convention* reason. The cases differ in this analysis amongst Common Law countries. Most notably, in the recent case of *Fornah* the House of Lords unanimously rejected this approach, holding that the only relevant issue is why the family member is being targeted; the reason why the original target was persecuted is irrelevant to the analysis.

The operation of s.91S has been considered in a number of Albanian “blood feud” cases. In applying s.91S, it is important to focus on the reason that the family member, other than the applicant, is being targeted and not on the family member’s reason for acting in a way that attracts the persecution. For example, in the blood feud cases, the question is not whether the ultimate cause of the feud was an illegal act by a family member, but whether any member of the relevant family feared persecution for a reason other than a *Convention* reason.²⁶³

v. The United Kingdom

a. The Structure of Decision Making

The *Asylum and Immigration (Treatment of Claimants, etc) Act, 2004 (the Act)* which received royal assent in July 2004, introduced a new structure for immigration and asylum appeals in April 2005. Immigration Officers with the Immigration Nationality Directorate render the initial decisions on asylum. Under the previous appeal system, persons who were refused asylum could appeal first to an Adjudicator and then (if leave was granted) to the Immigration Appeal Tribunal (IAT). The *Act* replaced the two-stage appeal system with a single-tier body called the Asylum and Immigration Tribunal (AIT). In limited cases, the Tribunal’s decision can be reviewed by the Court of Appeal (or Court of Session in Scotland, or Court of Appeal for Northern Ireland) and ultimately the House of Lords on the grounds that the Tribunal made an error of law.

As noted in MPSG policy guidelines prepared by the Immigration Nationality Directorate²⁶⁴ for immigration officers, persons claiming membership of a particular social group may overlap with a claim based on other grounds. The question of whether a particular social group exists depends on the factual situation in the country in question. What constitutes a particular social group in one country may not in another and therefore it is essential that immigration caseworkers refer to the *Country Guidance Reports* for guidance.

²⁶³ See *STXB v MIMIA* [2004] FCA 860 (Selway J, 8 July 2004).

²⁶⁴ IND Group F Asylum Policy Unit: *Asylum Policy Instructions*.

b. The Law

Definitions

The leading MPSPG case is the House of Lords decision in *Shah and Islam*²⁶⁵. The House of Lords appeared to accept the *Acosta/Ward* formulation of the test.

In *Fornah* Lord Bingham laid out the four characteristics of a PSG as derived in *Shah and Islam*:

Certain important points of principle relevant to these appeals are to be derived from the opinions of the House. First, the Convention is concerned not with all cases of persecution but with persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being: pp 651, 656. Secondly, to identify a social group one must first identify the society of which it forms part; a particular social group may be recognisable as such in one country but not in another: pp 652, 657. Thirdly, a social group need not be cohesive to be recognised as such: pp 643, 651, 657. Fourthly, applying *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 263, there can only be a particular social group if it exists independently of the persecution to which it is subject: pp 639-640, 656-657, 658.²⁶⁶

The question of the definition becomes more complicated in *Fornah*. Only Lord Bingham directly addresses the issue although Lord Brown appears to adopt the “either/or” test propounded by the UNHCR in its *Guidelines*²⁶⁷. Although he states what is to be derived in *Shah and Islam* he then goes on to review the subsequent jurisprudence as well as the UNHCR *Guidelines* on MPSPG and the EU *QD* which came into effect October 10, 2006 – just 8 days prior to the judgment being rendered. By the time he has completed his review he notes that the UNHCR *Guidelines* provides “... a very accurate and helpful distillation of [the international authorities]”.²⁶⁸

Lord Bingham addresses Article 10 of the EU *QD* and states that *if it is to be read as requiring both the “protected characteristics” and “social perception” tests be met then the QD is propounding “... a test more stringent*

265 R v IAT & SSHD ex parte Shah; Islam v IAT (1999) 2AC 629

266 Paragraph 13.

267 Paragraph 118.

268 Paragraph 15.

than is warranted by international authority”²⁶⁹. The fact that Lord Bingham was not convinced that the EU Directive requires a conjunctive, rather than a disjunctive, test may indicate trouble down the road in other EU Member States’ courts.

At the end of the day one is left unclear as to the precise formulation of MPSCG in the UK and, particularly, whether the “social perception” test is making headway in the UK.

In *Shah and Islam* each of the five Lords gave his own opinion on what the definition of the PSG group should be. Lord Millett dissented. Lords Steyn, Hoffman, and Hope chose the wider PSG as “women in Pakistan” because it was clear that women in Pakistan are discriminated against in many ways and do not enjoy state protection. Lord Hutton preferred the narrower PSG (essentially, “Pakistani women suspected of adultery and not protected by the state”) and Lord Steyn stated that if he was wrong about the wider group he would accept this narrower group. What united the PSG was that they shared a *common immutable characteristic of gender, they were discriminated against as a group in matters of fundamental human rights and the State gave them no adequate protection* because they were perceived as not being entitled to the same human rights as men. The Lords pointed out that the distinctive feature of this case is that women in Pakistan are unprotected by the State.

Fornah returned to the same issue of how to define a PSG. As put by Lord Hope: “Miss Fornah’s case, then, raises again the point that was discussed but did not have to be decided in *Shah and Islam* as to how precise the definition must be to satisfy the requirements of that article”.²⁷⁰ And, indeed the case (*Fornah* involved FGM in Sierra Leone) focused specifically on whether one could identify a PSG on the facts and if so, what would the PSG be? Once again all five participants in the case gave judgment. Lord Bingham adopted the wider group (Women in Sierra Leone) as being the PSG but would if he was wrong accept the narrower formulation (Intact women in Sierra Leone)²⁷¹; the other Lords and Baroness Hale adopted a narrower test, though, even then, they were not the same test. Lord Hope adopted “Uninitiated indigenous females in Sierra Leone”²⁷², Lord Rodger adopted “Uninitiated intact women”²⁷³, Baroness Hale adopted “Sierra Leone women belonging to those ethnic groups where FGM is practised”²⁷⁴, while Lord Brown adopted the formulation given by Arden, LJ, in the Court of Appeal and proffered by Lord Bingham: “Uninitiated indigenous females in Sierra Leone”²⁷⁵.

²⁶⁹ Paragraph 16.

²⁷⁰ Paragraph 38.

²⁷¹ Paragraph 31.

²⁷² Paragraph 58.

²⁷³ Paragraph 80. Even Lord Rodger accepted that a wider formulation could be upheld; however, it would not be “Sierra Leone women” because not all are susceptible to FGM. His wider group would be “women and girls who face enforced mutilation”.

²⁷⁴ Paragraph 114.

²⁷⁵ Paragraph 119.

What appears to be at issue in some of the judgments is whether the group is being defined simply because of its susceptibility to FGM (in which case it would appear the narrower reading is preferred) or whether the group is women of Sierra Leone of whom it may be said what was said of women in Pakistan – that they are subjected to unequal treatment in a male-oriented society. As put by Lord Brown: *I do not disagree with Lord Bingham and Baroness Hale that the group could if necessary be more widely defined to include even the initiated on the basis that all Sierra Leonean women suffer discrimination and subjugation of which the practice of FGM constitutes merely an extreme and ghastly manifestation.*²⁷⁶

Lord Rodger differed from all other judges in requiring that each member of a defined PSG must be susceptible to persecution. He also put forward a helpful way of determining a PSG.

To put the point another way, if one were to stop the person who was about to perform the mutilation of an unwilling victim and ask why she was doing it, she would not say that it was because the victim was a woman, but because she was an intact or uninitiated woman. In terms of the Convention, it would not be for reasons of her membership of the social group of women and girls, but for reasons of her membership of the social group of women and girls who are uninitiated and intact. To put the matter in yet another way, while it is not necessary that all members of the social group in question are persecuted before one can say that people are persecuted for reasons of their membership of the group, it is necessary that all members of the group should be susceptible to the persecution in question. See the first of the propositions stated in the passage from *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 400, which I quoted in para 73. This requirement is not met in the case of the group comprising all women and girls since it will include women and girls who have been initiated and who, according to the practice in Sierra Leone, will not be subjected to the ordeal of mutilation for a second time. In my view, it is therefore not appropriate for purposes of the Convention to say that the uninitiated, intact, women are persecuted simply for reasons of their membership of this wider social group comprising all women and girls in the relevant tribes.

If we return to the state of the law following *Shah and Islam* we find the following principles emerged from this judgment and subsequent decisions of the Court of Appeal in *Ivanauskiene*²⁷⁷ and the Tribunal in *Montoya*²⁷⁸:

²⁷⁶ Paragraph 119.

²⁷⁷ (2001) EWCA Civ 127, Skenderaj (25 April 2002)

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- The particular social group ground must be interpreted in the light of the basic principles and purposes of the *Refugee Convention* (i.e. countering discrimination).
- Members of the group must possess a common immutable characteristic, but cohesiveness is not a requirement for the existence of the group, e.g. women or homosexuals. This principle was re-affirmed in *Fornah*.
- The group must exist independently of the persecution its members suffer. However, serious discrimination against a group of people who share common characteristics may define that group. The purpose of the *Convention* is to protect people from persecution who are being discriminated against. This principle was also re-affirmed in *Fornah*.
- Societal recognition may help to identify the existence of a particular social group and in cases of non-state persecution it may be an alternative to the discrimination element.
- It is not necessary to show that all members of the PSG are persecuted. Where the existence of a particular social group can be established then the individual concerned would still need to show that he or she is at risk of persecution and that this persecution is “for reasons of” membership of the particular social group. This principle was also re-affirmed in *Fornah*.

Common immutable characteristics

In *Shah and Islam* the House of Lords defined an “immutable characteristic” as:

A characteristic that is either beyond the power of the individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed²⁷⁹

Characteristics which are beyond the power of an individual to change could include gender, sexuality, family membership, linguistic background or association with a particular group in the past (e.g. membership of a previous government).

Characteristics that are so fundamental to individual identity or conscience that they ought not be required to be changed are less easy to define. Each case will need to be considered on its individual merits and will be dependent on the nature of the group and the context in which it is based. Membership of a religious order has been recognised as sufficient to constitute an immutable characteristic but a person’s employment or financial status is less likely to be considered immutable.

²⁷⁹ 1999 IMM AR 283

Persecution and discrimination

A particular social group must exist independently of the persecution some of its members suffer. If a social group could be defined solely by the shared characteristic of persecution, then any persecuted group could constitute a PSG. However, persecution may help to identify the group and may even result in the creation of a PSG. An example cited by the House of Lords in *Shah and Islam* from the Australian case of *Applicant A* served to illustrate the point being made:

Left handed men are not a social group. But, if they were persecuted because they were left handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left handed would create a public perception that they were a particular social group. But it would be the attribute of being left handed and not the persecutory acts that would identify them as a particular social group.

Where the State is the agent of persecution then the element of discrimination must be the basis on which the group is persecuted. Where non-State agents are concerned, discrimination will be relevant in that it could be the reason for the persecution or will be found in the State's unwillingness to provide protection. However, the principal question is usually whether the State discriminates against the group with respect to the protection it affords them. For instance in *Shah and Islam* women in Pakistan were found to be a social group because they were discriminated against and the State tolerated and sanctioned the discrimination leaving them unprotected. For similar reasons the judges in *Fornah* all agreed that, essentially women are discriminated against in Sierra Leone.

Societal recognition

In addition to the common immutable characteristic and the element of discrimination, societal recognition of the group in question may also help to determine whether it is a PSG. The Court of Appeal in *Skenderaj*²⁸⁰ looked further at the issue of societal recognition. They found that where there is societal recognition of the group it is not always necessary for there to be discrimination in order to identify the PSG. Therefore, in cases of non-state persecution societal recognition may be an alternative to discrimination as a means of identifying the group. As mentioned earlier, other key decisions brought down by the Asylum and Immigration Tribunal and later broadly supported by the Court of Appeal include *Montoya*, which post-dated the *Shah and Islam* findings. There, the Court of Appeal

²⁸⁰ Secretary of State for the Home Department v Skenderaj [2002] EWCA Civ 567 (26th April, 2002)

agreed that the Tribunal determination in *Montoya*²⁸¹ had given a correct summary of the existing law, binding on the court, and which was then followed. In the decision of *Montoya*, in the Summary of Conclusions, a very helpful list of principles concerning MPSG was provided:

A. The Adjudicator was correct to conclude that the respondent could not show a Convention ground of political opinion but incorrect to conclude that he had made out the ground of membership of a particular social group (PSG). In deciding that private landowners were a PSG in current-day Colombia the Adjudicator overlooked the judgment of the House of Lords in *Shah and Islam* [1999] 2 A.C. 629 and in consequence applied the wrong criteria for evaluating the PSG category. She also erred in failing to consider whether there was a causal nexus between the respondent's well-founded fear of persecution and this alleged PSG.

B. Taking stock of post-*Shah and Islam* cases both here and abroad, the Tribunal considers that the basic principles that should govern assessment of a claim based on the PSG category are as follows:

(i) in order to succeed under the Refugee Convention a claimant who has a well-founded fear of persecution must show not only the existence of a PSG (the "PSG question"), but also a causal nexus between his membership of the PSG and that fear (the "causal nexus question");

The PSG Question

(ii) the PSG ground should be viewed as a category of last resort;

iii) persecution may be on account of more than one ground. If the principal ground is membership of a PSG, then focus should be on that;

(iv) the PSG ground must be interpreted in the light of the basic principles and purposes of the *Refugee Convention*;

(v) if the PSG ground had been intended as an all-embracing category, the five enumerated grounds would have been superfluous;

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(vi) the PSG ground is further limited by the *Convention's* integral reliance on anti-discrimination notions inherent in the basic norms of International Human Rights Law;

(vii) applying the *eiusdem generis* principle to the other 4 grounds, the PSG category must be concerned with discrimination directed against members of the group because of a common immutable characteristic;

(viii) a broad range of groups can *potentially* qualify as a PSG, including private landowners;

(ix) but whether any particular group is a PSG *in fact* must always be evaluated in the context of historical time and place;

(x) in order to avoid tautology, to qualify as a PSG it must be possible to identify the group independently of the persecution;

(xi) however the discrimination which lies at the heart of every persecutory act can assist in defining the PSG. Previous arguments excluding any identification by reference to such discrimination were misconceived;

(xii) a PSG cannot normally consist in a disparate collection of individuals;

(xiii) for a PSG to exist it is a necessary condition that its members share a common immutable characteristic. Such a characteristic may be innate or non-innate. However, if it is the latter, then the non-innate characteristic will only qualify if it is one which is beyond the power of the individual to change except at the cost of renunciation of core human rights entitlements;

(xiv) it is not necessary, on the other hand, for such a group to possess the attributes of cohesiveness, interdependence, organisation or homogeneity;

(xv) there is nothing in principle to prevent the size of the PSG being large (e.g. women), but if the claim relies on some refinement or sub-category of a larger group, care must be taken over whether the resultant group is still definable independently of the persecution;

(xvi) a PSG can be established by reference to discrimination from state agents or non-state agents (actors) of persecution;

(xvii) it is not necessary in order to qualify as a PSG that a person actually has the characteristics of the group in question. It is enough that he will be perceived to be a member of the group.

The Causal Nexus Question

C. The words “for reasons of” require a causal nexus between actual or perceived membership of the PSG and well-founded fear of persecution. Caution should be exercised against applying a set theory of causation. In *Shah and Islam* and the Australian High Court case of *Chen* no final choice was made between “but for” and “effective cause” tests, but the “but for” test was said to require a taking into account of the context in which the causal question was raised and of the broad policy of the *Convention*.

The primary significance of *Fornah* lies in the continuing attempt to discern a proper basis upon which to found a PSG. Of equal importance is recognizing that persons susceptible to FGM are capable of forming a PSG. As Lord Brown put it: *It would be most unfortunate if the jurisprudence of the United Kingdom (out of step with that of most enlightened countries) were available to support a narrow view of the Convention’s protective reach.*²⁸²

Fornah, however, is also important for its decision in the K (FC) side of the case. The issue there was whether a person could claim MPSPG as a family member if the person initially targeted would not have had a *Convention* ground or where no one knew why that person was targeted. The House made it clear that the motives for persecuting the initial target are irrelevant to whether the family members were targeted because of MPSPG – namely “family”. In this they reversed the Court of Appeal which in *Quijano*²⁸³ had held that where the original target could not fit within the *Refugee Convention* then neither could a derivative “family” claim do so. As has been seen, Australia has legislated the position espoused by the English Court of Appeal and Canadian law currently follows the English Court of Appeal but the issue, though certified, has not gone beyond the Federal Court. Lord Bingham quoted the following judgment of Law, J (as he then was) in *de Melo*²⁸⁴:

282 Paragraph 121.

283 *Quijano v. Secretary of State for the Home Department* [1997] IMM AR 227.

284 *R v. Immigration Appeal Tribunal, Ex p de Melo* [1997] Imm AR 43 at pages 49 – 50.

It is necessary next to examine the second question: is the alleged or actual persecution “for the reasons of ... membership of a particular social group”? Mr Kovats [for the Secretary of State] submits as follows. Where an individual is persecuted for a *non*-Convention reason, concurrent or subsequent threats (or, presumably, acts) against his family likewise cannot be regarded as persecution for a Convention reason. If it were otherwise, the person initially ill treated - here, the father - would have no claim to asylum under the 1951 Convention, and so it would be anomalous were the members of his family, persecuted or ill-treated simply because of their association with him, to be accorded Convention rights.

I do not consider that this argument is correct. Let it be assumed that an individual has been ill-treated or terrorised for a reason having nothing to do with the Convention. He has no Convention rights. But, on the view I have taken, his family may form a particular social group within the meaning of the Convention. If then *they* are persecuted because of their connection with him, it is as a matter of ordinary language and logic, *for reasons of* their membership of a family - the group - that they are persecuted. I see nothing anomalous in this. The original evil which gives rise to persecution against an individual is one thing; if it is then transferred so that a family is persecuted, on the face of it that will come within the Convention. The definition of ‘refugee’ in article 1 of the Convention treats membership of a particular social group as being *in pari materia* with the other ‘Convention reasons’ for persecution: race, religion and so forth. Mr Kovats’ argument implies, however, that membership of a particular social group is (at least on some sets of facts) to be regarded as merely adjectival to or parasitic upon the other reasons. With deference to him, that in my judgment amounts to a misconstruction of Article 1 with the consequence that his submission proceeds on a false premise. Moreover I incline to think that the argument accords to the persecutor’s *motive* a status not warranted by the Convention’s words. The motive may be to terrorise the person against whom the persecutor entertains ill will (for a ‘non-Convention’ reason) by getting at his family; but when it comes to the question whether the family are persecuted by reason of their membership of a particular social group - the family - I do not see that the persecutor’s motive has any relevance.²⁸⁵

²⁸⁵ De Melo was overturned in the Court of Appeal on this point. Law, J was then elevated to the Court of Appeal and had to deliver judgment in another case where he had to adopt the position opposite to what he had earlier espoused. Fomah finally resolves the issue in favour of Law, LJ’s favour.

Impact of the Qualification Directive in the UK: Brief Summary

In October 2006, there was a fundamental shift in asylum law throughout Europe, when European states begin to enact the *EU Refugee Qualification Directive 2004/83/EC* (the *QD*). The directive outlines the minimum standards for the qualification and status of third country nationals and stateless person as refugees or a person otherwise in need of international protection.

Recent UNCHR response to the *QD* has, on the one hand, welcomed the fact that the *Refugee Convention*, as currently interpreted, may not cover all of those in need of protection. In a recent press release, the UNHCR urged member states to live up both to their legal and moral obligation to protect refugees and asylum seekers by maintaining the highest possible asylum standards.

“This directive is meant to be the cornerstone of the emerging common European asylum system,” said Pirkko Kourula²⁸⁶, Director of UNHCR’s Europe Bureau. *“It seeks to establish a uniform understanding of who is entitled to protection. This is very much needed, for although every asylum application must be examined on its merits, the chance of finding protection in the EU ranges from zero to over 80 percent for certain nationalities, depending on where they apply.”*

The UNHCR noted that an important aspect of the *QD* was its role as codifying a uniform status, which it terms “subsidiary protection”, for people who do not fall under the 1951 *Convention’s* refugee definition but nonetheless face “serious harm” in their countries of origin – death, torture or life-threatening situations such as indiscriminate violence in armed conflict situations.

Among other important provisions, the *QD* confirmed that acts of a gender-specific nature can, but necessarily will, constitute persecution. Gender-related persecution has increasingly been recognized as falling within the scope of the 1951 *Refugee Convention’s* definition. Furthermore, the directive clarifies that people may need protection regardless of whether they face persecution by states, warlords, militias or other private actors, and thus puts an end to a decade-long controversy in Europe. Some of the *QD’s* provisions have been criticized by UNHCR for not going far enough. *“The definition of subsidiary protection in the directive is quite restrictive and it remains to be seen how many people who are in need of it will be offered this status in practice”*, said Kourula.²⁸⁷

²⁸⁶ Director, UNCHR Europe Bureau, 09 October 2006 [news release](#).

²⁸⁷ *ibid*

This is a sentiment also shared by others who find that whilst the QD is the first supranational instrument to seek harmonization of complementary protection (termed “subsidiary protection” in the EU) it is viewed as also entrenching a protection hierarchy that unjustifiably differentiates between the rights and status accorded to *Convention* refugees *vis a vis* beneficiaries of subsidiary protection. Many have criticized the narrowing down of the originally proposed categories of persons eligible for subsidiary protection, arguing that omitting to provide for known groups of extra-*Convention* refugees does not eliminate them, but merely creates new groups of unprotected persons.²⁸⁸ “*The Qualification Directive is not a perfect instrument*” added Kourula. “*It only sets minimum standards which EU member states are free to surpass.*” The UNHCR’s position on guidelines on International Protection was largely resolved following the UNHCR Global consultations (50th anniversary of the *Convention*) that took place in 2001/2002 wherein it adopted an either/or approach to the “protected characteristics” or “social perception” tests.²⁸⁹

In the UK and European Union context the *inclusion* of both approaches is made directly in the *EC Council Directive*²⁹⁰ on ‘*Minimum Standards for Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or Persons who otherwise need International Protection and the content of the Protection granted*’²⁹¹. Article 10(1)(d) of the directive ‘*Reasons for Persecution*’ states:

(d) A group shall be considered to form a particular social group where in particular:

Members of that group share an innate characteristic or common background that cannot be changed, or share a characteristic or belief that is so fundamental to their identity or conscience that a person should not be forced to renounce it; and

That group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.

288 See *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, Jane McAdam, *IJRL* Volume 17, number 3 pp 461-516

289 See section 7 following

290 2004/83/EC of 29 April 2004

291 OJ L 304/12 of 30.9.2004.

In reviewing the *Directive* and, in particular Article 10(d), the UNHCR commented:

In UNHCR's view, the term "social group" should be interpreted in a manner open to the diverse and changing nature of groups in various societies and to evolving international human rights norms. Two main schools of thought as to what constitutes a social group within the meaning of the 1951 Convention are reflected in the Directive. The "protected characteristics approach" is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. The "social perception approach" is based on a common characteristic which creates a cognizable group that sets it apart from the society at large. Whilst the results under the two approaches may frequently converge, this is not always the case. To avoid any gap in protection, UNHCR recommended that Member States reconcile the two approaches to permit alternative, rather than cumulative, application of the two concepts. Thus, in addition to the *ejusdem generis* categories, the UNHCR includes social perception groups.

States have recognised women, families, tribes, occupational groups and homosexuals as constituting a particular social group for the purpose of the 1951 Convention. To avoid misinterpretation, UNHCR would encourage Member States to provide in their legislation for further examples of "sexual orientation". Other examples would be gender, age, disability, and health status.

With respect to the provision that "[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of the article", UNHCR notes that courts and administrative bodies in a number of jurisdictions have found that women, for example, can constitute a particular social group within the meaning of Article 1A(2). Gender is a clear example of a social subset of persons who are defined by innate and immutable characteristics and who are frequently subject to differentiated treatment and standards. This does not mean that all women in the society qualify for refugee status. A claimant must demonstrate a well-founded fear of persecution based on her membership in the particular social group.

In the case of the UK, it is true to say that EU law has barely influenced the decision making surrounding asylum claims although immigration

decisions related to the free movement of workers and their families have been applied for some time. Following the October 1999 *Tampere Conclusions*, EU states have agreed to cede much of national asylum law to European governance and for the first time binds EU Member States to a supra-national instrument that deals with refugee protection and subsidiary protection under one instrument. The *Qualification Directive* clearly defines international protection as including both refugee and subsidiary protection, thus encompassing those in need of international protection but who fall outside of the provisions of the 1951 *Refugee Convention*. The *QD* gives rise in certain categories to a new minimum status known as subsidiary protection that covers much of the ground of the *European Convention on Human Rights and Fundamental Freedoms*²⁹², and much of the territory of MPSG claims.

As a response to the application of the *European Convention on Human Rights and Fundamental Freedoms*, (ECHR) in the UK after October 2000, the government initiated a one stop process that enabled immigration judges to determine both the refugee and the human rights appeal at the same hearing. The introduction of the *European Directive* will radically alter the judicial decision making by giving legal force to the right of a new status that carries with it an entitlement to specific minimum benefits set out in the *Directive*.

Dr Storey, in a recent research and training paper presented to the AIT²⁹³, noted that the *Qualification Directive* is not a replacement to the *Refugee Convention* as in reality both the 1951 *Convention* and the *ECHR* are left intact and the *Directive* is based on a full and inclusive application of the *Geneva Convention*. The intention of the *Directive* is to ensure continuity of application and guidance to Member States so that a common pan-European set of criteria in each of the Member States is applied for recognizing applicants for asylum as refugees within Article 1 of the *Geneva Convention*. The *Directive* does not in any way enable Member States to abdicate from their responsibilities under either the 1951 *Convention* or the *ECHR*. There is no provision for Member States to derogate existing treaty obligations, particularly as the *Qualification Directive* is narrower in scope than the *Refugee Convention* as it applies only to third country nationals and stateless persons, and not to asylum seekers from EU Member States. This new legal framework will require immigration judges to decide claims within a new set of definitions and guidelines forming some of the elements of definitions within the 1951 *Refugee Convention*.

292 Council Directive 2004/83/EC of 29 April 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

293 The EU *Qualification Directive*, Paper presented to the Spring Judicial Training Session, AIT 2006.

The *Qualification Directive* takes centre stage for Member States in determining and governing refugee status and gives rise to a new status of subsidiary protection. The *Qualification Directive* requires Member States to apply a whole new set of definitions of basic concepts and terms, requiring in some instances substantial changes to domestic law to bring compliance with the *Directive*. Germany, for example, has had to enact a national law that recognizes that there can be non-state agents of persecution, a previous lacuna of the German system that set it apart from many other European countries including the UK. In actuality, the *Qualification Directive* establishes its own definition of refugee as well as its own cessation and exclusion clauses.

Changes to Concept and Definition: Impact on the consideration of MPSG claims in the UK

The *Qualification Directive* now requires that decision-makers in the UK adopt a three-pronged analysis when deciding claims. A first step must establish if a person qualifies for refugee status, then an assessment is made as to whether a person qualifies for subsidiary protection (an analysis akin to protection under Article 3 of the *ECHR*). Rights and social benefits flow differently from each status. The third assessment considers the person's human rights under the *ECHR*, thus reducing the importance of the human rights decision particularly under Article 3 (fears of persecution upon return to a home country or country of habitual residence); as such, claims would have been dealt with in the first instance under the assessment for subsidiary protection.

It must be remembered that the *Qualification Directive* only applies to persons who are third country nationals and stateless persons. No such restriction applies to the *Refugee Convention*. However, third country nationals and stateless persons make up most of the claims under consideration. The consequences of the *Qualification Directive* are difficult to predict, but it is clear that the new notion of subsidiary protection and the courts interpretation of Article 3 will generate the need for much clarification by the senior judiciary. Article 3 of the *Qualification Directive* introduces a minimum and mandatory provision of "more favourable standards", where it states:

Member states may introduce or retain more favourable standards for determining who qualifies as a refugee or a person eligible for subsidiary protection, in so far as those standards are compatible with this Directive.

UNHCR and others have interpreted this to indicate that Member States can introduce more favourable standards at their discretion. This is likely to be tested by emerging case law. Dr Storey suggests that a principle of deference to the *Refugee Convention* may have to be articulated to avoid the phenomenon he calls the “disappearing *Convention*”. It is clear that the *Qualification Directive* now demands that Immigration Judges first decide whether a person qualifies as a refugee; then an assessment must be made if the person qualifies for subsidiary protection and then whether the decision appealed against is compatible with the protection of a person’s human rights under the *ECHR*. It is likely that prospective implementing legislation will continue to focus on a decision that deals with eligibility and not of qualification.

It is important to note however, that subsidiary protection is only applicable to a person who does not qualify for refugee status. Therefore someone can only be eligible for subsidiary protection if he does not qualify for refugee status. Furthermore, in the UK, it is likely that the difference in benefits that follow from refugee status or subsidiary protection will be minimal. However, in *Fornah* the House saw the differences as being highly significant²⁹⁴. This may not be the case elsewhere in Europe, a point well identified by McAdam.²⁹⁵ Following the enactment of recent legislation in the UK,²⁹⁶ it is understood that a new approach to basic refugee and asylum related concepts and guidelines will be required as the *Qualification Directive* text operates as a combined set of substitute definitions of key clauses of the *Refugee Convention* and the *ECHR* including a range of interpretive guidelines relating to the newly substituted definitions. Thus, existing case law for example related to *MPSG* may only carry over once lead cases at the UK Asylum and Immigration Tribunal or Court of Appeal establish that the principles of existing case law should still apply, if and when the domestic case law is seen to fall below the minimum established by the *QD*.

vi. Ireland

a. The Structure of Decision Making

The principal piece of domestic legislation dealing with refugees and asylum seekers is the 1996 *Refugee Act*, which entered into force in 2000. The *Act* incorporates the 1951 *Geneva Convention* into domestic law but adds to the definition of *MPSG* the following:

²⁹⁴ Lord Hope suggested that refugee protection was “a very substantial additional benefit which is well worth arguing for”; paragraph 35.

²⁹⁵ International Journal of Refugee Law, Volume17, Number 3

²⁹⁶ Statutory Instrument 2006 2525 The Refugee or Person in Need of International Protection (Qualifications) Regulation 2006 and Paragraph 339(c) of the Statement of Changes in Immigration Rules CM6918

‘membership of a particular social group’ includes membership of a trade union and also includes membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation.²⁹⁷

The *Act* provides for the establishment of the Office of the Refugee Applications Commissioner (ORAC) as well as the Refugee Appeals Tribunal (RAT) and sets out a framework for the determination of asylum applications²⁹⁸.

The first step in a refugee claim is for the applicant to be interviewed by an ORAC caseworker in accordance with Section 11 of the *Refugee Act*. The caseworker prepares a report on the application which will incorporate a recommendation on whether or not refugee status should be granted as well as the reasons for this recommendation. Where it is recommended that the applicant be granted refugee status ORAC notifies the Minister for Justice, Equality and Law Reform, who is bound by the recommendation except where questions of national security or public policy arise.

Where a recommendation is negative, ORAC notifies the applicant accordingly. Applicants who receive a negative recommendation following their interview are entitled to appeal to the Refugee Appeals Tribunal. The normal procedure is that an appeal must be made within 15 working days of the sending of the negative decision and the applicant is entitled to request an oral hearing at the appeal²⁹⁹.

The function of the Refugee Appeals Tribunal is to consider and decide appeals against recommendations of the Refugee Applications Commissioner and make recommendations to the Minister. Judicial review with leave lies to the High Court and finally to the Supreme Court. However, as noted by the European Council on Refugees and Exiles in its 2004 Report on Ireland:

Due to non-publication of the Refugee Appeals Tribunal’s decisions, it is extremely unclear how refugee jurisprudence is developing in Ireland. At present, a challenge to this non-publication policy is being heard in the High Court. As such, only judicial review decisions are available, which are restricted to procedural aspects of the determination process³⁰⁰.

297 S. 1(1).

298 The 1996 Act has been amended by the *Immigration Act 1999*, the *Illegal Immigrants (Trafficking) Act 2000* and the *Immigration Act 2003*.

299 In certain circumstances, which are set out in the *Refugee Act*, the period within which an appeal must be made is shorter and the appeal will be dealt with by the Refugee Appeals Tribunal without an oral hearing.

300 The quote comes from the 2004 Report, section 20; this may be found at: <http://www.ecre.org/country04/Ireland%20-%20FINAL.pdf>

b. The Law

Sometime in 2005 claimants challenged the RAT's failure to publish its decisions. On July 7, 2005 the Irish High Court ordered RAT to publish its decisions. RAT appealed but announced the following year that it would publish a selection of legally important decisions beginning March 31. On July 26, 2006 the Irish Supreme Court ordered RAT to publish all its decisions³⁰¹.

7. The UNHCR Guidelines

Although the term 'particular social group' is not defined in the *Convention*, the *UNHCR Handbook*³⁰² (published in 1979) comments upon it at paragraphs 77 to 79.

77. A "particular social group" normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

Following the discussions at the Second Track, the UNHCR published its *Guidelines*³⁰³. It summarised the state of the law with regard to MPSP as being constituted by two fundamental approaches. The first is what was referred to as the "protected characteristics" approach (US, Canada, NZ, and the UK) and the second was the "social perception" approach (Australia and the 2nd and 9th US Circuit Courts of Appeal). The UNHCR noted that while many social groups would be recognised in either approach, it would not always be the case³⁰⁴.

301 This judgment can be found at: <http://www.bailii.org/ie/cases/IESC/2006/S53.html>

302 This can be found at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.pdf>

303 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. UNHCR, May 7, 2002. The Guidelines may be found at: <http://www.unhcr.org/cgi-bin/texis/vtx/publ/openssl.pdf>

304 The example provided (paragraph 8) only shows that the protected characteristic approach can be subsumed under the social perception approach. This being the case it is difficult to see why the UNHCR did not simply stick with that approach and do away with the protected characteristics approach altogether.

6. 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 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 group is defined: (1) by an innate, unchangeable 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 dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).

7. The second approach examines whether or not a group shares a common characteristic which makes them [sic] a cognizable group or sets them apart from society at large. This has been referred to as the “social perception” approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.

8. In civil law jurisdictions, the particular social group ground is generally less well developed. Most decision-makers place more emphasis on whether or not a risk of persecution exists than on the standard for defining a particular social group. Nonetheless, both the protected characteristics and the social perception approaches have received mention.

9. Analyses under the two approaches may frequently converge. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. But at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity – such as, perhaps, occupation or social class.

10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.

11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

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.

12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.

13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart

As can be seen the *Guidelines* also commented on several other disputatious areas. It rejected the view that members of a PSG need to be "cohesive" or to know each other on the basis that there is no such requirement under the other four definitions. It rejected the view that a PSG not be too large on the same reasoning and finally stated that the state need not be the persecutor if it failed to offer protection for the members in a PSG.

It should be noted that the *Summary Conclusions – Membership of a Particular Social Group* did not embrace the combined definition but rather stated:

Consideration should be given to the continued evolution of the membership of a particular social group category in particular by exploring the relevance of a “social perception” test.³⁰⁵

James Hathaway discusses this at some length in *Membership of a Particular Social Group, Discussion Paper No. 4* given at the Advanced Refugee Law Workshop in New Zealand in October, 2002.³⁰⁶

It would appear that with a subtle change in the definition (changing “are perceived as a group by society” to “who have linking characteristics cognisable by someone” – i.e., the Australian definition) one might be able to do away with “protected characteristics” entirely. We say this because this formulation of the social perception test would always subsume the protected characteristics approach whereas the reverse would not be true.

8. The European Union Position

*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*³⁰⁷ came into effect on October 10, 2006. Respecting MPSG, Article 10 (1) (d) states:

1. Member States shall take the following elements into account when assessing the reasons for persecution...

(d) a group shall be considered to form a particular social group where in particular:

members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

³⁰⁵ Paragraph 9

³⁰⁶ “Membership of a Particular Social Group: Discussion Paper No. 4 Advanced Refugee Law Workshop International Association of Refugee Law Judges Auckland, New Zealand, October 2002.” M. Foster, co-author. *Int’l J. Refugee L.* 15, no. 3 (2003): 477-91.

³⁰⁷ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:NOT>

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation.

Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article;

The reasoning behind the recommendation is clearly to attempt to bring some uniformity to the interpretation amongst member states when they apply the Convention definition by way of providing minimum standards for protection. It does not appear to limit states from being more generous should they choose. Unlike the UNHCR Guidelines, and the proposed US Regulation which provide an “either/or” approach to the two tests, the EU position appears to require a conjunctive, rather than a disjunctive, approach.

It is noteworthy that whereas sexual orientation was considered in *Ward* to be innate and unchangeable under category one, the EU definition implies that under certain circumstances *sexual orientation* might not qualify for MPSPG at all; similarly the same applies to *gender per se*.

This definition would appear to have the following effect:

- A Member State which wished to limit its intake of refugees could require that in order to be a MPSPG the claimant would need to meet both tests;
- A Member State which wished to extend protection more generously could accept a claimant as a refugee under either test. However, the “social perception” test referred to in the QD is not the Australian one but one where the PSG is recognised as such within the particular society against which the claim is made;

This definition will almost certainly have the effect that potential refugees will attempt to claim protection in those Member States providing protection under either of the two tests rather than those where the claimant would have to meet both tests. A secondary, and perhaps less frequent, effect will be that certain states would be free to view homosexuals or gender-related claims as not part of a PSG whereas others would. For example, even Member States which recognise homosexuality as either innate or fundamental to dignity or conscience, but who require both tests to be met, might not recognise homosexuals from Iran or Bangladesh (such as Applicant S) as a PSG because people in those countries may not perceive homosexuals as a distinguishable group within their society.

What makes the above example even worse is that in a society where homosexuality was such a taboo that homosexuals were silent and unrecognised through fear of the consequences of being open they might fail to get refuge, whereas in those countries where the consequences of being a homosexual were less severe but the society recognised homosexuality a claimant under those circumstances would succeed in obtaining refuge.

Finally, as with the UNHCR definition, it is not clear to us how this new definition will help. We are still left with the interpretative anomalies of the “protected characteristics” and the “social perception” approach with the further and potentially serious ramifications outlined above. It is also worth repeating that, if the recent decision of the House of Lords in *Fornah* is a preview, then there may well be debate as to whether the *QD* is conjunctive.

9. Issues Remain

In summary it seems fair to say that there are two significantly different approaches to the interpretation of the MSPG definition in the *Convention*: the “Protected Characteristics” approach and the “Social Perception” approach. In the former camp are Canada, New Zealand, most likely the UK, and the most of the Circuit Courts of Appeal in the US; in the latter camp are Australia and the US 2nd and 9th Circuit Courts of Appeal.

In his 2002 paper to the IARLJ in Wellington, Professor Hathaway listed six elements upon which there is general agreement. They were:

1. applicability of general rules re nexus;
2. no requirement of voluntary, associational relationship;
3. no requirement of cohesiveness or homogeneity;
4. can comprise relatively large numbers of people;
5. may not be defined simply on basis of shared risk of being persecuted;
6. must be defined in a way that limits the beneficiary class on the basis of some form of civil or political status.

There is agreement with respect to the 1st element. With respect to the 2nd and 3rd elements there remains a lack of clarity surrounding the positions of the US 2nd, 8th and 9th Circuit Courts of Appeal. With respect to the 4th element this may well not be accepted by the US 2nd, 3rd and 8th Circuit Courts of Appeal. With respect to the 5th element there seems to be consensus. However, the 6th element may be disputable depending upon the meaning given “civil” or “political”. The essential point is that there is a large degree of unanimity amongst the world’s Common Law courts on these elements.

Given that international commentators have read the definition of MPSPG differently it should cause no surprise that courts do as well. But MPSPG is a living, breathing concept which has very much more growing to do as world conditions change. It may be that, as McHugh J said in *Applicant A*, it is futile to attempt to tether the meaning of MPSPG down. But such is the human need to do so and the desire for uniformity and predictability that these attempts will continue. And, at base, whichever interpretation is to be followed there must be a theoretical underpinning that is relied upon. In this sense there should be an interpretation across states that would allow similar cases to be treated similarly. In this section we examine some of the sticking points in both approaches, some common issues, and the attempt to amalgamate the two definitions.

Protected Characteristics

The Canadian courts, and most of the other courts around the Common Law world, see the protection under this ground as limited by persecution affecting anti-discrimination norms – just like the other four grounds. They put more emphasis upon the context and the object and purpose of the treaty than the Australian courts have.

For the purposes of analysis of this approach we refer to the Canadian Supreme Court’s formulation of the meaning of MPSPG in *Ward*:

The meaning assigned to “particular social group” in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers, supra*, *Cheung, supra*, and *Matter of Acosta, supra*, provide a good working rule to achieve this result. They identify three possible categories:

1. groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3. groups associated by a former voluntary status, unalterable due to its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one’s past is an immutable part of the person.

Innate or Unchangeable Characteristics

The court used the examples of gender, linguistic background and sexual orientation by way of illustrating the 1st category. It is not clear what the court saw as “innate” and what it saw as “unchangeable” characteristics. With the development of science we can now change someone’s gender and, as such, this group could as well fall under the 2nd category if it no longer fit under the 1st.

With respect to linguistic background, this is not innate but is certainly unchangeable as the status has already occurred, much like characteristics from the 3rd category. This would differ from language spoken which could be changed; in this latter case, language spoken could fall within the 2nd or 3rd category. As to sexual orientation, there are likely differences of opinion whether this is innate or unchangeable, but irrespective it would certainly fit under the 2nd or 3rd categories as well should there be debate over whether to include it within the 1st category.

What is a characteristic? We have noted the case of *Reynoso* from the Canadian Federal Court. It held that a memory is an “unchangeable characteristic” as referred to in *Ward’s* 1st category. In the writers’ view this is an unusual use of the term “characteristic”. The meaning given to “characteristic” in the O.E.D. 1st Edition is: “*That serves to indicate the essential nature or quality of persons or things;*” or “*A distinctive mark, trait, or feature; a distinguishing or essential peculiarity or quality*”. Given the ordinary meaning of this term it would not appear to refer to memories, which was what the court found in this case.

However, apart from the ordinary meaning to be given to “characteristic” the court’s analysis does not begin by examining the anti-discrimination aspect of the putative group. The judge refers to the group as “...a small number of former fellow municipal employees terrified and terrorized by what they know about the ruthless, criminal mayor.” While unchangeable (except in those limited cases referred to by the court) the group is not tied to any civil or political rights the discrimination against which underlies the *Ward* categories.

In *Palomares*³⁰⁸, [2000] FCJ No. 805 a case of a claimant witnessing and denouncing a murder by the military, the court took a different approach. It held that the “characteristic” of knowledge of a crime was a personal characteristic and the claimant was targeted for her particular knowledge of a crime and not for membership in the suggested PSG. As well, the court found that if there was such a group as people denouncing crime

308 *Palomares* [2000] FCJ No. 805

they have witnessed it could not fit into category 2 of *Ward* as there is no issue of association for reasons “fundamental to human dignity” in the conduct. Her conduct is laudable but not fundamental to human dignity or identity.

What these two cases demonstrate is a potential for uncertainty in the meaning to be given to “characteristic”. If “characteristic” is to have the elastic meaning given it in *Reynoso* then, as the IRB panel in that case suggested, there will be any number of potential groups as all of us have memories. However, in principle it will not likely be extended given its lack of anti-discrimination underpinnings. The *Reynoso* interpretation, if accepted under the social perception test, could however lead to considerable difficulties.

Voluntary Association

The court in *Ward* used the terms “groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association”. It is interesting to note that the court referred to reasons so fundamental to their human dignity as opposed to reasons so fundamental to human dignity. This raises the question as to whether the standard is an objective one or a subjective one. We are not aware of any Canadian cases touching on this.

In *Acosta* the formulation is stated more strongly in subjective terms: “... members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences”. [Underlining added] Here it seems clear that a court must make an evaluation of what is fundamental to a claimant’s particular conscience. The question arises as to whether the determination will be made subjectively (i.e., what an individual considers fundamental to his identity) or whether objectively (i.e., where the court, having ascertained what the claimant considers fundamental will, nevertheless, determine whether that characteristic is fundamental). Equally of interest is the BIA’s recent decision in *Matter of C-A* where the Board introduced the notion that if one voluntarily assumes characteristics (puts oneself into a PSG) which carry risk then this person may not be eligible for refugee protection. The basis for this qualification is unclear. This can be contrasted with Lord Justice Simon Brown’s comment in *Secretary of State for the Home Department v Ahmed*³⁰⁹ where he stated:

In all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would

³⁰⁹ Unreported but cited in Appellant S395/2002, supra at paragraph 42.

be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable.

As can be readily seen it is one thing to survey generally accepted views on what conduces to human dignity but quite another to attempt to discern a particular claimant's own beliefs and then weigh their merits. And whereas we do not discriminate amongst religions as to what is worth protecting and what not or similarly with respect to political opinions, the argument can certainly be made that if a person is free to choose his religion or his political opinion then why may he not choose what elements are fundamental to his own identity or conscience. Of course this would be limited, as in religion or political opinion, to things not injurious to others.

Beyond this there are many cases where the objective analysis is relied upon where the issue becomes whether a person should change his or her "voluntary" association. In *Acosta* itself it was found that he should be willing to leave his job as a taxi driver; in other words, this occupation was not believed to be fundamental to his identity or individual conscience. But the question, even if to be objectively determined by a court, should involve an appreciation of the nature of the country of the claimant as to what occupations merit this protection.

The Canadian Supreme Court used human rights workers as an example of such a voluntary association. But what others would there be? Politicians? Medical professionals? Police Officers? Prosecutors³¹⁰? Excellent boxing instructors?³¹¹ Groups organized to defend themselves because the government does not?³¹² Anti-drug crusaders³¹³? Unionists?³¹⁴ Some principle must be articulated to separate the "fundamental" from the "non-fundamental".

310 In *Ahmed* [2000] FCJ No. 651, the court found that a prosecutor who was targeted by persons he had successfully prosecuted was targeted for what he did as an individual not for being part of a "social group" of prosecutors. However, would a group of prosecutors be a PSG?

311 In *John Doe v. Canada* (M.C.I.) [2005] F.C.J. No. 1900 2005 FC 1532 Docket IMM-2343-05 the court found that it would be unreasonable for an experienced and successful boxing instructor to have to change his appearance, occupation, residence and break family ties in order to obtain protection. As the case turns on mixed facts it is not possible to define whether the court took a position on the occupation as being one fundamental to the claimant.

312 In *Galvan* a group of Mexican taxi drivers created a self defence group as police offered them no protection against thieves. *Galvan* [2000] FCJ No. 442

313 *Munoz* [1996] FCJ No. 234

314 *Porto* [1993] FCJ No. 881, decided before *Ward* characterised a union as a PSG. Note that in Ireland an amendment to the Convention definition asserts that trade union members are considered to be MPSG.

Former Voluntary Association

Like a truly unchangeable characteristic this category cannot be changed as the persecution is based upon an event in the past; i.e., landlords in countries annexed by the former Soviet Union or capitalists in Red China. In *Lai*³¹⁵ the claimant was a former capitalist in China before the coming to power of Mao. The court appears to assume that this would be a PSG. “Voluntary” connotes that the characteristic is optional whereas for many former capitalists in Red China they may not have actually chosen to be capitalists but might have been born into this category.

Categories not Exhaustive

Many courts, especially the Canadian Supreme Court, has held that the *Ward* categories are not exhaustive although any extension must take accord of the fundamental anti-discrimination and human rights bases to a further extension. We have not clearly seen such an extension in Canadian jurisprudence. However, the open-endedness may yet become a challenge.

Social Perception

The Australian High Court arrived at its seminal decision in *Applicant A* by viewing it as the domestic incorporation of an international treaty and applying what it took to be the proper approach to the interpretation of the phrase MPSPG in the *Vienna Convention*. Even so, the justices took somewhat different approaches – each writing his own judgment – but the essence was that primacy should be given to the ordinary words of the treaty – membership of a particular social group – and nothing in those words served to limit this class by the notions introduced by the BIA in *Acosta* or the Canadian Supreme Court in *Ward*. As we have seen, there is some difference of opinion as to whether the Australian High Court took too little guidance from the context, and the object and purpose part of section 31 (1) of the *Vienna Convention* or the other Common Law courts too much.

While the Australian court agreed that the context and the object and purpose of the treaty should inform the meaning of the phrase it still did not see the need for the limiting characteristics found by the BIA or the Canadian Court. Rather, it found the phrase to be either a stop-gap (Brennan, C.J.) or a method by which a person suffering persecution – for *any* reason so long as he was part of a cognisable group and the persecution was on account of his membership in that group – could be granted international protection.

315 [1989] FCA No. 826

Hathaway raises the broader question of whether the framers of the *Convention* would have had in mind protecting roller-bladers should they become a persecuted group. This of course is a convincing question to adherents of the protected characteristics approach and the answer is an unequivocal “no”. But it is precisely the non-judgmental or non-evaluative approach of the social perception group that allows them to answer “yes” in the sense that, if persecution of skateboarders became a serious persecutory issue in modern times then it *should* be covered.

It must be noted that, apart from Australia, the 2nd and 9th USCCA have also adopted variants of the Australian test. In the 2nd Circuit the approach requires that the group be closely affiliated which is contrary to the Australian position. The 9th Circuit – apart from adopting both the *Acosta* and its own *Sanchez-Trujillo* tests – requires under the social perception test both close association and voluntariness. Both of these formulations likely preclude a large PSG.

Another issue with respect to the social perception approach is that of the quantity of potential groups. There is a greater danger with this approach of including just about any groupings of people as long as someone can define the characteristics that distinguish the group. Without being able to limit by close or voluntary association or anti-discrimination aspects the Australian courts are put in the position of having to analyse almost any suggested group put to them. This may explain partly why the Australian courts appear to have generated so much jurisprudence on the subject of MPSG.

A further issue which arises concerns the difficulty in the Australian courts of analyzing whether a PSG exists in cases where the society, and even the persecutor, does not view those persecuted as being persecuted because they are members of a PSG. This occurs because of the High Court’s position that as long as a persecutor persecutes a person because he is *believed* by the persecutor to have characteristics which distinguish him from others in the relevant society then the persecuted can be a MPSG. The difficulty for courts here is the evidentiary one; the exercise of analysis would be easier in a protected characteristics approach as the fact finder might more readily recognise human rights-like groups and not have to do the extensive analysis of the claimant’s society that might be required.

Common Issues

It would appear that a single person could constitute a group where the persecutor *believed* there were more in the group but in fact targeted the only one – say an Albino. Given that Australia appears to permit the characteristics of the group to be definable objectively (and not necessarily

within the particular society) then there would be no reason why even if not recognised in Australia, Albinos could not constitute a PSG. An area that has caused some concern is how to distinguish a demographic group from a social group. The cases appear not to provide much in the way of analysis of this issue. Australia appears to recognise the distinction and allow that a demographic group may become a PSG over time. But exactly what distinguishes the two is not clear and courts have differed.

Semantics can become an issue for all courts. This is why such time is spent on defining the PSG. However, as can be seen in *Shah & Islam*³¹⁶ different Law Lords came to quite different conclusions about the definition of the group. Lords Steyn, Hoffman, Hope of Craighead accepted that the PSG was “women in Pakistan”; Lord Hutton adopted the “narrower” formulation proposed by Lord Steyn had he not adopted the broader one – namely “women in Pakistan, suspected of adultery who are unprotected”. Lord Millett dismissed the appeals failing to find a PSG. In *Fornah* the situation is even more confusing. Lord Bingham presents his analysis and chooses the wider group (Women in Sierra Leone) but acknowledges that he could accept the narrower group of “Intact women in Sierra Leone”. Lords Hope, Rodger, Brown and Baroness Hale choose the narrower group (variously defined) although all but Lord Roger indicate that they would be willing to accept the wider formulation. Lord Rodger does not say whether he would accept the wider formulation but his particular formulation of the test might make it difficult for him to do so. As noted before it may well be that the parties are focusing on different sets of facts and thereby arriving at different PSGs as a result. This is seen most closely in *Fornah*³¹⁷.

On a practical level those of us who are first-line decision makers are often faced with lazy counsel who define PSG such as “victims of crime” or “people persecuted because they violate a social norm”. As the courts have held – in Canada at least – that the panel must make its decision on the basis of the facts before them, this arguably makes the panel responsible for conjuring up the PSG or, at the very minimum, analyzing whether the facts disclose a PSG.

The Synthesized Approach

Attempts have been made to synthesize the two camps on the grounds that by doing so there would be unanimity of approach. This engenders a host of problems. Firstly, it is not clear what need there would be for the “Protected Characteristics” approach if the “Social Perception” (parti-

³¹⁶ *Islam (A.P.) v. Secretary of State for the Home Department; Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)*; March 25, 1999.

³¹⁷ This phenomenon can be seen at work elsewhere but most famously in a debate between Bertrand Russell and father Colpeston in the 1940s where they engaged in a two-hour debate about whether God existed only to break it off when they realized that they each entertained different concepts of what a “God” was.

cularly the Australian version) approach were joined to it in an either/or proposition such as advanced by the UNHCR. In our view the latter would always include the former, whereas the former would not always include the latter. To paraphrase Lord Steyn in *Islam*, it is not clear what the practical implications of adding “protected characteristics” would be.

Conversely, if the determination of PSGs required both approaches then, as noted earlier, odd situations will develop where some of those most in need of protection will be denied it.

However, even if one were to amalgamate the two approaches, there are still fundamental difficulties at the heart of each approach, aggravated by the elaborations they have undergone in the various countries which have adopted them. Far from eliminating the problems in each by uniting them it would compound them and in the process create further interpretative difficulties.

10. The Future of MSPG in Europe

Notwithstanding the growing debate about the interpretations and meanings of MSPG as applied in jurisdictions around the world, significant policy changes in Europe may result in the diminution of the use of MSPG as a basis for claiming refugee status, particularly in those Member States where the benefits arising from refugee status and subsidiary protection are almost identical. Some argue that the mandatory application of the *Qualification Directive* by Member States after October 2006, in the light of existing debates and difficulties in consensus between the divergent directions of the EU and the UNHCR on MSPG, may cause the debate to flounder. Indeed, it may be true to say that the new case law that will emerge from the application of the *Qualification Directive* will serve to fundamentally change the discussion and debate surrounding the interpretation and meaning of MSPG amongst EU Member States. This is already apparent in *Fornah* where one Lord states that the QD must be interpreted in light of the UNHCR’s *Guideline* and another Lord opens the question as to whether the QD requires a disjunctive or a conjunctive approach.

11. Conclusion

With few exceptions other than Australia³¹⁸ all common law countries have followed the *Acosta/Ward* “protected characteristics” approach. Australia has set out on its own path and rejected that approach in favour of a “social perception” test. In doing so it has gone beyond the position taken by other adherents to the social perception approach. It has held

³¹⁸ The US 2nd Circuit Court of Appeal and to a lesser extent the US 9th Circuit Court of Appeal.

that so long as the “characteristics” that mark the group are cognisable to someone (outside the country or presumably even the court if it had evidence) *and* the person is persecuted because of those characteristics which mark out this cognisable group then the PSG is made out irrespective of whether the society in question or even the persecutor saw the person as a member of a PSG.

This paper has not sought to provide a new interpretation of the meaning of MPSPG. Rather, it has sought to outline the state of the law as succinctly as possible and present the differences amongst states’ interpretations. We hope that by having done so, and providing some analysis of the problems besetting each approach, decision-makers may have ready at hand a brief compilation to assist them in their own deliberations.

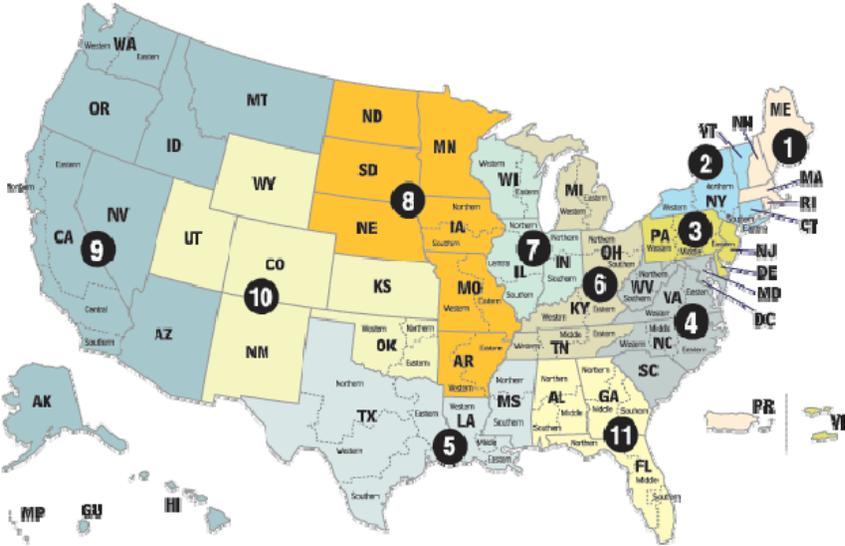
It has been thought by some that the attempt at synthesis taken either by the UNHCR or the EU will alleviate the wrangling over the meaning of MPSPG. We think this unlikely for the reasons given in this paper. It is our view that MPSPG will provide many more years of interpretative delight to scholars, courts and students of the law.

*Michael A. Ross,
Member of the Immigration and Refugee Board of Canada
Refugee Protection Division
Canada*

*Patricia Milligan-Baldwin,
Immigration Judge
Asylum and Immigration Tribunal
U.K.*

Appendix I

THE UNITED STATES CIRCUIT COURTS OF APPEAL³¹⁹



³¹⁹ This map may be found at: <http://www.uscourts.gov/courtlinks/>

Appendix II

Comparison of States' Positions on MPSG

A factor which affects the interpretation of MPSG and other categories is in the definition is the number of claims handled by refugee accepting nations. Over a ten year period (1992 – 2001) Germany averaged 160,000 claims a year, the US averaged 126,000, the UK averaged 57,000, Holland averaged 36,000, Canada averaged 29,000, France averaged 28,000, Switzerland and Sweden averaged 23,000 and Belgium averaged 22,000³²⁰.

JURISDICTION	PROTECTED CHARACTERISTICS		COMMON ISSUES				SOCIAL PERCEPTION			
	Prot. Char.	Permanent Unalterable Characteristic	Is/Does	MPSG = Main Cause	Demographic vs. Social Group	Size Limitation	Soc. Percep	Vol. Assoc.	Closely Related	Who must recognise PSG
Australia	No	No	Yes	Yes	Yes	No	Yes	No	No	Someone
Canada	Yes	No	Yes	No	No	No	No	No	No	
New Zealand	Yes	No					No			
UK	Yes	No		Effective		No	Yes	No	No	
USCCA 1	Yes				Yes		No			
USCCA 2						Yes	Yes			Outside world or persecutor
USCCA 3	Yes	Yes								
USCCA 4	Yes									
USCCA 5	Yes		Yes							
USCCA 6	Yes									
USCCA 7	Yes									
USCCA 8	Yes					Yes				
USCCA 9	Yes				Yes					
USCCA 10	Yes									
USCCA 11	Yes									
EU	Yes					No	Yes ²²¹	No	No	Society
UNHCR	Yes					No	Yes ²²²	No	No	Society
US Reg	Yes		Yes	Yes			Yes ²²²			

1 The UNHCR definition recognises both approaches but refers to the “protected characteristics” as forming the “core” of the social perception groups.

2 The US Regulation identifies the protected characteristics approach as being “required” but notes that some of the factors relevant to a social perception approach “may be considered”.

320 Showler, Peter, Refugee Sandwich: Stories of Exile and Asylum, McGill – Queen’s University Press, 2006; page 222, footnote 17.

REPORT OF THE VULNERABLE GROUPS WORKING PARTY

Justice Catriona Jarvis

Introduction

1. The working party has not held any formal meetings since the last international conference at Stockholm as there has, in effect, been no Rapporteur or Associate Rapporteur able to steer the work of the group following the departure of Lois Figg to take over the work of preparing for the Mexico conference. Joulekhan (Julie) Pirbay stepped in as Rapporteur at one stage for a brief period. It is now hoped that she will be able to serve as Associate Rapporteur, and Catriona Jarvis has very recently become the Rapporteur. Given this history, the Working Party does not, at this stage, have a long or detailed report to make, as we have not yet been able to develop matters arising from Conference at Stockholm .

Membership

2. The members of the group are set out at annexe 1.
Any other member of the IARLJ wishing to join us, or who knows of someone who may wish to join us, is asked to please contact Catriona Jarvis at Catriona.Jarvis@judiciary.gsi.gov.uk.
3. It is proposed that the group should be able to benefit from the assistance of academic, lawyer and NGO colleagues through co-option. A proposal to co-opt Ms Sarah Young, an academic lawyer, currently working at the Court of Appeal in the UK, who has excellent knowledge and experience in this field has already been made, and it has also been proposed to the President, to whom her CV has been sent, that she become an Associate Member as other academics have done (for example Jane McAdam and Michelle Foster). In this way, the Working Party should be able to move forward and achieve its aim more easily than would be the case were we obliged to rely only upon judicial members whose time and resources must be subject first and foremost to the demands of our individual jurisdictions.

Proposals

4. The Working Party seeks the endorsement by Conference at Mexico of our proposal that the Working Party take all necessary steps to enable the preparation of, and to prepare, Guidelines on Procedures with Respect to Vulnerable Persons for adoption by the IARLJ. It is acknowledged that members belong to jurisdictions that differ in many ways, some having highly developed practice and procedure and jurisprudential guidance and some not, so that the guidelines would be of use in different ways to each jurisdiction. However, the aim would be to distil best practice and procedure so that there would be something of use to all to be found within the guidelines.
5. It is envisaged that this work would include, but not be limited to, guidelines in respect of children and young people; gender (both women and men lead gendered lives), and people with disabilities.
6. Some documents have been identified as likely to assist the Working party in its task and these are mentioned at Annex 2. The list is simply a starting point and we should be grateful to receive from colleagues any other documents that may be relevant.
7. Our work will be carried out in the main by email communication, but it is hoped that we shall also be able to speak to one another and that some of us at least will be able to meet at Regional Conferences, between our international gatherings. At this stage it is not possible to attach any intended completion date to our task, but this will be done as soon as it is realistic to do so.
8. We ask that Conference please support and endorse our proposal.

*Catriona Jarvis,
Rapporteur
Senior Immigration Judge
UK Asylum and Immigration Tribunal
London*

Membership of the Group

1. Catriona Jarvis / Rapporteur / Senior Immigration Judge / UKAIT / London UK.
2. Joulekhani (Julie) Pirbay / Associate Rapporteur / Member Immigration and Refugee Board / Toronto Canada.
3. Jane Coker / Immigration Judge / UKAIT / London UK.
4. Ms J Cunningham / Immigration and Refugee Board / Toronto Canada.
5. Mr E R Grant / US Dep. of Justice Board of Immigration Appeals, Falls Church, USA.
6. Rt Hon Lord Justice Kanyehamba / Supreme Court of Uganda / Kampala Uganda.
7. Syd Bolton / Legal and Policy Officer Children / Medical Foundation for the Care of Victims of Torture / London, UK.
8. Lori Rosenberg / Lawyer / Maryland / USA.
9. Professor R M M Wallace / Immigration Judge / UKAIT / Scotland, UK.
10. Sarah Young (to be co-opted 2006) / Lawyer / Court of Appeal / London, UK.

Documentation

1. Guidelines on Procedures with Respect to Vulnerable Persons. Immigration and Refugee Board Canada.
2. Asylum Gender Guidelines IAA, UK November 2000 and the Gender Guidelines of other countries and of the Refugee Women's Legal Group, upon which the IAA Guidelines draw.
3. Article: The Application of the Gender Guidelines within the UK asylum determination process Professor R M M Wallace and Mrs Anne Holliday.
4. Numerous publications of the UK Immigration Law Practitioners' Association.
5. All international Conventions and other relevant instruments and materials as well as legal texts.

GUIDELINE ON PROCEDURES WITH RESPECT TO VULNERABLE PERSONS APPEARING BEFORE THE IRB

Justice Lois D. Figg

Objective of the Guideline

The primary objective of the Guideline is “to ensure that ... vulnerable persons are identified and appropriate procedural accommodations are made” (as stated in paragraph 3 of the Guideline). The IRB recognizes that certain individuals face particular difficulties when they appear for their hearings because their ability to present their cases is severely impaired.

Another objective is to prevent, to the extent possible, vulnerable persons from becoming traumatized by IRB processes and to ensure the on-going sensitization of members and others to the impact of severe vulnerability.

The Guideline follows in the tradition of previous IRB Guidelines - the *Guideline on Women Refugee Claimants Fearing Gender-Related Persecution* (Gender Guideline) and the *Guideline on Child Refugee Claimants* (Children’s Guideline)– which also recognize the special circumstances and needs of particular persons who appear before the IRB.

Procedural Focus

The guideline is called the “*Guideline on Procedures...*”. Its primary purpose is to recognize that appropriate procedural accommodations should be made so that the cases of vulnerable persons will be presented to the IRB as fully and as coherently as possible. Procedural accommodations are the key reason for the guideline. There is no need or purpose in identifying persons as vulnerable unless there is also an intention to put procedural accommodations in place.

Merit of the Refugee Claim is Not Relevant

An important principle underlies the guideline: namely, that identification of vulnerability in no way indicates that the IRB accepts the underlying facts, in circumstances where those underlying facts are also relevant to the ultimate determination of the person’s case. The identification is made for the purpose of procedural accommodation only, to ensure that the person will not be disadvantaged in the presentation of their case. It is

not intended to signal that the IRB accepts any of the facts related to the person's case itself.

It follows that *"the identification of a person as vulnerable does not predispose... a particular determination of the case on its merits"*. The decision-maker must still fully probe the evidence provided by the vulnerable person.

Builds on Existing Practices

The Guideline does not dramatically depart from existing practice at the IRB. Members typically adopt *ad hoc* measures to respond to the particular needs of vulnerable persons. On the institutional level, the IRB has encouraged practices which recognize the special circumstances of vulnerable persons, particularly in the Refugee Protection Division.

Therefore, it is reasonable to ask: why is this new guideline needed? The answer is that it is intended to set out a consistent and coordinated cross-divisional approach in identifying vulnerable persons. Even though members already recognize persons' vulnerabilities and treat such persons with sensitivity, it is possible that some cases are missed. The new guideline sets out a coordinated approach which will help in making sure those cases are not overlooked.

Definition

The guideline defines vulnerable persons as *"individuals whose ability to present their cases before the IRB is severely impaired"*. In determining whether a person falls under the definition of "vulnerable person", the focus will be on whether the person's ability to present their case before the IRB is severely impaired. No clear line can be provided to explain when a person is properly identified as "vulnerable". It falls to the member to identify a person as vulnerable, based on the evidence regarding whether or not the person's ability to present their case is severely impaired. There is no group of predetermined "vulnerable persons". A case-by-case approach will be necessary to implement the Guideline properly.

Application

The Guideline is intended to apply only to cases where persons have *severe* impairment of their ability to present their cases. Many individuals encounter some difficulty in appearing before the IRB due to language and cultural barriers, nervousness about the outcome of the hearing, and because of mistreatment they have suffered. The very process of appearing is very stressful for most individuals and it is reasonable to expect persons to show symptoms of some vulnerability.

The Guideline expressly points out that IRB proceedings have been designed to recognize that the very nature of the Board's mandate inherently involves persons who may have some vulnerabilities. Dealing with vulnerabilities is the Board's "business" and what we do every day. Every person is treated with care and respect. It is in the very nature of what we do to identify and respond to situations of vulnerability

Supporting Evidence

The Guideline states that a person's allegation of vulnerability must be supported by independent credible evidence "*wherever it is reasonably possible*" to obtain. We expect that the most useful type of independent evidence will be an expert's report.

There will be circumstances where the vulnerable person, because of the nature of their particular vulnerability, will have difficulty obtaining corroborative evidence to support their case. In such cases it is appropriate not to expect or require corroborative evidence and the testimony of the person will be considered sufficient.

Whether or not a person is vulnerable is a question which is best answered by an expert such as a psychiatrist, psychologist or medical doctor, since it involves information which is largely outside the experience and knowledge of IRB decision-makers. Psychiatrists and other experts will also be best placed to inform the IRB about the type of accommodations which are most suitable in the circumstances of particular individuals.

Early Identification

The guideline places an emphasis on the importance of early identification of vulnerable persons. It recognizes that a person may be identified as vulnerable at any stage of the proceedings but that it is preferable to identify vulnerable persons at the earliest opportunity.

Unrepresented Claimants

In situations where individuals are not represented, the guideline states that the IRB will take extra care to ensure that such persons can participate as meaningfully as possible in their hearings. In some cases, it may be necessary for the IRB to act on its own initiative, in determining whether any procedural accommodations are required for individuals who are not represented by counsel.

Conclusion

In issuing this new guideline, the IRB is officially recognizing the compassion and sensitivity which members already show to vulnerable persons who come before them.

In its practical application, where the line falls exactly – between a person who ought to be identified and a person who will not be identified as vulnerable – will not always be clear. This will be the challenge for IRB members, whose role will be to give practical meaning and recognition to this new guideline.

IARLJ AMERICAS CHAPTER REPORT

Justice Jean-Guy Fleury

By way of an Americas Chapter report, our activities over recent months have largely been focussed on the organisation of this IARLJ World Conference. In addition, IARLJ Executive Director James Simeon has continued to work on the IPPA project, I will ask James Simeon to issue a brief report on IPPA.

The World Conference being held in Mexico City is ideal for the Americas Chapter. It is very encouraging to see the great number of participants from Americas at this World Conference. With so many new judges and decision-makers from the Americas who are now being exposed to the IARLJ, this should help to rejuvenate our Chapter.

Upon leaving Mexico City the next steps will be to work on the IPPA programme, James Simeon will provide an update on this in a few moments. Since I will be leaving the IRB within a year or so there will be a need to select a new Chairperson for the Management Committee of the Americas Chapter. Ideally, I feel we should have someone from Mexico, Central or South America who should lead the Americas Chapter.

I have had a great experience as the head of the Americas Chapter and with the IARLJ generally. I would like to thank all of you for your support and cooperation. I also ask you to please work closely together to invigorate the Americas Chapter as we move into the future.

1. IARLJ World Conference in Mexico City, November 2006 (**Lois Figg**)
 - Lois to review highlights of conference
2. International Protection Project for the Americas (IPPA) (**James Simeon**)
 - James to provide an update
3. Strategic Direction of the Americas Chapter (**Lois Figg to lead**)
4. Next Americas Chapter Conference (**all**)
 - Perhaps should be held in country of new America's Chapter President
 - Ecuador another good option, a country of great interest to the UNHCR currently
5. Other and Next Steps (**round-table**)

Jean-Guy Fleury,
Chairperson, Immigration and Refugee Board of Canada

ADDRESS OF THE CHAIRMAN OF THE EUROPEAN CHAPTER

Justice Eamonn Cahill

In November 2005 European colleagues attended at the fourth Conference of the European Chapter in Budapest. Mindful of the deadline imposed for implementation of the Qualifications Directive, the conference and associated workshops concentrated on the implementation of the directive for those of its members who are from member states of the European Union.

The second theme of the conference was on the sourcing and dissemination of country of origin information which constitutes an ingredient of The Hague Programme, adopted by the European Council 2004, and which aims for a greater degree of harmonisation of asylum law by 2010.

The Qualifications Directive introduces a human rights provision as one of the entitlements of those seeking protection pursuant to the Directive. The concept of Subsidiary Protection is an alternative for those applicants who failed to achieve asylum status. For many of us, the inclusion of this entitlement in the Directive is a long awaited addition for those courts whose previous jurisdiction was limited to consideration of applications made pursuant to the 1951 Convention.

Interpretation of the Directive, with particular emphasis on Subsidiary Protection, may show some variation among member states, particularly during the early stage of implementation. In attempting to achieve an acceptable degree of harmonisation in our decision writing, our Chapter must provide additional workshops to accommodate those of our colleagues would feel that they are in need of additional training.

Over the past three years the European Chapter carried out an extensive training programme for the ten new member states of the European Union. This was made possible through the financial generosity of Taix (Commission for Enlargement). We hope that the Commission will again assist us with our immediate training requirements which are geared towards common interpretation in operating the Directive.

The training of judges requires major financial support. It cannot be taken for granted that the European Union will always be available to offer support for our training needs. It is important therefore that we in the European Chapter look to our own resources and, where possible, solicit funding from our respective governments.

The harmonisation of asylum law, which is now inclusive of basic human rights provisions, will hopefully also influence our judicial colleagues whose countries are not member states of the European Union. Earlier this year some of our colleagues were invited by Taiex to address a seminar on asylum law, in Ankara, which was attended by over one hundred Turkish provincial governors.

Our French colleagues have generously agreed to host the next Conference of the European Chapter. This will take place in Strasbourg, October 2007. The conference theme will be focused on humanitarian issues associated with the development of asylum law in the European Union.

*Justice Eamonn Cahill,
IARLJ European Chapter Convenor*

AUSTRALASIA CHAPTER REPORT

Justice Sue Zelinka

Over the last 18 months, the Australasian Chapter has been busy supporting the activities of Justice Tony North, who was elected President of the IARLJ at the 6th IARLJ World Conference in Stockholm. This has involved focussing on Africa, where Justice North was keen to see the idea of an African Chapter come to fruition in time for the Mexican Conference.

The Australasian Chapter had carriage of a UNHCR project involving training and capacity building in Malawi. After a period of negotiation with the UNHCR, a position was advertised through the IARLJ and a number of members responded. Those who were unavailable for the project at that particular time, or who were not selected on this occasion, have indicated that their names may be used within the IARLJ for consideration for future similar projects.

Chris Keher, a former Refugee Review Tribunal (RRT) member from Australia, was selected and departed for Malawi in February 2006. He spent four months in Malawi, leaving with the satisfaction of having almost entirely cleared one refugee camp. His experiences will provide a useful guide for future projects in the region.

The Chapter was also involved in efforts to find financial support for the new African Chapter, which was launched in September 2006, and was able to obtain this with the assistance of the Australian Embassy in South Africa. Some of this money allowed the participation of African delegates at the Mexican Conference.

In November 2005, a major refugee law conference was held in Sydney, Australia. The keynote speaker was Guy Goodwin-Gill, supported by his Australian colleague, Dr Jane McAdam. Other distinguished speakers were Rodger Haines QC of New Zealand and Justice Tony North (the last three are all members of the Chapter). With both Rodger Haines and Ema Aitken in Sydney for the conference, there was an opportunity for a "mini" Chapter meeting.

At its regional Chapter Conference in June 2004, the chapter scheduled its next local conference for June 2006. However, as the Mexican conference was to take place only five months later, it was decided to postpone the regional meeting. This also reflected particular circumstance which RRT (Australian) members were experiencing in 2006, restricting the time they had available to attend conferences: all members had been recently cross-

appointed to the Migration Review Tribunal (MRT) (dealing with all visa classes relating to in-comers not seeking asylum) and were busy coming to terms with the different workload.

The cross-appointment process also meant that former MRT members were now on the RRT and hearing refugee cases. A number of these members joined the IARLJ. Subsequently, the Tribunal provided its largest ever delegation of members to an IARLJ World Conference, contributing to a substantial presence from Australian and New Zealand.

REPORT OF THE AFRICA CHAPTER OF THE IARLJ

Ahmed Arbee

This has been a momentous year for the new Africa Chapter of the IARLJ. On September 26th, 2006, the Founding Meeting of the new IARLJ Regional Chapter for Africa was held at the historic Union Buildings in Pretoria, South Africa. The Founding Meeting had some 45 delegates in attendance from across Africa who unanimously adopted two seminal covenants, its "Statement of Purpose" and "Governance" documents. The new Africa Chapter's "Statement of Purpose" states, in part, as follows:

The Africa Chapter of the IARLJ will seek to further the Objects of the Association, as stated in the IARLJ Constitution, through the cooperation and the exchange of information and expertise on asylum and refugee law, procedures and decision-making among states in Africa.

Immediately following the Founding Meeting, the new IARLJ Africa Chapter held a two-day Professional Development Workshop at another historic venue in Pretoria, the Ou Raadsaal, in Church Square. The Professional Development Workshop dealt with a number of critically important refugee law issues germane for judges and asylum and refugee law adjudicators and decision-makers in Africa. It also provided the occasion for the first meeting of the new IARLJ Africa Chapter Interim Management Committee that was held on September 28th, 2006. The first order of business for the meeting was the election of the Chairperson of the new IARLJ Africa Chapter Interim Management Committee. Ahmed Arbee, IARLJ Council member and the former Chairperson of the South Africa Refugee Appeal Board, was unanimously elected as the Chairperson of the new IARLJ Africa Chapter Interim Management Committee. The Interim Management Committee also dealt with a number of other items, including, African judges attendance at the IARLJ World Conference in Mexico City; recruitment of new members to the IARLJ in Africa; the Professional Development Seminar planned for Trinity College, Dublin, Ireland; and, fundraising. It was also agreed that the next meeting of the Interim Management Committee of the new IARLJ Africa Chapter should be held at the Mexico City IARLJ World Conference.

The new IARLJ Africa Chapter held a number of meetings at the 7th IARLJ World Conference in Mexico City. In fact, the Mexico City IARLJ World Conference had perhaps the highest number of African judges in attendance in the Association's history. This was due, in no small part, to

the number of judges who attended from Nigeria. However, it was also due to the funding that the new IARLJ Africa Chapter received from AusAID's African Government Facility (AGF) to sponsor judges from Africa to attend the IARLJ Pre-World Conference Workshops, at the Universidad Iberoamericana (UIA), and the 7th IARLJ World Conference in Mexico City, held at the Gran Melia Mexico Reforma Hotel and Convention Centre and the Federal Judicial Institute of Mexico.

The Interim Management Committee of the new IARLJ Africa Chapter held its second meeting on November 8th, 2006. The Interim Management Committee commenced its meeting by adopting the new IARLJ Africa Chapter's "Statement of Purpose" and "Governance" documents. In addition, it approved two other important initiatives. The meeting resolved that, "the IARLJ Africa Chapter fully endorses and supports the bid of the Republic of South Africa to host the next biennial IARLJ World Conference." The Interim Management Committee the new IARLJ Africa Chapter also endorsed that a Regional Chapter meeting should be held in Nigeria, to be hosted by the Nigerian judiciary, with the aim of also trying to attract the participation of French speaking judges from francophone countries in Africa.

The new IARLJ Africa Chapter also held a separate meeting at the Mexico City IARLJ World Conference with a number of members of the IARLJ Executive, including, Eamonn Cahill, IARLJ Europe Chapter Convenor, and principal organizer of the Trinity College, Dublin, Ireland, Professional Development Seminar. Eamonn Cahill emphasized the Trinity College, Dublin Seminar, was a meeting for Africa judges who not only dealt with cases dealing with asylum and refugee law but also human rights law. He encouraged all those at the meeting to consider attending the Trinity College, Dublin Seminar, that would be held in the spring of 2007.

The new IARLJ Africa Chapter made a substantial contribution to the 7th IARLJ World Conference programme. Two of its members were elected to serve on the IARLJ Council, Ahmed Arbee, Chairperson of the Interim Management Committee of the new IARLJ Africa Chapter, and Andrew Nyirenda, Justice, High Court of Malawi. The new IARLJ Africa Chapter is now posed to make play a significant role within our Association.

We are most grateful to IARLJ President Justice Tony North and Dr. James C. Simeon, IARLJ Executive Director, for not only their contributions and efforts in helping to launch our new IARLJ Regional Chapter for Africa but also for their ongoing sustaining support.

A NEW IARLJ REGIONAL CHAPTER FOR AFRICA

Proposed Draft for Plan of Action

This document outlines, in broad terms, how a “Plan of Action” for the new IARLJ Regional Chapter for Africa can be formulated at its Founding Meeting and be used by the new IARLJ Africa Chapter to guide its activities in the immediate and short-term. It also highlights some possible key areas of activity of the new IARLJ Regional Chapter for Africa and outlines a series of meetings, which will be held over the next six months, to assist the new IARLJ Africa Chapter grow and develop.

Founding Meeting

The first order of business will be to establish, formally, the new IARLJ Regional Chapter for Africa. The Founding Meeting of the new IARLJ Regional Chapter for Africa is intended to do precisely this by reviewing and approving a number of key draft documents that will be central to the new IARLJ Africa Chapter, including:

- A draft “Statement of Purpose,” and;
- A “Governance” Document.

The Founding Meeting will systematically review each of these documents. All those judges and decision-makers present in Pretoria will be asked to provide their comments and suggestions for how these draft documents should be improved, altered or amended. After these draft documents have been fully discussed, debated and revised, participants will be asked whether they should be accepted.

After the “Statement of Purpose” and the “Governance” documents, as amended, are accepted, it is proposed that the participants at the Founding Meeting should then breakout into various Committees. The Founding Meeting participants will be asked to choose a Committee that they would be willing to serve on for the purposes of examining a particular functional area of the Regional Chapter, such as, Professional Development, Communications, Membership, Regional Conferences, and Fundraising. Each of these functional Committees will be asked to select someone from their group to report on the outcome of their discussions and deliberations and any recommended course of action.

In the plenary session that immediately follows the functional Committee meetings, the rapporteur selected from each committee will be asked to make a brief presentation on the outcome of their Committee's discussions and deliberations and any recommended course of action. The recommendations of each of these functional Committees could then form the basis for the new IARLJ Africa Chapters' suggested "Plan of Action" for the immediate and short-term.

Ratification of the new IARLJ Regional Chapter for Africa

Once these three central documents of the new IARLJ Regional Chapter for Africa are accepted, as amended, by the Founding Meeting, they will then be presented to the IARLJ Executive and Council for their review, consideration and, hopefully, acceptance. It will be absolutely essential for the IARLJ Executive and Council to accept fully the three central documents of the new IARLJ Africa Chapter: the "Statement of Purpose," the "Governance" document; and, its proposed "Plan of Action."

Once accepted by the Founding Meeting of the new IARLJ Regional Chapter for Africa, these three key documents should be tabled immediately with the IARLJ Executive and Council for their consideration at their next meeting. As it so happens, an IARLJ Executive and Council meeting is being planned to take place this October in Europe. The consideration and discussion of the IARLJ Africa Chapter's key documents should be one of the items on the agenda for this meeting.

Assuming that the IARLJ Executive and Council endorse and accept these three key documents of the new IARLJ Regional Chapter for Africa, it is suggested that these documents can then be tabled for all IARLJ members to consider. These key documents of the IARLJ Africa Chapter can then be posted on the IARLJ's website under "Regional Chapters." Moreover, it is further anticipated that these three key documents, so endorsed and accepted by the IARLJ Executive and Council, will then be presented by the IARLJ Executive and Council, at the Association's next General Meeting, that will be held at the 7th IARLJ World Conference in Mexico City.

The next General Meeting of the IARLJ will be held on Thursday, November 9th, 2006, in Mexico City. A motion will be presented by an IARLJ Executive member to have the documents ratified by the General Meeting of the IARLJ and seconded by an IARLJ member from Africa. Once the General Meeting of the IARLJ carries this motion, then these three key documents of the IARLJ Africa Chapter will be fully ratified by the Association.

Building a New IARLJ Regional Chapter for Africa

No matter how successful our meetings in Pretoria prove to be, we do not expect that our new IARLJ Regional Chapter for Africa will emerge fully formed without further effort and support. Indeed, we anticipate that the new IARLJ Regional Chapter will take continuous dedicated effort on the part of its current members and build gradually as it recruits new members and partners over the next few years. To cultivate and nurture this process we propose the following series of meetings for the new IARLJ Regional Chapter for Africa in order to facilitate and accelerate its further growth and development.

Regional Chapter Meetings at the 7th IARLJ World Conference in Mexico City

The next IARLJ World Conference will be held in beautiful Mexico City. On Wednesday, November 8th, Day Two of the 7th IARLJ World Conference, a full three hours will be dedicated to IARLJ Regional Chapter meetings. The first two hours will be dedicated to individual Regional Chapter meetings. The third hour will be a plenary session that will allow the respective heads of each of the Regional Chapters, Europe, Americas, Australasia, and Africa, to provide a brief report on the discussions and deliberations that were held in each of the Regional Chapter meetings.

There are a number of efforts underway currently to try and raise sufficient funds to ensure that as many judges and decision-makers from Africa as possible will be able to attend the Mexico City IARLJ World Conference and, therefore, be able also to participate in their Regional Chapter's meeting. We believe that it is important to have a strong contingent of judges and decision-makers from Africa at our Mexico City IARLJ World Conference. This will not only provide an excellent opportunity for our members from Africa to get together not only with their colleagues in all parts of Africa, but also all parts of the globe. It will also allow our members in Africa to be able to learn from each other's respective experiences. Moreover, it will provide a further opportunity for the Management Committee of the new IARLJ Regional Chapter for Africa to meet, to strategize and to plan the further growth and development of the newest Regional Chapter in the IARLJ.

Africa Seminar, Trinity College Dublin, Ireland

Europe Chapter Convenor, Eamonn Cahill, and Professor William Benchy, School of Law, Trinity College Dublin, Ireland, have received funding from the Irish Government to hold a seminar for senior African judges and members of the new IARLJ Africa Chapter at Trinity College Dublin, in the spring of 2007. This will be a further opportunity for judges and decision-makers from Africa to come together as the new IARLJ Regional Chapter for Africa.

The Trinity College Dublin Africa Seminar will also be an opportunity for the IARLJ Africa Chapter members to meet jointly with the members of the IARLJ Executive and Council and help to plan and to organize future activities in Africa. Chief among these will be to give serious consideration to a first Africa Chapter Conference. It is anticipated that the IARLJ Africa Chapter would be a position to hold its First Conference before the end of 2007.

We consider the Trinity College Dublin Africa Seminar as a key step in the development of a viable and vibrant IARLJ Africa Chapter.

Meeting with the African Court of Human and People's Rights in Arusha, Tanzania

The recent establishment of the African Court of Human and People's Rights marks an important milestone in the advancement and protection of human rights, including, of course, refugee rights, throughout Africa. We are very fortunate in having two of our most senior members on the African Court of Human and People's Rights, the Right Honourable Justice Dr. George Kanyiehamba, Supreme Court of Uganda, and Judge President Bernard Ngoepe, High Court Transvaal Division, Republic of South Africa. Following the official swearing-in ceremonies of the eleven new Justices of the African Court of Human and People's Rights on July 2nd, 2006, in Banjul, The Gambia, it was announced that the new court would be located in Arusha, Tanzania.

Working closely with the African Union (AU), we hope that the new IARLJ Africa Chapter will be able to arrange a meeting with the African Court of Human and People's Rights, once it settles into its new chambers in Arusha. These meetings will provide a further opportunity for the Management Committee of the new IARLJ Africa Chapter to meet and discuss their activities and plans for further developing and building the IARLJ Africa Chapter.

It will also provide an opportunity for the Management Committee of the new IARLJ Africa Chapter to meet with senior officials of the AU and to discuss the feasibility of cooperating on future projects of mutual interest.

A Plan of Action for a New IARLJ Africa Chapter

These three proposed meetings, following immediately after our Founding Meeting in Pretoria, and held over a reasonably short period of time, will help to sustain the momentum and enthusiasm generated by our Pretoria, South Africa, meetings. It will also help to maintain the focus of the new IARLJ Africa Chapter on building its membership and other essential activities, such as, professional development and capacity building.

There will, of course, be other opportunities to help build and develop the new IARLJ Regional Chapter for Africa. We fully expect that the members of the new IARLJ Regional Chapter for Africa to set their own course and to build their Regional Chapter consistent with their own "Statement of Purpose" and the overall objectives of our international Association.

As noted above the Founding Meeting is, in part, designed to facilitate the planning process for the new IARLJ Regional Chapter for Africa. At the conclusion of the Founding Meeting, the minutes of the meeting should show that a number of suggestions were presented and endorsed, by those who were present, on what the new IARLJ Africa Chapter ought to be doing in the areas of Professional Development, Communications, Membership, Regional Conferences, and Fundraising. These suggestions could then be incorporated in a more detailed "Plan of Action" that the new IARLJ Africa Chapter can follow in the immediate and short-term.

IARLJ NEW REGIONAL CHAPTER FOR AFRICA

Pretoria “Plan Of Action”

At the Pretoria, South Africa, Founding Meeting of the new IARLJ Regional Chapter for Africa, on September 26th, 2006, those in attendance formulated a number of suggestions for a possible course of action for the new IARLJ Africa Chapter in three functional areas: Funding; Professional Development; and, Membership.

This document should be read in conjunction with the Proposed Draft Plan of Action for a new IARLJ Regional Chapter for Africa that was distributed in Pretoria, as one of the three key documents for consideration at the Founding Meeting.

Funding

It was suggested that there are various possible sources of funding for the new IARLJ Africa Chapter. One primary source of funds could be governments. It was suggested that IARLJ members could approach their respective Departments of Home Affairs for funding. The UNHCR could be approached to lend assistance in helping with obtaining funding from these governments. The African Union was also seen as a potential source of funds.

To help with raising funds for the new IARLJ Africa Chapter it was suggested that a Fundraising Committee be established to oversee the raising of funds.

Other suggestions that were proposed for raising funds were through cultural and sporting events, approaching Western donors, and through the investment of funds, once acquired.

Professional Development

It was suggested that professional development should be an ongoing process. By necessity the focus should be on those who are on “the front line,” judges and quasi-judicial decision-makers. Clearly, the main areas to be covered would be the OAU Convention and norms. The training should also be practically oriented and related to conditions that are taking place “on the ground.” The concentration should also be on asylum seekers and internal displaced persons.

It was also suggested that there needed to be sessions for “training the trainers.” In order to market the training programmes for the new IARLJ Africa Chapter, it was suggested that there should be a booklet. This booklet should outline the types of training that the new IARLJ Africa Chapter could offer.

The professional development programmes for Africa should seek to foster conformity in processes. The great diversity in asylum and refugee laws throughout Africa should be brought “in line.”

IARLJ Africa Chapter training programmes should draw upon local expertise, whenever possible.

Membership

In order to promote new membership in the IARLJ and its new Africa Chapter, it was suggested that letters should be sent to all the Chief Justices in African states asking them to nominate their members to join our Association. It was also suggested that the respective judiciaries in Africa should pay for the membership fees of judges who join our Association.

It was agreed that expanding the membership of the IARLJ and its new Africa Chapter should be one of its principal priorities.

Justice Katelijne Declerck, Vice-President of the IARLJ

I would like to say a few thank you words now. Don't you worry, it will be short. However, you must admit that being received in such a beautiful and historical venue does not leave us untouched.

Thank you Sinor Lauro Lopez, Subsecretary of Population, Migration and Religious Affairs for receiving us in such an amazing surrounding. The Chapultepec Castle is a monument in which many important historical events took place and we feel privileged to be here. We would lack modesty to think that we could also become a small part of its history. However, I am sure that this event and your invitation for this superb dinner will stay a part of our personal memories.

Thank you again and may we also ask you to pass our thanks to the other members of the Mexican Government and the head of Departments who made it possible to hold our 7th Biennial World Conference of the International Association of Refugee Law Judges.

Palabras del Ingeniero Lauro López Sánchez Acevedo Subsecretario de Población, Migración y Asuntos

SEÑORA KATELIJNE DECLERCK

Vicepresidenta de la Asociación Internacional de Jueces Del Derecho de Refugiados (IARLJ)

SEÑORA ERIKA FELLER

Alta Comisionada Adjunta para la Protección de Refugiados de la Organización de las Naciones Unidas

DOCTORA NORMA DOLORES SABIDO PENICHE

Coordinadora General de la Comisión Mexicana de Ayuda a Refugiados

Distiguídos delegados y asistentes a esta conferencia

El día de hoy que están finalizando los trabajos de la Séptima Conferencia Mundial de la Asociación Internacional de Jueces del Derecho de Refugiados es, sin duda, un momento propicio para felicitar a todos ustedes por el éxito que ha tenido esta reunión.

Los temas que se analizaron en cada una de las sesiones, a lo largo de estos tres días, reflejan la preocupación que las instituciones del Derecho Internacional están teniendo en torno a los complejos fenómenos que se presentan, de forma creciente, en materia de asilo y de refugio, en prácticamente todas las regiones de la tierra.

Reitero lo que señaló el Señor Secretario de Gobernación, Don Carlos Abascal, en la ceremonia de inauguración, en el sentido de que para México es un gran honor el haber tenido la oportunidad de ser la sede de este evento de carácter internacional, en el que se trataron cuestiones que para nuestro país son muy significativas, ya que la historia de nuestra nación nos presenta ejemplos de la alta calidad humana del pueblo mexicano, pues en innumerables ocasiones esta tierra ha brindado asilo y refugio a nutridos contingentes de extranjeros, que por motivos de persecución o graves disturbios en sus países han llegado a nuestras fronteras.

Por ello, esta reunión mundial de la Asociación Internacional de Jueces del Derecho de Refugiados, representa para nosotros un acontecimiento sobresaliente, en el que la Secretaría de Gobernación, por conducto de la Coordinación de la Comisión Mexicana de Ayuda a Refugiados, ha puesto su mejor empeño en la realización del evento y para el buen logro de sus metas y objetivos.

Deseamos a ustedes que concluyan su estancia en México de forma agradable y satisfactoria, y de nueva cuenta les externo mi reconocimiento y mis congratulaciones por los esfuerzos que vienen realizando a nivel internacional para lograr que se conozcan y se difundan en las diversas regiones de la tierra, las mejores prácticas y el tratamiento justo a quienes se ven precisados a pedir refugio.

En México estamos comprometidos, y lo seguiremos haciendo, por buscar acciones eficaces que redunden en un pleno respeto a los derechos humanos de los asilados y de los refugiados. El gobierno mexicano tiene como una tarea prioritaria, la de velar porque se auxilie a los refugiados y se les integre cabalmente a nuestra sociedad.

Muchas felicidades y que tengan buen retorno a sus países.

Muy buen provecho
Gracias.