

On the Development of the Concept of ‘Persecution’ in International Refugee Law

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Resumo

Este artigo traça o desenvolvimento do conceito de “perseguição” dentro do Direito Internacional dos Refugiados. Após uma reflexão, o artigo analisa o desenvolvimento doutrinário e jurisprudencial do conceito de “perseguição” e identifica seus elementos centrais.

Abstract

This article tracks the development of the concept of ‘persecution’ in International Refugee Law. After a historical reflection, the article analyses the doctrinal and jurisprudential development of the concept of ‘persecution’ and identifies its core elements.

Initial Remarks

The existence of ‘refugees’ dates back to time immemorial. Their internationally accepted legal definition, however, was only developed in mid-20th century and is reflected in the Convention relating to the Status of Refugees¹.

The refugee definition applied today by most countries is based on the 1951 Convention; but just like the Convention refugee definition builds upon the experience and events which occurred between the First and Second World Wars and the immediate post-1945 period, in subsequent decades the interpretation of the refugee definition has progressively developed.

A key aspect of the refugee definition is the notion of ‘persecution’. Although the term ‘persecution’ is not codified under International Refugee Law, it has evolved significantly by means of doctrine and case law.

This article tracks the development of the concept of ‘persecution’ in International Refugee Law. The first three sections of the article show that although the notion of ‘persecution’ did not figure explicitly in interwar refugee instruments, it started to become apparent at that time; that in the immediate post-1945 period the notion of ‘persecution’ began to take a normative form as one of the ‘valid objections’ that

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¹ See 189 *United Nations Treaty Series [UNTS]* (1954), pp. 137-221; hereinafter “1951 Convention”.

would justify a refugee's resolve not to return to his or her country of origin, and hence a need for international protection; and that the 1951 Convention consolidated the importance of the notion of 'persecution' *vis-à-vis* the refugee definition. After this historical reflection, the article analyses the doctrinal and jurisprudential development of the concept of 'persecution' and identifies its core elements by answering the following questions: *Who* carries out the persecution and *who* is considered a victim of persecution? *How* is it carried out? *What* are the putative reasons advanced as grounds for persecution? *When* is it carried out? *Which* rights are (to be) violated in cases of persecution?

Inter-war period

Although refugees have been a common feature of European history, it was not until after the First World War and particularly following the 1917 Revolution in Russia and the exchange of populations between Greece and Turkey that this continent was faced for the first time with massive flows of refugees amounting to millions in need of international protection. Several international legal instruments dealt directly or indirectly with the legal and logistical aspects regarding their situation².

Russian refugees were mostly denationalised and numbered between 1,500,000 and 2,000,000 persons³. The League of Nations decided to act on their behalf and on November 1st, 1921, Dr. Fridtjof Nansen took office as High Commissioner for Russian Refugees⁴. On the July 5th, 1922 an agreement⁵ was concluded with a view to protecting Russian refugees by means of documenting them. A definition of who should be considered a Russian refugee was not given.

An influx of some 300,000 to 400,000 Armenian refugees mainly to Europe in the early 1920s prompted the League of Nations to assist them. They came under the *ratione personae* jurisdiction of Dr. Nansen's office. Between May 10th and 12th, 1926 a Conference regarding Russian and Armenian refugee questions was convened in Geneva. The result was the conclusion of an international instrument on the issuance of identity documents to both Russian and Armenian refugees⁶. Beneficiaries were defined as follows:

2 See, *inter alia*, "Agreement between the Latvian Democratic Republic and the Ukrainian Socialist Soviet Republic Regarding the Repatriation of Latvian Refugees who are at Present in the Territory of the Latter", 17 *League of Nations Treaty Series [LNTS]* (1923), pp. 306-315; "Protocol Relating to the Settlement of Refugees in Greece and the Creation for this Purpose of a Refugees Settlement Commission", 20 *LNTS* (1923), pp. 29-39; "Declaration Relating to the Settlement of Refugees in Greece and the Creation for this Purpose of a Refugees Settlement Commission", 20 *LNTS* (1923), p. 43; "Treaty of Peace", 28 *LNTS* (1924), pp. 13-113; "Additional Act to the Protocol of September 29, 1923, Relating to the Settlement of Greek Refugees", 30 *LNTS* (1924-25), pp. 413-419; "Convention concerning the Exchange of Greek and Turkish Populations and Protocol", 32 *LNTS* (1925), pp. 75-87; "Declaration of Amnesty and Protocol", 36 *LNTS* (1925), pp. 145-151; and "Protocol Concerning the Settlement of Refugees in Bulgaria", 58 *LNTS* (1926), pp. 245-257.

3 For a survey of several estimates regarding the Russians who left Russia in late 1910s and early 1920s, see G. Ginsburgs, "The Soviet Union and the Problem of Refugees and Displaced Persons 1917-1956", 51(2) *American Journal of International Law* (1957), p. 326.

4 Cf. G.J. van Heuven Goedhart, "The Problem of Refugees", 82(1) *Recueil des Cours de l'Académie de Droit International* (1953), p. 271; and J.H. Simpson, *The Refugee Problem: report of a survey*, London, Oxford University Press/Royal Institute of International Affairs, 1939, p. 200.

5 See "Agreement with Regard to the Issue of Certificates of Identity to Russian Refugees", 13 *LNTS* (1922), pp. 237-242.

6 See "Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, supplementing and amending the previous Arrangements dated July 5, 1922, and May 31, 1924", 89 *LNTS* (1929), pp. 47-52.

Russian [refugee]: Any person of Russian origin who does not enjoy or no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.

Armenian [refugee]: Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality⁷.

In the late 1920s other groups of refugees needed international protection. Hence on June 28th, 1928 a Conference was convened in Geneva by the League of Nations High Commissioner for Refugees. In execution of a resolution previously adopted on June 7th, 1928 by the Council of the League of Nations, the governments represented at the conference decided to adopt an international instrument⁸ by which the measures on behalf of the Russian and Armenian refugees would be extended to other groups of refugees so defined:

Assyrian, Assyro-Chaldaeian and assimilated refugee. Any person of Assyrian or Assyro-Chaldaeian origin, and also by assimilation any person of Syrian or Kurdish origin, who does not enjoy or no longer enjoys the protection of the State to which he previously belonged and who has not acquired or does not possess another nationality;

Turkish refugee. Any person of Turkish origin, previously a subject of the Ottoman Empire who under the terms of the Protocol of Lausanne of July 24, 1923, does not enjoy or no longer enjoys the protection of the Turkish Republic and has not acquired another nationality⁹.

These four definitions merit comment. Firstly, they were embodied in non-binding instruments and hence did not have legal force between the parties, since the agreements were not treaties but rather mere recommendations¹⁰. Secondly – and most notably for the purpose of this article – not one of the four definitions of a ‘refugee’ made any mention of ‘persecution’. While ‘lack of protection’ is offered as a criterion for granting refugee status, ‘lack of protection’ did not imply or even import ‘persecution’ for definitional purposes¹¹. Nor was there in these definitions any constituent element that could be directly related to persecution.

Until the mid-1930s there had been no development of a general, more comprehensive definition of ‘refugee’. At its Brussels session in 1936, *L’Institut de Droit International* defined a ‘refugee’ as any person who, because of political events arising in the state of which he is a national, has left or remains outside the territory

⁷ *Ibid.*, p. 49; emphasis in the original.

⁸ See “Arrangement concerning the Extension to other Categories of Refugees of certain Measures taken in favour of Russian and Armenian Refugees”, 89 *LNTS* (1929), pp. 63-67.

⁹ *Ibid.*, pp. 65 and 67; emphasis in original.

¹⁰ Some French courts, however, dissented from this understanding; in this regard, see J.H. Simpson, *op. cit. supra*, p. 244.

¹¹ It may be inferred from the drafting history of the ‘refugee’ definition that the term ‘protection’ meant ‘diplomatic protection’, i.e. the protection accorded by States to their nationals abroad, and not the protection that the State must provide within its territory to victims or potential victims of persecution; see A. Fortin, “The Meaning of ‘Protection’ in the Refugee Definition”, 12(4) *International Journal of Refugee Law* (2000), pp. 548-576. Although this interpretation of the term ‘protection’ may be challenged nowadays, it can be concluded by the analysis of the *travaux préparatoires* that in the 1920s ‘lack of protection’ was not indeed tantamount to ‘persecution’.

of that state, has not acquired another nationality and *does not enjoy the diplomatic protection* of another state¹². The 'lack of protection' standard still prevailed.

It was only in 1938 that a criterion of 'persecution' first appeared in an international legally binding instrument. Article 1 of the Convention Concerning the Status of Refugees coming from Germany¹³, signed in Geneva on February 10th, 1938, stated that

1. For the purpose of the present Convention, the term 'refugees coming from Germany' shall be deemed to apply to:
 - (a) Persons possessing or having possessed German nationality and not possessing another nationality who are proved not to enjoy, in law or in fact, the protection of the German Government;
 - (b) Stateless persons not covered by previous Conventions or Agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German government.
2. Persons who have left Germany for *reasons of purely personal convenience* are not included in this definition¹⁴.

The first part of the Convention follows the pattern of the previous instruments by generally defining as a 'refugee' someone who no longer enjoys the protection of his or her state of nationality, nor has become a national of another state. The difference in Article 1 of the 1938 Convention, as opposed to the preceding instruments, is that it has a differently worded *exclusion clause*, which leaves out from the definition of 'refugee' persons who left Germany for *reasons of purely personal convenience*, and not merely those who have acquired another nationality.

By including this newly-worded exclusion clause, its drafters singled out for the first time the *forced migration character* of refugee status. In previous definitions forced migration was not an explicit let alone a fundamental element of the definition. Undoubtedly the intention of this new wording was to insert – albeit timidly – in the definition of 'refugee' the reasons which prompted both the flight¹⁵ and the lack of – and therefore the need for substitutive – protection. In doing so the component 'persecution' surfaced, although implicitly.

From the summary records of the Inter-Governmental Conference of 1938, which adopted the Convention, it is quite clear that a condemnation of German policies at that time was exactly what the Conference wanted to make¹⁶. The discussions that took place in the Inter-Governmental Conference clearly indicate that the persons envisaged by the exclusion clause of paragraph 2 of Article 1 were those "who had left Germany for economic reasons but without being compelled to do so, or [who]

12 "Tout individu qui, en raison d'événements politiques survenus dans son Etat d'origine, fuit le territoire de cet Etat, soit qu'il quitte le pays volontairement ou sous le coup d'une expulsion, soit que, séjournant à l'étranger, il n'y revienne pas, et qui, au surplus, n'a pas acquis d'autre nationalité et ne jouit pas de la protection diplomatique d'un autre Etat"; see "Projet de Résolutions et Commentaires", in *Annuaire de l'Institut de Droit International* (1936), p. 46.

13 See 192 *LNTS* (1938), pp. 59-81; hereinafter "1938 Convention".

14 *Ibid.*, p. 63; emphasis added.

15 Cf. P. Hartling, *Concept and Definition of 'Refugee' – legal and humanitarian aspects* (II Nordic Seminar on Refugee Law, Copenhagen, 23.IV.1979), Geneva, UNHCR, 1979, p. 3 (mimeo), and *ibid.*, 48(1/4) *Nordic Journal of International Law* (1979), pp. 126-127.

16 L.N. Doc. Conf. C.S.R.A./P.V.4, p. 10, *apud* G. Melander, "The Protection of Refugees", 18 *Scandinavian Studies in Law* (1974), p. 160.

had gone abroad in order to evade taxation”¹⁷, and therefore not the victims of race- or politically-based economic sanctions or proscription imposed by the Nazi regime.

The association which one finds in the 1938 Convention between the refugee’s flight and the requirement that the flight cannot be based on reasons of purely personal convenience has significantly evolved since. In the 1938 Convention the inclusion clause does not mention the reasons on which flight *is* grounded; it rather makes reference to two reasons which are *not* to be taken into account when recognizing someone as a refugee – namely personal convenience and protection by another state. In the ensuing instruments the reason justifying the need for protection evolved gradually until its current construction emerged, i.e. ‘well-founded fear of persecution’. In this process the 1938 Convention played an important role. As one leading commentator puts it, “the relationship between the concept of ‘well-founded fear of being persecuted’ with the concept of reasons other than those ‘of purely personal convenience’ in the 1938 Convention is apparent”¹⁸.

During the Second World War the Allies realized the need to establish an organization aimed *inter alia* at assisting persons displaced on account of the conflict, and at carrying out a major international reconstruction and rehabilitation program. On November 9th, 1943 the Charter of the United Nations Relief and Rehabilitation Administration (UNRRA), the very first international organization to incorporate the words ‘United Nations’ in its title, was signed¹⁹.

Once established, the UNRRA was confronted with the question of its *ratione personae* competence, i.e. of who was eligible for its assistance. The uprooted were divided into three categories, refugees being one of them²⁰. Refugees were initially defined as persons who had left their native countries of their own free will to escape persecution or the ravages of war²¹. Soon after, the definition was extended to “other persons who have been obliged to leave their country or place of origin or former residence”²². This wording displeased the Eastern European countries as too far-reaching and was heavily criticized by them. The refugee policy of the UNRRA established by interpretation of Resolution 71 was focused on individual as distinct from group concerns²³ which prevailed in the 1920s and 1930s. The policy was further narrowed by a July 1946 directive²⁴ which required applicants of post-war refugee status to establish “concrete evidence” of persecution before being admitted to the care of UNRRA. As a result, only persons suffering objectively demonstrable incompatibility with their state of origin could receive the benefits of refugee status²⁵.

17 Cf. *Provisional Minutes of the International Conference for the Adoption of a Convention concerning the Status of Refugees coming from Germany*, League of Nations Doc. Conf./C.S.R.A./P.V.1-4 (1938), *apud* J.C. Hathaway, *op. cit. supra*, p. 365.

18 Cf. A. Grahl-Madsen, *op. cit. supra*, p. 216.

19 It existed until 1946, when its mandate was taken over by newly established UN organs.

20 Cf. J.G. Stoessinger, *The Refugee and the World Community*, Minneapolis, University of Minnesota Press, 1956, pp. 49-51.

21 UNRRA Council Resolutions on Policy, Resolution 40, July 1945, p. 9; *apud ibid.*, p. 49.

22 UNRRA Resolution 71, *UNRRA Journal* (1945), p. 152; *apud* J.C. Hathaway, *op. cit. supra*, p. 373.

23 J.C. Hathaway, *op. cit. supra*, p. 377.

24 UNRRA European Region Order 40(1), 3 July 1946; *apud ibid.*, p. 373.

25 J.C. Hathaway, *op. cit. supra*, pp. 373-374.

Under the UNRRA regime applications for refugee status were to be *individually determined*. Such status was to be granted to those who succeeded in objectively demonstrating that they were victimized by persecution. Hence the trend to define a refugee as someone who had been persecuted as an individual, due to his or her particularities, and no longer for being a member of a collectivity, was gaining ground.

The majority of refugees entitled to international assistance and protection between the world wars were victims of international and non-international armed conflict. It is significant that the international instruments which were initially adopted termed as 'refugees' persons coming from a certain origin, i.e. Russian, Armenian, Assyro-Chaldaeian and Turkish. There was no individual criterion in the definition. In the era of the League of Nations, refugees were outside their former home countries for a variety of reasons which may or may not have amounted to 'persecution' as this term is now understood²⁶.

In conclusion, it may be stated that the notion of 'persecution' did not figure explicitly in pre-Second World War international instruments relating to refugees. It was, however, in the inter-war period that the notion of 'persecution' became apparent – though implicitly – as a constituent element in the definition of a 'refugee'.

Immediate post-1945 period

The term 'persecution' first figured in the draft Constitution of the International Refugee Organization (IRO). It was introduced by the Special Committee on Refugees and Stateless Persons, established by the United Nations Economic and Social Council (ECOSOC) in 1946. Its purpose was to define the 'valid objections' which would entitle a refugee not to return to his or her country of origin and thus become the concern of the Organization. Hence the notion of 'persecution' was not introduced in order to restrict the 'refugee' concept as hitherto understood²⁷. It had come to play a vital role in the question of the recognition of refugeehood, and had been added to the prewar requirement that a person enjoyed no protection from his or her own country.

The records of the Special Committee do not indicate why this particular term – 'persecution' – was chosen²⁸. Some observers assert that since the intention was to protect persons from countries under Communist domination, the definition was meant to describe the situation in those countries – thus a strong political element had been inserted when defining the term 'refugee'²⁹.

Annex I, Part I, Section A (Definition of Refugees) to the IRO Constitution³⁰, which was open for signature on the 15th of December 1946, defined a 'refugee' *inter alia* as someone

26 Cf. I.C. Jackson, "The 1951 Convention relating to the Status of Refugees: a universal basis for protection", 3(3) *International Journal of Refugee Law* (1991), p. 405.

27 *Ibid.*, p. 406.

28 *Ibid.*, p. 405.

29 Cf. G. Melander, "The Concept of the Term 'Refugee'", in A.C. Bramwell (ed.), *Refugees in the Age of Total War*, London, Unwin Hyman, 1988, p. 9.

30 "Constitution of the International Refugee Organization and Agreement on interim measures to be taken in respect of refugee and displaced persons", 18 *UNTS* (1948), pp. 3-24.

3. [...] who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of nazi [*sic*] *persecution* and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.³¹

Apart from meeting the inclusion clauses of the IRO Constitution, to become the concern of the Organization refugees should

3. [...] have definitively [...] expressed *valid objections* to returning to those countries [of nationality or former habitual residence].

(a) The following shall be considered as *valid objections*:

- (i) *persecution*, or fear, based on reasonable grounds of *persecution* because of race, religion, nationality or political opinions [...].

(iii) [...] compelling family reasons arising out of previous *persecution* [...]³².

The complexity of the definitional provisions was the result of an attempt to reconcile the divergent views of Member States voiced in a myriad of organs and committees which participated in the eighteen-month drafting process³³. Ultimately, the definitions laid down in the IRO Constitution were regarded as a “mixture of geographic or pragmatic and ideological concepts”³⁴. Some commentators assessed them as artificial and formalistic, having stated that in practical application many of these definitions were very often broken down³⁵.

This rather pessimistic appraisal should not prevail. In fact, the definition of ‘refugee’ laid down in the IRO Constitution represented a two-fold innovation, namely the *individualisation* of the term ‘refugee’³⁶, and the listing of the *reasons upon which persecution was grounded*, which had never been spelt out in full before. Association of those reasons with a partly subjective element, namely ‘fear’, based on well-founded grounds of persecution, was further innovative. Consequently, from then on, every refugee would have to substantiate the fear he or she invoked by providing some proof based both on objective data and on the personal factors which made him or her fear persecution in the future, even if he or she had not been persecuted in the past³⁷.

It must be noted that this innovation was incorporated *mutatis mutandis* by the Universal Declaration of Human Rights, which spelt out in its Article 14.1: “Everyone has the right to seek and to enjoy in other countries asylum from *persecution*”³⁸.

Although some 1,600,000 refugees and displaced persons had benefited from the IRO’s *ratione personae* mandate, its planned extinction was to leave some 410,000 persons in

31 *Ibid.*, p. 18; emphasis added.

32 See Annex I, Part I, Section C (Conditions under which ‘refugees’ and ‘displaced persons’ will become the concern of the Organization), *ibid.*, p. 19; emphasis added.

33 J.C. Hathaway, *op. cit. supra*, p. 374.

34 Cf. P. Hartling, *op. cit. supra*, p. 4 and p. 127, respectively.

35 Cf. D.B. Fowler, “The Developing Jurisdiction of the United Nations High Commissioner for Refugees”, 7(1) *Revue des Droits de l’Homme* (1974), p. 124.

36 The collective aspect of the ‘refugee’ phenomenon ceased to be decisive in granting refugee status, emphasis being placed henceforth on the situation of the individual.

37 Cf. S. Aga Khan, “Legal Problems relating to Refugees and Displaced Persons”, 149(1) *Recueil des Cours de l’Académie de Droit International* (1976), p. 297.

38 See UN GA Res. 217, adopted on December 10th, 1948; emphasis added.

need of protection and assistance³⁹. Accordingly, shortly before the winding up of the IRO⁴⁰, the preparations for the establishment of the Office of the UNHCR began.

On December 3rd, 1949 the United Nations General Assembly [UN GA] decided to establish a High Commissioner's Office for Refugees as of January 1st, 1951⁴¹. On December 14th, 1950 the UN GA adopted Resolution No. 428 (V), which embodied the Statute of the UNHCR. Under Chapter II (Functions of the High Commissioner), it is laid down that

6. The competence of the High Commissioner shall extend to:

[...]

(ii) Any person who [...] owing to well-founded fear of being *persecuted* for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such a fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country [...]⁴².

Strictly construed, the UNHCR Statute's definition of 'refugee' calls for individualised determination of eligibility of refugee status based upon an evaluation of the subjective and objective elements necessary to establish a well-founded fear of persecution. The subjective element requires that the fear be well-founded in the sense that it is sincere and reasonable rather than feigned or imaginary.

From a logistical standpoint, the need to establish a well-founded fear of persecution on an individualised, subjective basis risked restriction of UNHCR's ability to aid large groups of refugees. This was especially the case where a lack of huge administrative machinery rendered impracticable a procedure for determining the individual eligibility of all the members of large groups of refugees⁴³. Over the years UNHCR, acting as pragmatism dictates, has found it necessary to bypass its statutory restrictions. It no longer confines itself to the original definition of 'refugee' and to its criterion of 'well-founded fear of persecution': since the mid 1970s the UN GA has broadened the mandate of the UNHCR⁴⁴. The conduct of a large number of refugee-receiving states has not, however, matched the UN GA's magnanimity.

The innovation of the IRO was therefore being irradiated to several international instruments. Apart from the Universal Declaration of Human Rights and the UNHCR Statute, this was also the case with the 1951 Convention, as will be seen below.

39 Cf. M. Moussalli, "The Evolving Functions of the Office of the High Commissioner for Refugees", in V. Gowlland & K. Samson (eds.), *Problems and Prospects of Refugee Law* (Colloquium of Geneva, 23-24.V.91), Geneva, Graduate Institute of International Studies, 1992, p. 85.

40 The IRO concluded its operations on behalf of refugees and displaced persons on January 31st, 1952 and went on liquidation on March 1st, 1952; cf. L.W. Holborn, *The International Refugee Organization – a specialized agency of the United Nations. Its history and work, 1946-1952*, Oxford, Oxford University Press, 1956, p. 565.

41 See UN GA Res. No. 319 (IV).

42 Statute of the Office of the United Nations High Commissioner for Refugees, UN Doc. A/1775 (1950), in *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, Vol. 1, Geneva, UNHCR, 2007, p. 6.

43 D. Hull, "Displaced Persons: the new refugees", 13(3) *Georgia Journal of International and Comparative Law* (1983), p. 765.

44 Cf. J.I. Garvey, "Toward a Reformulation of International Refugee Law", 26(2) *Harvard International Law Journal* (1985), p. 489. See, *inter alia*, UN GA res. 3143 (XXVIII), 14 December 1973; UN GA res. 1673 (XVI), 18 December 1961; UN GA res. 2294 (XXII), 11 December 1967; UN Economic and Social Council [ECOSOC] Res. 2011 (LXI), 2 August 1976; UN GA res. 31/55, 30 November 1976; UN GA res. 36/125, 14 December 1981; UN GA res. 44/150, 15 December 1988; and UN GA res. 48/118, 20 December 1993.

The 1951 Convention

Right after the commencement of the activities of the UNHCR on January 1st, 1951 an obvious need was recognised for a legally binding normative framework both defining the term ‘refugee’ and listing their rights and duties. Following the UN Conference of Plenipotentiaries held in Geneva from July 2nd to 25th, 1951 for the purpose of drafting a new international instrument, the text of the 1951 Convention was adopted on July 28th that year and entered into force on April 22nd, 1954.

Article 1 (Definition of the term ‘refugee’) of the 1951 Convention laid down in its inclusion clauses *inter alia* that

A. For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who:

[...]

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.⁴⁵

Two comments are appropriate. Firstly, it must be noted that Western states, which initially saw the admission of refugees to be consistent with their more general political goals, found the persecution-based definition to be quite capable of embracing virtually all *émigrés* from the socialist states of Europe. Moreover, determining that refugees faced ‘persecution’ in their state of origin supported efforts to ascribe inappropriate behavior to the ideological adversaries of the East⁴⁶. It may be thus accurately stated that in a widely prevalent Western view of the time, refugee movements were good, as long as they provided the receiving countries with the means of attacking an adversary as well as manpower for reconstruction and development⁴⁷.

Secondly, Article 1A(2) was originally intended to deal exclusively with existing refugees. The concept of ‘refugees’ whom the 1951 Convention was initially designed to protect was therefore very limited and not at all universal, but rather European. The phrase “as a result of events occurring before 1 January 1951” was retained until the adoption of the Protocol Relating to the Status of Refugees⁴⁸, by which the temporal clause was eliminated⁴⁹.

⁴⁵ Emphasis added.

⁴⁶ Cf. J.C. Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law”, 31(1) *Harvard International Law Journal* (1990), p. 169.

⁴⁷ G. Coles, *The Human Rights Approach to the Solution of the Refugee Problem: a theoretical and practical enquiry* (Mar. 1988) (unpublished manuscript, available at the Refugee Law Research Unit, Osgoode Hall Law School, Ontario, Canada), pp. 14-15, *apud id. ibid.*

⁴⁸ See 606 *UNTS* (1967), pp. 268-277; hereinafter “1967 Protocol”.

⁴⁹ On the 1967 Protocol, see P. Weis, “The 1967 Protocol Relating to the Status of Refugees and some Questions of the Law of Treaties”, 42 *British Yearbook of International Law* (1967), pp. 39-70; G.S. Goodwin-Gill, “The Relationship between the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees”, 13 *Thesaurus Acroasium* (1987), pp. 939-953; and S.K.N. Blay & B.N. Tsamenyi, “Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”, 2(4) *International Journal of Refugee Law* (1990), pp. 527-561.

Although the 1951 Convention seems considerably to limit the scope of 'refugee' by enumerating five factors – i.e. race, religion, nationality, social group and political opinion – as the reason for their persecution, in fact it establishes rather broad categories. It should also be especially noted that while general International Law referred at that time to actual persecution, the 1951 Convention talked of the 'fear of being persecuted'. The 'fear of being persecuted' indicated the mental state of putative refugees, showing the terror of persecution and their anxiety or misgivings at the likelihood of persecution. To use their state of mind as the criterion in establishing their refugeehood is a subjective requirement, and the term 'well-founded' was added to make the yardstick more objective; i.e. the test is subjective, the evidence required is not. The adjective 'well-founded' was meant to signify that a "person has either been actually a victim of persecution or can show good reason why he fears persecution"⁵⁰.

Doctrinal and jurisprudential development

The 1951 Convention and 1967 Protocol have been ratified or adhered to by signatories who together constitute the majority of the international community: on December 31st, 2007 there were 147 State Parties to one or both of these instruments⁵¹. The concept of 'refugee' adopted by domestic legislation in these states as well as by non-signatory states has been inspired by – when not literally reproduced from – the 1951 Convention and the 1967 Protocol.

Despite the variety of phrasing used by domestic legislation and regional instruments in defining 'refugee', 'persecution' figures in most of them as *the* element of causation of refugee exodus⁵². However, since 'persecution' has not been defined in normative terms in International Refugee Law, its meaning has been developed by a substantial body of academic, administrative and judicial interpretations, there being no uniform scholarly definition or practice.

Scholars normally refrain from defining the term 'persecution'. They would rather analyse its various components. One of the few definitions of 'persecution' by a leading Refugee Law expert describes it as "the sustained or systemic violation of basic human rights demonstrative of a failure of state protection"⁵³. A similar definition, based on a

50 N. Robinson, *Convention Relating to the Status of Refugees – its history, contents and interpretation*, New York, Institute of Jewish Affairs, 1953, p. 48. For a comprehensive review of the historical background that led to the adoption of the term 'well-founded fear', as well as of the interpretative state practice in several countries, see T.N. Cox, "'Well-Founded Fear of Being Persecuted': the sources and application of a criterion of refugee status", 10(2) *Brooklyn Journal of International Law* (1984), pp. 333-379. As explained above, this article is limited to analyzing the development of the concept of 'persecution', and hence it does not dwell into how it can be objectively established.

51 Cf., for a list of these countries, "States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol", 26(4) *Refugee Survey Quarterly* (2007), pp. 313-317.

52 Two exceptions are the Organization of African Unity (OAU) Convention governing the specific aspects of refugees problems in Africa, of September 10th, 1969 (1969 African Convention) and the non-binding Cartagena Declaration on Refugees, of November 22nd, 1984 (1984 Cartagena Declaration); for these texts, see *Collection of International Instruments and other Legal Texts concerning Refugees and Displaced Persons*, vol. II (Regional Instruments), Geneva, UNHCR Division of International Protection, 1995, pp. 3-9 [esp. 4], and pp. 206-211 [esp. 208], respectively. The definitions of a 'refugee' adopted in the 1969 OAU Convention and in the 1984 Cartagena Declaration are the only salient challenges to the proposition that 'persecution' is an essential criterion for refugeehood. Both of them recognized, as the UN definition does not, that the normal bond between the citizen and the state can be severed in diverse ways – such as generalized violence, foreign or external aggression or domination, occupation, internal conflict and serious violation of human rights –, persecution being but one; see A.E. Shacknové, "Who is a refugee?", 95(2) *Ethics* (1985), pp. 275-276.

53 J.C. Hathaway, *The Law of Refugee Status*, Toronto, Butterworths, 1991, pp. 104-105.

decision by the House of Lords is that “‘persecution’ means the failure (or absence) of State protection against a serious harm, including persistent discriminatory acts”⁵⁴.

Notwithstanding the meritorious goal of widening the scope of refugee status beneficiaries, these broad definitions would serve almost no purpose in the real world, particularly if national migration authorities responsible for determination of eligibility of asylum-seekers use a rather restrictive interpretation of what constitutes ‘basic human rights’ and ‘failure of state protection’⁵⁵.

To avoid the perils of restrictive interpretation, principles of International Human Rights Law have been shaping the way ‘persecution’ is interpreted and determined. Increasingly scholars⁵⁶ and national adjudication authorities⁵⁷ are using human rights norms as a framework for analysing which types of harm amount to ‘persecution’. Thus harm to the individual should be assessed in light of International Human Rights instruments; recognition of an international human rights standard for assessing whether a feared harm is persecutory does not, however, eliminate all the complexities of such determination.

In a doctrinal endeavor to develop interpretation of the term ‘persecution’ by relating it to Human Rights values, the UNHCR claims that there are several forms of harm that amount to persecution, including:

- (i) *serious physical harm, loss of freedom, and other serious violations of basic human rights* as defined by international human rights instruments⁵⁸;
- (ii) *discriminatory treatment* which lead to consequences of a substantially prejudicial nature (for instance, serious restriction on the applicant’s right to earn his or her living, to practice his or her religion, to access normally available education facilities)⁵⁹; and
- (iii) a *combination of numerous harms* none of which alone constitutes persecution but which, when considered in the context of a general atmosphere in the applicant’s country, produces a cumulative effect which creates a well-founded fear of persecution⁶⁰.

Parallel with doctrinal development, administrative and judicial case law on refugee status determination has developed distinct – and often contradictory – views on several

54 H. Lambert, “The Conceptualization of ‘Persecution’ by the House of Lords: *Horvath v. Secretary of State for the Home Department*”, 13 (1/2) *International Journal of Refugee Law* (2001), p. 30.

55 This used to be the case e.g. in the United States, where it was stated that “U.S. policy ought to be much more sensitive to the level of political violence in other countries in making refugee/asylum decisions than it has in the past”; cf. M. Gibney, “A ‘Well-Founded Fear’ of Persecution”, 10 *Human Rights Quarterly* (1988), p. 120.

56 See e.g. C. Apodaca, “Human Rights Abuses: precursor to refugee flight?”, 11(1) *Journal of Refugee Studies* (1998), pp. 80-93; G.J.L. Coles, “Refugee and Human Rights”, in *Bulletin of Human Rights* (1991/1), Geneva/New York, Centre for Human Rights/UN, 1992, pp. 63-73; P. Nobel, “Blurred Vision in the Rich World and Violations of Human Rights - a critical assessment of the human rights and refugee linkage”, in *Bulletin of Human Rights* (1991/1), Geneva/New York, Centre for Human Rights/UN, 1992, pp. 74-84; and A.F. Bayefsky & J. Fitzpatrick (eds.), *Human Rights and Forced Displacement*, The Hague, Martinus Nijhoff Publ., 2000, 320p.

57 The denial of a core human right as the appropriate benchmark for determining what ‘persecution’ is has been explicitly recognised in the jurisprudence of several common law jurisdictions including Canada (see *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689; New Zealand, *Refugee Appeal No. 2039/93 e MN*, of February 12th, 1996.) In its review of State practice the Human Rights Nexus Working Party (HRNWP) of the International Association of Refugee Law Judges (IARLJ) concluded that some signatory States like Canada, New Zealand, Australia and the United Kingdom explicitly refer to human rights instruments when assessing whether the situation facing the claimant is persecutory, and most countries implicitly incorporate a human rights approach in their analysis.

58 *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, UNHCR, 1979, § 52.

59 *Ibid.*, § 54.

60 *Ibid.*, § 53.

features related to the content of 'persecution'. Some of these features may be used in an attempt to establish its essential, core elements in International Refugee Law.

In order to identify what the core elements of the content of 'persecution' are, the following questions ought to be answered: *who* carries out the persecution and *who* is considered a victim of persecution? *How* is it carried out? *What* are the putative reasons advanced as grounds for persecution? *When* is it carried out? *Which* rights are (to be) violated in cases of persecution? These questions will be taken in turn⁶¹.

1. Who are the perpetrators of persecutory acts?

It is widely accepted that, as a rule, persecution is carried out by State actors. When it comes to recognizing non-state actors as persecutors, case law is divided. Austrian case law upholds that persecution must be attributable to state authorities, there being no guarantee of protection when the persecution is private or in connection with rebel activities⁶². In Switzerland, if persecution is the work of private individuals, it must be imputed to the state in order to produce the effects leading to recognition, which happens only if the asylum-seeker has solicited the protection of the state and the latter did not grant it⁶³. Belgian case law indicates that the agent of persecution need not be limited to the authorities of the country of origin, and that there may also be third parties if acts committed by them are consciously tolerated by the authorities or against which the authorities are incapable of offering protection⁶⁴. The same principle is followed in Danish case law, where not only conscious tolerance of the state, but also its refusal and/or inability to offer protection may lead to the recognition of acts perpetrated by private agents as persecutory⁶⁵. One may conclude, therefore, that perpetrators of persecution are no longer restricted to *state actors*. Case law has consistently and increasingly considered *non-state agents* to be perpetrators of persecution⁶⁶.

There is no requirement that the persecutor must intend to harm the person in order for the treatment to be considered persecutory. The fact that the persecutor does not intend to persecute does not change the character of his or her actions. For example, a law that prohibits the practice of a certain religion may be persecutory even though

61 When answering these questions, the case law analysis will not be exhaustive but rather limited to few examples on each topic. Some of the cases used in this article were obtained from the following publications: J.-Y. Carlier *et al.* (eds.), *Who is a Refugee? A Comparative Case Law Study*, The Hague, Kluwer, 1997, 794p.; N. Sitaropoulos, *Judicial Interpretation of Refugee Status – in search of a principled methodology based on a critical comparative analysis, with special reference to contemporary British, French and German Jurisprudence*, Athens/Baden-Baden, Ant. N. Sakkoulas Publ./Nomos Verlag (Human Rights Series, vol. 2), 1999, 521p.; and K. Musalo *et al.* (eds.), *Refugee Law and Policy – a comparative and international approach*, 2nd ed., Durham, Carolina Academic Press, 2002, 990p. The other cases were obtained from the official sites of the New Zealand Refugee Status Appeals Authority; the University of Michigan Law School Refugee Caselaw Site; the Immigration and Refugee Board of Canada; the Federal Court of Canada; the Federal Court of Appeal of Canada; the Belgium *Commission permanente de recours des réfugiés*; the Australasian Legal Information Institute; and the French *Commission des recours des réfugiés*.

62 *Verwaltungsgerichtshof* (VwGH), 11.03.1993, 93/18/0083, and VwGH, 08.07.1993, 93/18/0283, 0284.

63 *Office fédérale des réfugiés* (ODR), 24 June 1992, N 249 173.

64 *Commission permanente de recours des réfugiés* (C.P.R.) (1 ch), 21 November 1991, F035; also C.P.R., 8 November 1990, F015.

65 *Refugee Appeals Board* (R.A.B.), 18 October 1991, No. 21-2827; R.A.B., 18 December 1991, No. 21-2574; R.A.B., 30 January 1992, No. 21-2546; R.A.B., 18 February 1993, No. 21-3861.

66 For scholarly analysis of case law and recent trends, see C. Phuong, "Persecution by Third Parties and European Harmonization of Asylum Policies", 16 *Georgetown Immigration Law Journal* (2001-02), pp. 81-97; R. Marx, "The Notion of Persecution by Non-State Agents in German Jurisprudence", 16 *Georgetown Immigration Law Journal* (2001-02), pp. 447-461; and W. Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", 16 *Georgetown Immigration Law Journal* (2001-02), pp. 415-431.

the legislators firmly believe that it is best for those who adhere to the proscribed religion to convert to the dominant faith. Similarly, a father who insists his daughter must marry, contrary to her protected right not to be forced into marriage, may be doing so in the belief it is genuinely in her interests.

2. Who are the victims of ‘persecution’?

As mentioned in the previous sections, the collective aspect of the ‘refugee’ phenomenon ceased to be decisive in granting refugee status, the emphasis being placed during the 1940s and henceforth on the individual situation of the asylum-seeker. Hence, strictly construed the UNHCR Statute’s and the 1951 Convention’s definitions of ‘refugee’ call for determination of refugee status on the merits of each case. In the same vein, and as decided by a French Appeals Board, the granting of refugee status is subject to examination of the fear of individual persecution⁶⁷. As a consequence, the same Board dismissed situations in which the asylum-seeker was the victim of the non-discriminatory application of general legislation⁶⁸. It is worth noting that the Board has sometimes taken into consideration the general context in order to ascertain whether the personal fear stated by the asylum-seeker was well-founded⁶⁹. Persecution does not need to be directed against the asylum-seeker. As German case law indicates, violation of the rights of one member of a family as an intimidation measure may give rise to a right of asylum for others⁷⁰. Granting refugee status to a member of the asylum-seeker’s family may not lead to recognition of the asylum-seeker’s status as refugee, since each request is examined on its merits. However, the assertions of an asylum-seeker may be considered more credible once it has been confirmed that a close relative has been granted asylum on account of suffering a similar persecution⁷¹. According to Portuguese case law an asylum-seeker may establish reasonable fear of persecution on the basis of allegation and proof of a situation of persecution suffered by compatriots⁷². Similarly, the German Federal Constitutional Court has coined the notion of “individual persecution due to membership of a group”, which may not meet the criteria of group persecution, but where the fate of other members of a certain group is evidence of persecution⁷³. Thus although refugee status must be individually determined, the asylum-seeker may substantiate his or her fear on evidence of incidents experienced by family members or compatriots.

3. How is ‘persecution’ carried out?

There are three basic persecutory methods: physical, psychological and economic. According to Belgian case law, serious assault on *physical* integrity are regarded

67 *Commission des recours des réfugiés* (CRR), 19 February 1988, 30.022.

68 CRR, 13 March 1989, R. 71.993, and CRR, 30 November 1987, 67.040.

69 CRR, 7 June 1982, 14.243.

70 *Bundesverfassungsgericht* (BVerfG) (2nd senate) 11 May 1992, 2 BvR 1549/91.

71 *Verwaltungsgericht* (VG) Stuttgart (7th division) 21 September 1992, A 7 K 1369/91.

72 *Supremo Tribunal Administrativo* (S.T.A.), 1a secção, Acórdão, 17 May 1984.

73 *Bundesverfassungsgericht* (BVerfG) (2nd senate) 23 January 1991, 2 BvR 902/85.

as 'persecution'⁷⁴. Additionally, murder and physical maltreatment are necessarily elements of persecution, according to rulings upheld by the Council of State of The Netherlands⁷⁵. Against the backdrop of the fundamental rights to freedom from arbitrary deprivation of life and protection against torture or cruel, inhuman or degrading punishment or treatment, a range of measures has been recognized as persecutory. These include arbitrary detention, torture, beatings, forced sterilization, forced abortion, and female genital mutilation.

That measures have been carried out to further a legitimate social policy may not render the measures less persecutory. So, for example, the beating and torture of individuals in detention during anti-terror campaigns has been held to be persecutory. In addressing this point, the Canadian Federal Court of Appeal stated in *Thirunavukkarasu* that "(...) the State of emergency in Sri Lanka cannot justify the arbitrary arrest and detention as well as beating and torture of an innocent civilian at the hands of the very government from whom the claimant is supposed to be seeking safety"⁷⁶. As stressed by another Canadian court, "brutality in the furtherance of a legitimate end is still brutality"⁷⁷.

Similar findings have been reached in some cases which have considered whether forced sterilization and forced abortion were persecutory when carried out as a broad population control policy. Courts have held that the means were disproportionate to the worthy objectives sought, in that they constituted extreme violations of basic rights to reproductive freedom, security of the person and freedom from cruel, inhuman and degrading treatment⁷⁸. The social policy objectives were held not to render the measures less persecutory⁷⁹.

Other forms of gender-related physical harm such as rape, dowry-related violence, female genital mutilation, domestic abuse and trafficking are acts which have been regarded as infliction of physical and mental pain and suffering thus held to constitute 'persecution' within the Refugee provisions⁸⁰.

Forms of *psychological* harm may amount to 'persecution'. The 1984 Convention Against Cruel, Inhuman and Degrading Treatment or Punishment expressly defines 'torture' for purposes of the Convention as including the intentional infliction of

74 C.P.R. (1 ch.), 21 May 1992, F095.

75 *Raad van State, Afdeling Rechtspraak* (ARRvS), 29 June 1982, R.V., 1982, 3; ARRvS., 12 July 1982, R.V., 1982, 7.

76 *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* [1994] 1 F.C. 589 (C.A.) § 22.

77 *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.) 323.

78 In the context of a mentally disabled person, the Supreme Court of Canada has forbidden non-therapeutic sterilization as a grave "intrusion on the physical and mental integrity of the person", and, as a "grave intrusion of a person's right [leading to] certain physical damage", *E.(Mrs.) v. Eve*, [1986] 2 S.C.R. 388, pp. 434 and 431. The Court of Appeal applied the same reasoning to forced sterilization within refugee context noting that there is "no doubt, then, that the threat to forced sterilization can ground a fear of persecution within the meaning of Convention refugee under the Immigration Act...", *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), § 18.

79 For similar reasons the court noted that "forced abortion, being an invasion of a woman's body, is equivalent to or worse than forced sterilization"; cf. *Lai, Quang v. M.E.I.* (F.C.T.D., no. IMM-307-93), McKeown, 20 May 1994. For a pertinent comment on a similar decision, see A.D. Sealove, "Shu-Hao Zhao v. Schiltgen: persecution on account of political opinion – inconsistencies and ambiguities", XXIII(1) *Brooklyn Journal of International Law* (1997), pp. 309-337.

80 *Lazo-Majano v. INS* 813 F.2d 1432, 1434 99th Cir., 1987). See also *Matter of Sharmin*, A73-556-883 (IJ Dec. New York, NY, 27 September 1996). See also M. Randall, "Refugee Law and State Accountability for Violence against Women: a comparative analyses of legal approaches to recognizing asylum claims based on gender persecution", 25 *Harvard Women's Law Journal* (2002), pp. 281-318; and M. Mulligan, "Obtaining Political Asylum: classifying rape as a well-founded fear of persecution on account of political opinion", 10(2) *Boston College Third World Law Journal* (1990), pp. 355-380.

“severe pain or suffering whether physical or mental”. Forcing an individual e.g. to watch the torture of a family member in order to compel the subject to make a confession is ‘persecutory’. So may be less intrusive forms of harm if, as a result, the individual suffers mental anguish. Depending on the age and personality profile of the putative victim, actions that may not cause serious psychological harm on some may on others⁸¹. Frequent interrogation, false accusation, or persistent threats to detain do not deprive a person of liberty or livelihood but may in the long term cause injurious psychological stress amounting to ‘persecution’ depending on the person concerned.

Psychological persecution may thus take various forms. British jurisprudence found unreasonable and equated to persecution the finding of fact that a former Trade Union leader had to give up his lifelong activities, live apart from his wife and family in the capital and withdraw to a remote part of the country to avoid the attention of the authorities⁸². In Germany, an attempt at forced conversion was held to constitute psychological persecution⁸³.

Discrimination in *economic* and social matters may also be an element of the threat directed against the claimant, although economic misfortune alone is not a valid basis for a refugee claim. Economic measures that are directed at a particular group and have serious prejudicial effects may be persecutory. These include restricting trading rights, discriminatory or excessive taxation, and denial of work permits. The applicant must show that the economic deprivation at issue is a consequence of discrimination on the basis of a recognised ground such as that the hardship is “specific in its oppressive impact”⁸⁴ and that it is severe.

Economic deprivation, while relevant in this context is not the sole measure of harm. In certain circumstances the prohibition from pursuit of a profession, in which the applicant is committed and trained, may be persecutory. This was the conclusion of the court in *He*⁸⁵, which held that being forced into an occupation which is fundamentally unsuitable as a punishment for expressing political opinion was persecutory. In that case the applicant participated in a pro-democracy demonstration for which she was arrested, detained and, in addition, her teaching job was terminated and her request for a work card permitting her to do other work was denied. She was forced to live in a rural farming community and to make a living as a farmhand. The court held that “permanently [to] deprive a teacher of her profession and forever convert an educated young woman into a farm hand and a garment worker constituted persecution”. In contrast, the loss of property, even where confiscated in a discriminatory manner, has

81 In *Ammerly, Poone v. S.S.C.* (F.C.T.D., no. IMM-5404-93), MacKay, 11 May 1994, the court noted that persecution did not necessarily involve physical harm and found that the Board had erred in failing to consider whether repeated visits by the authorities to the elderly applicant’s home and their numerous interrogations of her amounted to persecution. In a similar vein, the Federal Court in *Gragagnini-Ore, Gianina Evelyn v. S.S.C.* (F.C.T.D., no. IMM-2243-93), Pinard, 4 February 1994, recognized that psychological torment may be an aspect of persecution and that the claimant had been persecuted when she was detained by the Peruvian authorities, physically mistreated and repeatedly told she should be free only to continue the detention.

82 *R. v. Immigration Appeals Tribunal (I.A.T.), Ex parte Jonah*, [1985] Immigration Appeals Report (Imm. A.R.) 7 Court of Appeal (C.A.).

83 *Verwaltungsgericht Hessen (VGH)* (12th senate) 21 December 1992, 12 EU 1847/89.

84 See J.C. Hathaway, *The Law of...*, *op. cit. supra*, p. 118, and *Handbook*, *op. cit. supra*, §§ 63 and 64. See also *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988); *Rivera v. INS*, No. 94-70706, 1996 U.S. App. LEXIS 27783 (9th Cir., 10 October 1996).

85 *He v. Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d), 128 (F.C.T.D.)

not been readily recognized as persecutory where the consequences have not been so severe as to deprive the person of a livelihood or a means of support"⁸⁶.

Thus, when determining the claim of an asylum-seeker several aspects of his or her experience have to be taken into account. Although physical persecution may be the most common, it is not the only criterion.

Finally, the *cumulative effect* of putative incidents of 'persecution', which must be considered as a whole, may indicate that the applicant's fear is 'well-founded'⁸⁷, for just as the duration of ill treatment is relevant, so too is the cumulative effect of individual harmful acts⁸⁸. Imprisonment and torture years before the applicant's departure may be relevant where, combined with more recent but lesser acts of harassment, they cumulatively establish the well-foundedness of the applicant's fear. Similarly, discriminatory treatment at school and at work, occasional beatings and threats from unknown assailants, while not emanating from the same source and so seemingly isolated acts, may cumulatively constitute persecution and support the claimant's fear of prospective risk⁸⁹.

4. What are the grounds for 'persecution'?

Five reasons are identified by the 1951 Convention and the 1967 Protocol, as well as by the large majority of domestic refugee Acts: race, religion, nationality, membership of a particular social group or political opinion. Persecution must accordingly be based on at least one of these five grounds⁹⁰.

Race is a broad concept including not only those of common genealogy but also those who share a common historical, national, linguistic or cultural heritage⁹¹. The racial reason, for instance, was well accepted by Greek courts, particularly in cases related to Kurdish people in Turkey and Assirian and Chaldian people in Iraq⁹². Other examples of claims based on race include those made by Amharas from Ethiopia, Tamils from Sri Lanka, Jews from Russia and the Ukraine, ethnic Indians from Guyana and Fiji, Sikhs from India, Darods from Somalia, Tutsis from

86 See e.g. *Ramirez, Rosa Etelevina v. S.G.C.* (F.C.T.D., no. IMM-1192-94), Rouleau, 9 December 1994, where the state expropriated the home of an elderly lady because of her daughter's refusal to participate in the local militia; and *Chen, Yo Long v. M.C.I.* (F.C.T.D. no. IMM-487-94), Richard, 30 January 1995, where the applicant feared, under threats to his life, having to give up without compensation a parcel of his land to a neighbour.

87 See *Handbook...*, *op. cit. supra*, § 201.

88 In *Retnam v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 53 (F.C.A.), MacGuigan stated that a "Board's failure to deal with the cumulative effect of the persecution the claimant alleged is a patent error of law". In these cases, the Board had selected an incident or incidents in isolation, but not given consideration to the overall impact of a number of 'smaller' occurrences.

89 This point was emphasised in *Iossifov, Svetoslav Gueorguiev v. M.E.I.* (F.C.T.D., no. A-854-92), McKeown, 8 December 1993, where the court made clear that it is insufficient for the decision-maker to list a series of facts in their decision "without determining whether the acts taken cumulatively constituted persecution and whether the applicant had a reasonable prospective fear of persecution by reason of these previous acts".

90 The limitation to these five reasons has been criticised. For instance, it was held that "[t]he current definition (...) is inadequate because it limits eligibility for asylum (...). This definition does not address the problem of persons facing random, indiscriminate oppression or persecution for unspecified reasons. In order to correct this deficiency, the cognizable grounds should be eliminated, leaving the experience or fear of persecution as the operative qualification for refugee status", cf. D.P. Gagliardi, "The Inadequacy of Cognizable Grounds of Persecution as a Criterion for According Refugee Status", 24(1) *Stanford Journal of International Law* (1987), p. 286.

91 Arguments in support of a broad interpretation of 'race' within the refugee context can be found in G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford, Oxford University Press, 2007, p. 70; and J.C. Hathaway, *The Law of...*, *op. cit. supra*, p. 142. The *Handbook...*, *op. cit. supra*, § 68, refers to race in this connection as having to be "understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage".

92 *First Instance Penal Court of Chios*, No. 233, 19 April 1993; *Court of Appeal of Thessaloniki*, no. 337, 17 May 1993.

Rwanda, Roma from the Czech and Slovak Republic, and African-Americans from Colombia.

The identification of a racial group in the refugee context is relatively straightforward and does not draw the same level of complexity in interpretation, as do political opinion or social group grounds. That is not to say that the determination of such claims is without difficulty, for while the nexus requirement is often not an issue, whether the treatment feared amounts to persecution frequently is.

For example, the determination often centers on whether actions such as poor treatment at school, restrictions on employment opportunities, prohibitions on language instruction or cultural celebrations, and/or random assaults either alone or in combination amount to persecution or are discriminatory conduct insufficiently grave to be considered persecutory. Also, where the conduct feared is from non-state actors, the question arises as to whether state protection is available.

Restriction on a person's *religious freedom* may be persecutory. There are four broad categories of cases that fall within this ground. The first one relates to prohibitions on practice or expression of religious beliefs. For example, religious minorities all over the world, from Jehovah Witnesses in Ghana, Bahai's in Iran to the Falon Ghong in China, have had their refugee claims recognized on the basis of their having been prevented by law from holding religious services and possessing religious materials pertaining to their faith. That the person may still be permitted to practice in private does not mitigate the infringement of his or her basic right to worship freely with others⁹³.

The second category involves discrimination against religious minorities, i.e. those who may not be prevented in law from practising their faith, but are at risk of harm on account of their religious affiliation. This may take the form of physical harassment, discrimination in cultural and economic spheres, and restriction on civil entitlements.

Individuals who fear persecution through forced conversion to another faith comprise a third group of cases advanced under the religion ground. Recognized claims of this nature are generally from countries where renunciation of the Islamic faith is punishable by law, and where such punishments are severe enough to constitute persecution. Similarly, laws and customs that impose religious conversion as precondition to recognition of fundamental civil entitlements enjoyed by members of the dominant faith have been found to be persecutory where the person concerned opposes such conversion⁹⁴.

A fourth category of cases involves persons who fear persecution for failing to follow religious codes of behaviour to which they do not subscribe. The most common examples are claims made by women who oppose religiously-based state-imposed strictures on their education, employment and rights under Family Law. Frequently claims brought under this category are also made on the social

⁹³ *Fosu v. Canada (M.E.I.)* [1994] F.C.J. No. 1813.

⁹⁴ *Refugee Appeal No. 70283/96 Re KJ and FS*, New Zealand Status Appeals Authority (RSAA).

group ground⁹⁵. This category of cases also includes those who fear persecution for refusing to join a religious association or take compulsory religious instruction and/or indoctrination, since freedom of religion includes the freedom to choose whether or not to join a religion and freedom from being coerced into participating in another's religious observances⁹⁶.

Persecution following the choice of *nationality* made by the asylum-seeker may also lead to recognition of refugee status, according both to French⁹⁷ and Portuguese⁹⁸ case law. It is frequently acknowledged that 'nationality', within the context of 'refugee' definition, means more than 'citizenship'. To define it narrowly would make little sense since as a practical matter persons are not persecuted in their own state simply on account of their citizenship there. Moreover, as regards residents' fearing persecution because of their foreign citizenship, they can avail themselves of the protection of their own state.

Nationality then, as a Convention refugee ground is, like race, regarded as associated with ethnicity. In fact Convention refugee claims based on race often include nationality as an alternative ground for fear, to the extent that a distinction may be drawn between the two. Nationality as the sole basis of a refugee claim tends to appear most frequently in situations where the persecution stems from the association of the person with another nation state rather than with a social or cultural group. For example, claims brought by ethnic Russians from various Republics formerly within the former Soviet Union, or by ethnic Croats and Albanians from Yugoslavia are often based on fear of persecution because of their nationality.

As with claims based on race, the identification of the group is usually not problematic. The determination frequently rests on whether the treatment complained of amounts to persecution and/or whether state protection from the harm feared is available.

Membership in a particular *social group* is arguably the least developed of all the Convention grounds. Inconsistency in its application and the search for a consensus on its definition have been the focus of literature and discussion⁹⁹. Most commentators note that its intended meaning is not apparent from the *travaux préparatoires*¹⁰⁰.

The most comprehensive analysis of the particular social group ground has been made in several common law jurisdictions, most notably Australia, Britain, Canada, New Zealand and the United States¹⁰¹. Various interpretative tools have been employed in an attempt to delineate its boundaries, including the identification of three common principles.

⁹⁵ E.g., where religious opposition is perceived as a challenge to the State's authority the persecution may be on account of political opinion as well. Where discriminatory laws against women are justified on religious grounds, the claim has also been brought on the basis of social group grounds, the social group being 'women'; cf. NZRSA, No. 2039/93, and no. 71427/99.

⁹⁶ *Okere v. Minister for Immigration and Multicultural Affairs* (1998), 157 A.L.R. (Australian High Court).

⁹⁷ CRR, 13 March 1986, 34.126, in F. Tiberghien, *La protection des réfugiés en France*, Paris, Economica, 1988, p. 318.

⁹⁸ S.T.A., 1a secção, Acórdão, 5 June 1986.

⁹⁹ See, *inter alia*, M. Fullerton, "A Comparative Look at the Refugee Status Based on Persecution Due to Membership in a Particular Social Group", 26 *Cornell International Law Journal* (1993), pp. 505-563; and A.C. Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", 15(2) *Columbia Human Rights Law Review* (1984), pp. 39-67.

¹⁰⁰ See G.S. Goodwin-Gill, *op. cit. supra*, p. 46; and J.C. Hathaway, *The Law of...*, *op. cit. supra*, p. 156.

¹⁰¹ In civil law jurisdictions the ground is less developed, more emphasis being placed on whether the applicant's fear is well-founded.

The first one states that a ‘social group’ cannot arise solely from fear of persecution. There is general agreement that the ground was not intended to be open-ended, covering all persons who face persecution, for that would render the other grounds superfluous and extend the obligations of state parties far beyond what they agreed. Moreover, since persecution must be by reason of membership of the particular social group, that social group cannot be defined solely by the persecution feared. As stated by Justice Dawson of the High Court of Australia in *Applicant A*:

There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution¹⁰².

This does not mean, however, that the persecution in question cannot help to define the group. McHugh J in *Applicant A* illustrates this as follows:

(...) 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 recognizable 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 group¹⁰³.

The second common principle is that individuals do not need to associate voluntarily with a particular social group in order to be members of it. There is substantial agreement that the individual need not be in a voluntary association with other members of the particular social group or that the group be cohesive or homogeneous¹⁰⁴. Rather the association exists by virtue of a common characteristic shared by members of the group whether voluntary or not. To suggest otherwise would be to read into the Convention requirements that are not supported by the language of its provisions. It would exclude, for example, persons who are persecuted because of their family membership (involuntary) or gender or sexual orientation¹⁰⁵ (involuntary and not a cohesive group). It would also exclude those who may not want to be associated with the particular group but who are because of perceptions of others in society. In this regard, Lord Hope observes in his *ratio decidendi* in *Islam and Shah* that the group may have been created by the norms and customs of society and contrary to the wishes of those who comprise it¹⁰⁶.

¹⁰² *Applicant A v. Minister for Immigration and Ethnic Affairs*. (1997) 190 Commonwealth Law Reports (C.L.R.) 225.

¹⁰³ *Ibid.*

¹⁰⁴ The contrary view, however, was taken in the decision of the United States Court of Appeal, 9th Circuit, in *Sanchez-Trujillo v. Immigration and Naturalization Service* (1986) 801 F.2d 1571, where it was held that “particular social group implies a collection of people closely affiliated with each other”. Although other courts in the 9th Circuit have followed the decision, it has not been followed in other circuits in the United States and the proposition has been rejected by high courts in Australia, Canada, and the United Kingdom.

¹⁰⁵ On this particular ground, see D. McGhee, “Persecution and Social Group Status: homosexual refugees in the 1990s”, 14(1) *Journal of Refugee Studies* (2001), pp. 20-42.

¹⁰⁶ *Lai, Quang v. M.E.I.* (F.C.T.D., no. IMM-307-93), McKeown, 20 May 1994.

The third and last common principle, which serves as an interpretative tool employed to delineate the boundaries of what constitutes a 'social group', is that the claimant need not prove that every member of the group with which he or she is associated also fears persecution. As with the other grounds, evidence that one is of a certain race, nationality, political opinion or a member of a particular social group will not substantiate a claim. Nor, however, will a claim be defeated simply because not all persons of the same characteristic are persecuted. What is relevant is that the persecution stems from or is 'by reason of' the ground. That some members of the group are able to avoid or are not exposed to the persecution feared by the applicant does not diminish the applicant's claim that the persecution feared is on account of membership of the group, although it may affect the determination of whether the fear of persecution is well-founded.

Finally, what constitutes *political opinion* raises a number of difficult interpretative issues. Simply holding a particular political opinion is not a sufficient basis for a claim to refugee status. As with all Convention grounds, the applicant is required to show that there is a serious threat of persecution on this ground.

Also, as with the other Convention grounds, the reason for the threatened harm is central. The persecution must be because of the applicant's perceived political opinion, regardless of whether that putative political opinion is accurate or not. It is the perception of the persecutor that is at issue, for that is what incites the persecution. International protection extends therefore to situations where the claimant faces persecution on account of his or her perceived political opinions even where that perception is erroneous. The perception of the persecutor may be on account of the person's expressed opinion but also on the basis of the person's actions to which the persecutor imputes a political opinion. So, for example, a person who is engaged in social justice work in a repressive state and faces arrest and maltreatment by the authorities in consequence may be able to establish a claim under political opinion on the basis that his or her actions are perceived to be a threat to the state.

The person need not belong to a formal political group or hold an official title or office. The focus is always on the *de facto* attribution "notwithstanding the objective unimportance of the claimant's political acts, her own inability to characterize her actions as flowing from a particular ideology or even an explicit disavowal of the views ascribed to her by the state"¹⁰⁷. Moreover, it must also be kept in mind that an act, which might not be considered political in the state of asylum, may well be seen as such in the applicant's nation state¹⁰⁸.

As is the case with other grounds, individuals are not required to hide their political opinions to avoid persecution. Thus even in situations where the person's political opinions are not known, refugee status may be accorded if the person is inhibited from expressing genuinely held political opinions because of the threat of serious harm. This follows from the fact that the right freely to express one's political views

¹⁰⁷ Cf. J.C. Hathaway, *The Law of...*, *op. cit. supra*, pp. 155-156.

¹⁰⁸ *Jerez-Spring v. Canada (Minister of Employment and Immigration)* [1981] 2 F.C. 527 (C.A.), and *Osorio v. INSI* 18 F. 2d 1143 (2nd Cir. 1994).

is an internationally protected human right¹⁰⁹. Similarly, persons who have been able to conceal their political opinion in the past but can show that their views will find expression in the future may meet the ‘refugee’ definition provided they can establish a serious risk of persecution as a result¹¹⁰. Related to this are cases of those who decide to exercise their right to a political opinion after they have left their country. They will fall within the Convention’s definition of ‘refugee’ if they can establish that in consequence they will face persecution or reprisal upon their return home¹¹¹.

5. When is ‘persecution’ carried out?

The most frequent claim is that lodged by an asylum-seeker who has him/herself already suffered, or is related to someone who has already suffered, persecution. A claimant need not have suffered incidents of persecutory treatment in order to show a risk of future harm, and past persecution may not substantiate a prospective risk¹¹². However, where there is evidence of past harm, the decision-maker must consider whether it supports a finding that there is a reasonable threat of future persecution¹¹³.

Decision-makers must also consider evidence of past persecution of others similar to the applicant. The suffering of those who share the applicant’s racial, religious, political or other protected characteristics, for example, may well substantiate the applicant’s own fear and be the best indicator of possible harm.

Related to this is the necessity of viewing the harm complained of within the context of the conditions prevailing in the applicant’s country. This is particularly so where documentary evidence shows that the treatment suffered and feared by the applicant is part of a larger phenomenon of widespread discrimination in the state¹¹⁴.

Austrian jurisprudence points to the need that the well-founded fear of persecution continue until the moment of departure. Hence if the time between persecution and leaving becomes too long, the required link is missing¹¹⁵. However, the occurrence of persecution prior to departure from the country of origin is not a *sine qua non* requirement. It may occur that an application for refugee status be based on likelihood of persecution following departure – for any other reason – of the asylum-seeker. According to Canadian jurisprudence, because refugee status turns upon the presence of a prospective risk of persecution, the country conditions relevant to a claim are those existing at the time of the hearing or adjudication of the claim¹¹⁶. A decision-maker must not therefore restrict him- or herself to those conditions prevailing at the time of the claimant’s departure¹¹⁷. Since refugee status is expected to be granted to

109 See Article 19 of the 1948 Universal Declaration of Human Rights, and art. 19 of the 1966 International Covenant of Civil and Political Rights.

110 *Ahmed v. Secretary of State for Home Department*, [1999] E.W.J. No. 5882 (English Court of Appeal).

111 *Urur v. Canada (Minister of Employment and Immigration)* (1988), 91 N.R. 146 (Fed. C.A.).

112 *Salibian v. Canada (M.E.I.)* [1990] 3 F.C. 250 (C.A.). In this regard, see. S.C. Vance, “An Enduring Fear: recent limitations on the past persecution ground for asylum”, 91 *Kentucky Law Journal* (2002-03), pp. 957-1003.

113 *Oyarzo v. Canada (Minister of Employment and Immigration)*, [1982] 2 F.C. 779 (C.A.).

114 *Lerer, Iakov v. M.C.I.* (F.C.T.D., no. IMM-7438-93), Cullen, 5 January 1995.

115 *Bundesasylamt (BAA)*, 25.11.1993, 93 04 295.

116 *Canada v. Johan*, [1993] Federal Court Judgments (F.C.J.) No. 130 Quick Law on-line legal databases (QL); *Longia v. Canada*, [1990] 3 F.C. 288 Federal Court of Appeal (F.C.A.), 10 *Immigration Law Reports* (Imm.L.R.) (2d) 312.

117 *Canada v. Malgorzata* [1991] F.C.J. No. 337 (QL).

someone who has *well-founded fear* of persecution, and not merely to one who *has been the object of* persecution, the previous experience of an asylum-seeker – though relevant in many instances – is not a crucial constituent determinant. A positive refugee status determination may therefore be decided upon balance of probability of persecution as the case is examined or upon the asylum-seeker's return to his or her country of origin.

'Fear' of persecution, consequently, is a subjective element that plays a decisive role particularly in the review of an application lodged by an asylum-seeker who has not yet been persecuted.

6. Which rights are (to be) violated in cases of 'persecution'?

Article 33 of the 1951 Convention speaks of the right to life and freedom. As to discrimination, its existence is not *per se* a reason to claim persecution, since it ought to be connected to a specific right in order to be regarded as a Human Rights violation¹¹⁸. It must be noted that when giving guidance on the interpretation of the 1951 Convention, UNHCR affirmed that discrimination will only amount to persecution if the alleged measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned¹¹⁹; it went even further to observe that "[d]ifferences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favorable treatment as a result of such differences are not necessarily victims of persecution"¹²⁰.

Not all violations of human rights are, therefore, persecutory. A distinction is frequently made between discriminatory and persecutory acts. When determining whether treatment is discriminatory or persecutory, one must consider its effect on the individual. Where the consequences are of 'a substantially prejudicial nature' they may be found to be persecutory. Here reference to the Human Rights standards will help to identify the significance of the infringement that must be assessed according to the circumstances of the case. So too will the duration of any harm suffered. So, for example, harassment in some circumstances may constitute persecution if sufficiently serious and if it occurred over such a long period of time that it may be said that a claimant's physical or moral integrity is threatened¹²¹.

Administrative and judicial jurisprudence has widely addressed the 1951 Convention's restrictive reference to the right to life and to freedom by referring to other Human Rights, and has also largely weighed the issue of discrimination. Swiss jurisprudence accepts that the general situation in a state may serve as an indicator of violation of human rights, but there must be a real (or at least a highly probable) threat to the asylum-seeker¹²². Moreover, precise reference to one Human Right or one

¹¹⁸ Some scholars, however, have claimed that the best way to unify and inject coherency, consistency and certainty in Refugee Law is to make discrimination the sole criterion of persecution; see M. Bagaric & P. Dimopoulos, "Discrimination as the touchstone of persecution in refugee law", 32 *International Journal of the Sociology of Law* (2004), pp. 303-331.

¹¹⁹ *Handbook*.... *op. cit. supra*, § 54.

¹²⁰ *Id. ibid.*

¹²¹ *Rajudeen v. Canada* (1984), 55 N.R. 129, §129; *Retnam v. Canada* (M.E.I.), A-470-89, 6 May 1991; *Ovakimoglu v. Canada* (M.E.I.) (1983), 52 N.R. 67, § 69.

¹²² ODR, 31 January 1992.

fundamental freedom is a widespread practice of courts in Canada and The Netherlands. While serious limitations to freedom of expression and speech¹²³ and lack of fair trial guarantees¹²⁴ may lead to recognition of refugee status by the Council of State of The Netherlands, Canadian case law assembles various decisions based upon international human rights instruments including the Universal Declaration of Human Rights¹²⁵, the Convention on the Rights of the Child¹²⁶, and the Convention on the Elimination of All Forms of Discrimination against Women¹²⁷. Austrian case law, following the *rationale* of the 1951 Convention, has asserted that discrimination will be equivalent to persecution only in particular circumstances, e.g. when discriminatory measures have serious detrimental consequences¹²⁸. The attitude of national authorities is decisive in this respect, according to German case law. The state must offer protection against unrestrained discrimination, which must exceed a certain level in order to be considered persecution¹²⁹. On the other hand, systematic official discrimination, particularly accounting for serious prejudicial consequences to the asylum-seeker, may also be an element in determining in favour of persecution, as US jurisprudence indicates¹³⁰.

Concluding Remarks

The 1951 Convention refugee definition has been captured in national refugee legislation in a majority of countries that are State Parties thereto. The provisions of the refugee acts pertaining to the concept of 'refugee' have maintained reference to 'persecution'.

The importance of the term 'persecution' and the lack of a definition thereof by an International Refugee Law legally binding instrument has prompted doctrinal approaches to advance the concept. Likewise and more significantly, case law of various countries has been progressively developing the concept of 'persecution' by analyzing various of its constitutive elements.

The identification of the constitutive elements of the term 'persecution' and the understanding of how these elements have been interpreted by doctrine and case law should contribute to a dynamic, progressive and yet harmonious interpretation of the refugee definition.

123 ARRvS., 20 December 1979, G.V. D12-37.

124 ARRvS., 15 June 1993, R.V. 1993, 8.

125 *Arguello Garcia v. Canada*, [1993] F.C.J. No. 635 (QL).

126 *B. (P.V.) (Re)*, [1994] C.R.D.D. No. 12 (QL).

127 *Ibid.*

128 C.P.R. (2 ch.), 3 July 1992, R716.

129 BverfG (2nd senate) 23 January 1991, 2 BrV 1827/89.

130 *Matter of Salama*, 11 I & N Dec. 536 Board of Immigration Appeals (B.I.A 1966).