

NEW ISSUES IN REFUGEE RESEARCH

Working Paper No. 119

Improving decision-making in asylum determination

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August 2005



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ISSN 1020-7473

Abstract

This paper ♦ takes as its starting point the assumption that variations in refugee status determination procedures and the use of evidence by national authorities and UNHCR lead to inconsistent and irregular results. It therefore aims to present a reasonable prescription of remedies, by which the application of the 1951 Refugee Convention definition can be made more consistent and predictable.

This paper focuses on the 1951 Convention definition, not out of a failure to recognise practices of subsidiary, complementary and humanitarian protection, but because the Convention offers the only universal refugee definition. Furthermore, the grant of other protection and humanitarian status by states is extremely fluid and varied and based on divergent legal standards. The granting of subsidiary/complimentary protection status as it relates to Convention status in national decision-making is worthy of separate examination, but it is beyond the scope of this essay. This paper will also attempt to offer policy prescriptions and advice for future study, training, as well as the use of country of origin information and relevant legal standards and guidelines, with a view to enhancing the ability of decision-makers (and thereby states) to apply the 1951 Convention refugee definition more uniformly.

♦ This paper was presented at the 6th World Conference of the International Association of Refugee Law Judges (IARLJ) on 21 April 2005 in Stockholm. The views expressed in this paper are those of the author and they are not necessarily shared by the UN or UNHCR.

This paper takes as its starting point the assumption that variations in refugee status determination procedures and the use of evidence by national authorities and UNHCR lead to inconsistent and irregular results. It therefore aims to present a reasonable prescription of remedies, by which the application of the 1951 Refugee Convention¹ definition can be made more consistent and predictable.

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The big picture

At the start of 2004 the number of persons ‘of concern’ to UNHCR was just over 17 million, a reduction from more than 20 million the year before. This figure of 17 million is the lowest figure in a decade. Of this number is some 9.7 million refugees, 1 million asylum-seekers, 1.1 million returned refugees, 4.4 million internally displaced persons, and 1 million stateless and others. Of the total number of refugees some 7.5 million refugees have been living in camps or settlements for more than a decade, which has been referred to as the “warehoused” refugee population. This latter figure testifies to a general failure in finding durable solutions for the majority of the world’s refugees.³ One should add that the disproportionate share of the global refugee burden is borne by developing countries and contributes to, in some instances, overwhelming development challenges.

¹ Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (hereafter ‘1951 Convention’). There are presently 145 states parties to the 1951 Convention and/or its 1967 Protocol.

² Well known in the European context is the adoption of the Council of the European Union (EU) Directive 2004/83EC (29 April 2004) on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (hereafter ‘Qualification Directive’) which sets out a common legal instrument for EU Member States on the application of the 1951 Refugee Convention definition as well as the grant of subsidiary protection status. UNHCR has welcomed the aim of the EU to create a common European asylum system based on a full and inclusive application of the 1951 Refugee Convention. UNHCR has however called in EU Member States to take into consideration common understandings on the application of the 1951 Convention achieved in international fora, especially UNHCR’s Executive Committee, as well as the development of state practice and best standards and practices developed in the EU and in other regions.

³ “Half a million refugees from Burma, for example, have lived in camps in neighbouring countries for 20 years with no right to work or travel. The same is true of about 140,000 Somalis, who have lived since 1991 in closed camps in North Kenya. The camps are often established quickly to deal with refugee emergencies and never get dismantled”, Editorial ‘End of Refugee Warehousing’, International Herald Tribune, 29 September 2004.

James Hathaway draws a telling comparison of refugee burden sharing in Northern and Southern states. Several years ago he noted that that: “Of the twenty-six states hosting at least one refugee per 100 citizens, twenty-one were among the world’s poorest (i.e. they had a per capita income of less than US \$1000 per year) ... Northern states each year spend at least \$12 billion to process the refugee claims of about 15% of the world’s refugee population, yet contribute only \$1-2 billion to meet the needs of 85% of the world’s refugees who are present in comparatively poor states.”⁴

Despite diplomatic assurances to uphold protection principles for asylum-seekers and refugees⁵, measures aimed at reducing the number of asylum-seekers reaching the West, challenges the continuing validity of international refugee law and the authority of UNHCR. As well, fickle state commitment to a growing number of protracted refugee problems is yet another current reality. Although we are experiencing a global decrease in the number of refugees, there are a growing number of voices suggesting that the international system of refugee law is dysfunctional. Added to the heightened fear of global terrorism and the perception in some countries that foreigners are somehow responsible for large numbers of crimes and social unrest, feeds into a prejudice which affects the generosity of the state and the public to receive asylum-seekers and refugees.

Opinion polls in a number of Western countries have shown that the public view the arrival of significant numbers of asylum-seekers as a danger.⁶ Although one may question the validity of such surveys, the fact remains that asylum and refugee issues rarely receive positive coverage in the media. Rapidly changing asylum policies and practices, including greatly varying Convention recognition rates, often confuse public perception and reinforce the view that the vast majority of asylum-seekers are undeserving of legal protection and, by consequence, society’s attention, sympathy and assistance.

Defining the problem

It is a fact that states which otherwise share similar values, political outlooks and common foreign policies and support for UN institutions including UNHCR,

⁴ Keynote address of Professor James Hathaway at New Delhi Workshop on International Refugee Law, Indian Journal of International Law, Vol 39, No 1, January-March 1999: 11.

⁵ See the Declaration of States Parties to the 1951 Convention or its 1967 Protocol Relating to the Status of Refugees adopted in December 2001 after the first ever meeting of states parties to the international refugee instruments, available on-line at: www.unhcr.org

⁶ A recent survey conducted in Switzerland found that Swiss citizens are more fearful about an influx of foreigners than terrorism or war. Two-thirds of the 714 people questioned felt that the flood of asylum-seekers was a big danger, while only 51% were worried about terrorist attacks. ‘Swiss more fearful of foreign immigrants than terror attack: survey’, reported by Agence France Press, 1 December 2004. Danish Prime Minister Anders Fogh Rasmussen, when asked to name the areas where he had successfully altered attitudes during his tenure, said: “I would think that 80-85% of the population backs the government’s policy on foreigners”. The same article notes that Prime Minister Rasmussen’s government swept to power three years ago on a promise to curb immigration and asylum-seekers. During this period, Denmark’s share of asylum applications in the Scandinavian countries fell from 31% in 2000 to 9% in 2003. Correspondingly Sweden’s rose from 41% to 60% and Norway’s from 28% to 31%. It is suggested that the reason for this drastic reduction in Denmark is linked to the government’s adoption of a more restrictive asylum law and policy beginning in 2002. See The Economist, ‘Send back your huddled masses’, 16 December 2004.

consistently register widely divergent refugee recognition rates under the 1951 Convention. These differences are not just between states in the North, but between regions; for example, North America and Europe⁷, and states North and South. Even if one were to control for countries of origin of asylum-seekers and first and appeal instance decisions, as well as numbers of decisions, there are remarkable differences between the Convention refugee recognition rates of asylum-seekers coming from particular countries. These differences are found when one compares recognition rates between asylum countries, and with UNHCR's determinations under its mandate.⁸

For example, in the case of asylum-seekers from Iraq, 2003 figures show that an Iraqi asylum-seeker would have a negligible chance of being recognised as a Convention refugee in Western Europe, but would have a 50-80% chance in North America. Similarly, Iranian asylum-seekers would have between 1-25% chance of being recognised in Europe, and approx. 50-70% chance in North America. Asylum-seekers from Sudan, Afghanistan, China and Eritrea tell a similar story. UNHCR's mandate recognition rates for certain nationalities of asylum-seekers, for example Afghans in India, Sudanese in Kenya and Iranians in Turkey, is clearly on the liberal side of the spectrum with positive decisions between 65-90%.⁹ Of course these figures change over time, but one can map out particular trends whereby asylum countries over a period of years have more, or less, generous grants of refugee recognition status.

Why the differences?

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

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

⁸ Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950.

⁹ Figures cited in this paragraph are on file with the author.

contrary, an increasing number of states have adopted measures to strengthen immigration control which may negatively impact on bona fide asylum-seekers.¹⁰

Could political influence be the explanation why during the mid-1980s some 80%-plus of El Salvadoran asylum-seekers were granted Convention refugee status in Canada, while at the same time in the United States, El Salvadoran asylum-seekers were granted Convention status in 10-14% of the cases? Could it really be, as some have suggested, that the 'genuine' asylum-seekers made their way to Canada while those without a well-founded claim remained in the US? Or could the explanation be that asylum-seekers of a particular nationality are less likely to receive favourable adjudication of their claims in the midst of a clearly partisan or polemical political climate in the asylum country?

Now consider the situation of Iraqi asylum-seekers. In Western Europe some 1% of Iraqi asylum-seekers are granted Convention refugee status, while available figures show that in the United States the Asylum Division of the US Department of Homeland Security recognised 50% of Iraqi applicants as refugees and the US Immigration courts recognised 35% as refugees during the period of March 2003 and July 2004.¹¹ Given the differences of opinion amongst several European states and the US administration concerning the war in Iraq, one would think the figures should be different, if not the opposite. Then again, such figures may attest to the considerable independence of the American asylum determination authorities.

Perhaps there is no standard answer for why there are divergent recognition rates amongst like-minded states. Any number of factors could come into play including the particularities of the refugee status determination process, the investment and practice of some authorities in collecting, analysing and disseminating country of origin information¹², how different legal traditions operate in practice, as well as how national authorities may choose and train their decision-makers and other professional staff. Evidentiary questions and perceived differences in how evidence is assessed in common and civil law traditions may also play a role in explaining why some countries do things differently, and as a consequence reach different results in terms of refugee recognition.¹³

¹⁰ See footnote 20 *infra*.

¹¹ Figures on file with the author.

¹² See for example The Structure and Functioning of Country of Origin Information Systems: Comparative Overview of Six Countries, Commissioned by the Advisory Panel on Country Information (APCI.3.1) Report prepared by the International Centre for Migration Policy Development, August 2004. The countries surveyed in the study are the UK, Canada, Germany, the Netherlands and Switzerland. The study shows differences in the number and in some respects expertise of staff working on country of origin issues, as well as the focus, role and frequency the respective country information units play in preparing reports and providing inputs to the determination process.

¹³ "... the terms 'burden of proof' and 'standard of proof' are used in the law of evidence in common law countries. In those common law countries which have adopted sophisticated systems for adjudicating refugee claims, legal arguments may revolve around whether the applicant has met the requisite evidentiary standard or degree of proof for demonstrating that he or she is a refugee. While the question of the burden of proof is also a relevant consideration in countries with legal systems based on civil law, the application of the standard of proof generally does not arise in the same manner as in common law jurisdictions ... UNHCR favours the more generous test of 'standard of proof' as developed in common law countries as the correct approach ...", Brian Gorlick, 'Common Burdens

Some scholars have attributed differences in global recognition rates to various factors including: the number of applications received in the country of asylum; neighbouring countries recognition rates; long-term political ideology; openness to outsiders; diplomatic relationships; economic conditions; administrative capacity; the consequences arising from an incorrect ruling on an asylum claim; and of most importance, the asylum country's ten year track record in granting refugee status.¹⁴ Issues which have yet to be thoroughly examined on a comparative basis are how differences of national procedures and case law affect refugee recognition rates. It would also be useful to study how the expertise of decision-makers, reliance on credibility assessments and available resources interact and come into play in reaching decisions on asylum cases.

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

1. Issues of credibility (39%) "To decide whether someone tells the truth or not".
2. Lack of knowledge about home country (14%), "It's difficult to get adequate information about the situation in the asylum-seeker's home country".
3. Other (13%), "Political decisions from the receiving state make judicially correct decisions impossible.
4. Difficulty in checking accuracy in given information (9%)
5. Empathy for the asylum-seeker (9%), "Decisions must not be made on the basis of one's feelings for the asylum-seeker".
6. Lack of time (6%)
7. Don't know or no answer (8%)¹⁵

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

In the words of Lord Steyn of the UK House of Lords, "in principle ... there can be only one true interpretation of a treaty."¹⁶ Said another way, if we believe that

and Standards: Legal Elements in Assessing Claims to Refugee Status', International Journal of Refugee Law, Vol 15, No 3, 2003, at pp 361 & 369.

¹⁴ Mary-Anne Kate, 'The provision of protection to asylum-seekers in destination countries', UNHCR New Issues in Refugee Research Working Paper no 114, UNHCR Geneva, May 2005, available on-line at: www.unhcr.org

¹⁵ Pär Anders Granhag, Leif A Strömwall and Maria Hartwig, 'Granting Asylum or Not? Migration Board Personnel's Beliefs about Deception', Journal of Ethnic and Migration Studies, Vol 31, No 1, January 2005, at p 40.

¹⁶ In the House of Lords decision of Regina v Secretary of State for Home Department, Ex Parte Adan, Regina v Secretary of State for the Home Department, Ex Parte Aitseguer, Judgments of 19 December

international law is valuable and important, then it is equally important to apply international standards with a high degree of consistency and predictability. As noted by one author: “In an asylum regime that delivers inequitable outcomes, ‘asylum shopping’ is simply a pragmatic way for an asylum-seeker to increase their chances of protection.”¹⁷ Moreover, the fact that persons who may be deserving of Convention refugee recognition may not be obtaining it not only raises legal questions, but may feed into an already negative perception of asylum-seekers and refugees.

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

The proportion of asylum-seekers from certain countries of origin recognised in different states sometimes varies significantly, while interpretations of various aspects of the refugee definition also differ. These range from differing interpretations of obligations towards those fearing persecution by non-state agents or gender-related persecution to different approaches as regards the internal flight or relocation alternative or persons fleeing generalised violence. A variety of complementary or subsidiary statuses, generally offering less security and fewer rights than are available to refugees, were also being increasingly used by [EU] member states. Additionally, such diverging policies and practices have been among factors which mean that refugees do not necessarily enjoy comparable security of status or standards of treatment throughout the EU and may seek to move onwards if their status is not secure. These differences have also undermined the effectiveness and viability of efforts to share burdens and responsibilities for hosting refugees and asylum-seekers among EU member states.¹⁸

Although the developments of harmonised laws and policies in the asylum and migration field among EU states have been watched with anticipation by UNHCR, refugee advocates and no doubt refugees themselves, “the tendency has generally been in the direction of [adopting] lower standards, with restrictive concepts and practices ...being “exported” from one member state to another and even beyond ...”¹⁹ The hope that a gradually enlarged common European market and geographic

2002, available at: www.parliament.thestationaryoffice.co.uk/pa/Id200001/ljudmt/jd001219/adan-1.htm. Lord Steyn concluded that: ‘It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 (of the 1969 Vienna Treaty Convention) and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can be only one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: Article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning’ (at para 68).

¹⁷ Kate, *op cit*, p 35.

¹⁸ Frances Nicholson, ‘Challenges to Forging a Common European Asylum System in Line with International Obligations’, forthcoming in S. Peers and N. Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary*, 2005.

¹⁹ *Ibid.*

space would create oneness and harmony among a diverse group of nations remains a political objective of monumental proportions.²⁰

However, for the asylum-seeker who may try to enter Europe to seek refuge the barriers are getting more varied, more far-reaching and legally entrenched.²¹ Whether and how such EU law and policy developments and practices will impact on individual determination of refugee status is yet another topic worth close examination.

How to ensure that asylum determination is predictable and fair

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

1. Access to a refugee determination system;
2. A definition of protection broad enough to cover serious risk;
3. An independent qualified decision-maker;
4. Right to counsel;
5. Controlling unscrupulous immigration consultants;
6. Disclosure of evidence;
7. The right to an oral hearing;

²⁰ See Joanne van Selm, 'European Refugee Policy: Is there such a thing?', UNHCR New Issues in Refugee Research Working Paper no 115, UNHCR Geneva, May 2005.

²¹ Many states which have subscribed to the international protection regime by voluntarily becoming party to the international refugee instruments have and/or continue to undertake far-reaching changes through legislative and inter-state arrangements which may restrict access to asylum and the provision of legal rights to refugees. These restrictions include limiting access to refugee status determination procedures and employing an increasingly restrictive interpretation of the refugee definition. In order to avoid the related difficulties, expense and responsibility for protecting refugees on their own territory some states have introduced, in some cases temporarily, off-shore procedures for processing and granting temporary protection to asylum-seekers, a practice which parallels the extra-territorial arrangements being proposed by some EU states today. Practices which may have the effect of deterring asylum-seekers include: the use of administrative detention; the misuse of readmission agreements; the application of so-called 'safe third country' principles; the use of first country of asylum; the imposition of carrier sanctions; visa restrictions and inspection of travellers in airports before embarkation and immediately upon arrival; bolstering border patrols including air and sea port regulations; the absence of domestic refugee law or functioning determination procedures; restricting access to determination procedures including the right to appeal with suspensive effect; limitations on access to legal aid, legal counsel and UNHCR personnel; and interdiction on the high seas. In the context of the former Yugoslavia and Northern Iraq the establishment of so-called 'safe zones' offered a poor alternative to facilitating access across borders to persons in need of international protection, but despite the dangers of such practices it is not unlikely they will be promoted again. Particularly in the post 9/11 world, there are increasing efforts by states to control illegal migration, and would-be refugees may find that they are subject to these control measures. It should be recalled that the system of international refugee protection enshrined in the 1951 Refugee Convention could not have foreseen these wide-ranging developments to avoid state responsibility for asylum-seekers and refugees, nor were the international refugee instruments designed to address migration issues.

8. Use of the benefit of the doubt;
9. Full reasons for decisions;
10. Right to an appeal;
11. A possibility of reopening and second claims; and
12. Humane treatment of claimants²²

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

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

In other states, open disclosure is not the norm. Indeed, although documentation such as embassy or diplomatic mission reports may be extensively relied upon to decide upon claims from particular countries of origin, these reports are not routinely or adequately shared or not shared at all. In such circumstances the asylum-seeker is unable to know and thus refute the evidence which may be relied upon to reach a negative decision. Non-disclosure or limited disclosure can also extend to requests from UNHCR officials, and by doing so the ability of the Office to consult with state authorities and offer its views in individual cases or related policy decisions is undermined.²³

²² David Matas, ‘Stars and Mud: The Participation of Refugee Workers in Refugee Policy Formation’, forthcoming in *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Honour of Joan Fitzpatrick and Arthur Helton*, Anne Bayefsky (ed), Brill Academic Publishers, 2005.

²³ Under Article 35 of the 1951 Refugee Convention, the contracting states undertake to cooperate with the Office of the UNHCR in the exercise of its functions and shall in particular facilitate its supervisory duty. UNHCR’s supervisory responsibility in respect of the 1951 Convention and its 1967 Protocol and other refugee protection instruments is also contained in Article 8(a) of the 1950 Statute of the Office of the UNHCR. At a minimum, UNHCR is granted an advisory-consultative role in national asylum and refugee status determination procedures UNHCR can be notified of asylum applications and informed of the course of determination procedures. UNHCR may have access to files and decisions that may be taken up by the authorities. UNHCR is entitled to intervene and submit its observations on any case at any stage of the procedure, and is entitled to intervene and make submissions to quasi-judicial institutions or courts of law in the form of amicus curiae briefs, statements or letters. See Volker Türk, ‘UNHCR’s Supervisory Responsibility’, Working Paper No 67, Evaluation and Policy Unit, UNHCR Geneva (2002), available on-line at: www.unhcr.org; and Walter Kälin, ‘Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond’, in *Refugee Protection in International Law*, Erika Feller, Volker Türk, Frances Nicholson (eds), Cambridge University Press, 2003.

Right to an oral hearing and right of appeal are other elements which, legally speaking, one would favour as being an integral part of a fair administrative process for determining refugee status. Although many states provide for at least a review of an asylum claim in second instance or on appeal, it is increasingly the norm that asylum appeals have no suspensive effect.²⁴ This approach, which is contrary to the very nature of refugee status determination, is disturbingly present in the Council of the European Union (EU) Procedures Directive.²⁵

The list presented by Matas provides basic and useful benchmarks which, if implemented, go a long way to ensuring that asylum procedures meet international legal standards and are consistent with administrative law principles of fairness and natural justice. In addition to these elements, the difficult job of asylum decision-making could be assisted through development of common evidentiary guidelines; something which goes beyond a normative description of considerations as highlighted in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, its related updates and other sources.

What is required are detailed, analytical guidelines which could be used in both common and civil law jurisdictions, grounded on both international principles and leading national jurisprudence. For example, the study and guidelines on questions of evidence in asylum determinations prepared by the Canadian Immigration and Refugee Board are useful and would be particularly relevant in common law systems.²⁶ However, the idea would be to develop guidelines which specifically focus on evidentiary standards for inclusion, cessation, exclusion and cancellation of

The above-noted EC Qualification Directive inter alia states that UNHCR may provide valuable guidance for EU member states when determining refugee status according to Article 1 of the 1951 Refugee Convention. The EC Directive on Minimum standards on procedures in member states for granting and withdrawing refugee status (Asile 64 of 9 November 2004) (hereafter 'Procedures Directive'), at Article 21(b) provides that UNHCR shall "have access to information on individual applications for asylum, on the course and on decisions taken, provided the applicant for asylum agrees; Article 21(c) further provides authority for UNHCR to "present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure".

²⁴ See Article 38(3) of the EU Procedures Directive. UNHCR has inter alia stated in official comments on the Directive that: "Many refugees in Europe are recognised only during the appeal process. Given the potentially serious consequences of an erroneous determination at first instance, the suspensive effect of asylum appeals is a critical safeguard. This requirement is essential to ensure respect for the principle of non-refoulement. If an applicant is not permitted to await the outcome of an appeal against a negative decision in first instance in the territory of the member state, the remedy against a decision is ineffective", UNHCR Provisional Comments on the Procedures Directive, at p 53.

²⁵ See Article 10(2)(b) and (c) and (3) of the Procedures Directive. UNHCR has expressed serious concern about the extended possibilities for limiting personal interviews in asylum determinations, as personal testimony often proves decisive in the decision. The Office has further noted that "such exceptions significantly undermine the fairness of procedures and the accuracy of decisions. In line with UNHCR Executive Committee Conclusions No 8 (XXVIII) of 1977 and 30 (XXXIV) of 1983, all claimants should in principle be granted personal interviews, unless the applicant is unfit or unable to attend an interview owing to enduring circumstances beyond his or her control. All reasonable measures should be undertaken to conduct an interview. Where an earlier meeting has taken place for the purpose of filing an application according to Article 10(2)(b), applicants should in particular be permitted to refute gaps or contradictions." (p 16)

²⁶ See for example the Canadian Immigration and Refugee Board publications: *Weighing Evidence*, Legal Services, 31 December 2003, and *Assessment of Credibility in Claims for Refugee Protection*, 31 January 2004, available on-line at: www.irb.gc.ca

refugee status and related questions of disclosure and sources of evidence. Over the years UNHCR has undertaken a series of studies and developed guidelines which address some relevant issues.²⁷ What is missing is a more fully developed analysis of evidentiary standards and guidelines which decision-makers across jurisdictions can rely upon: guidelines which are adequately detailed and comparative, yet clear and straightforward and which would have universal application and appeal.

Country of origin information (COI) is a key source of evidence commonly used in asylum determinations. As concerns the use of COI, and in view of the particular nature and limited abilities of some asylum-seekers to present evidence, it is a well-established principle that the decision-maker must share the duty to ascertain and evaluate all the relevant facts. Reference to relevant COI and human rights information by the decision maker assists in assessing the objective situation in an applicant's country of origin. UNHCR and a number of states and non-governmental organisations have made significant advances in producing, compiling and disseminating country of origin and related human rights information. The UNHCR REFWORLD database is a valuable tool and some useful national and comparative asylum caselaw databases are also available.²⁸

Some national authorities invest significant resources in producing country of origin background papers which are publicly available. What needs to be considered in terms of an evidentiary approach to COI, is what decision makers consider an authoritative source. For example, are UNHCR protection guidelines or legal opinions which may include reference to COI issues sufficiently authoritative? One would like to think so, but when you consider that UNHCR's protection guidelines for specific caseloads are regularly ignored begs a number of questions. Do states sometimes know better than UNHCR? If this is so, we must be able to discuss these different perspectives constructively and openly with key stakeholders including decision-makers and judges.

Another important area where UNHCR, academic institutions, organisations such as the International Association of Refugee Law Judges (IARLJ) and the NGO

²⁷ See, for example, UNHCR 'Guidelines on International Protection': Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2002, and Background Note on the Application of the Exclusion Clauses; and Cessation of Refugee Status under Articles 1C(5) and (6) of the 1951 Refugee Convention; HCR/GIP/03/03 of 10 February 2003. See UNHCR study on 'Cancellation of Refugee Status' by Sybille Kapferer, Legal and Protection Policy Research Series, March 2003; UNHCR 'Note on Burden and Standard of Proof in Refugee Claims' of 16 December 1998 and 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', UNHCR European Series, September 1995. Also see Part 7 (Exclusion) and Part 8 (Cessation) in Feller, Türk and Nicholson (eds), *op cit*. These documents and publications are available on-line at: www.unhcr.org

²⁸ The UNHCR REFWORLD CD-ROM and database contains COI including national legislation, case law, human rights reports and replies to queries on specific practices of states. The CD-ROM version of REFWORLD contains the full text of documents, but information is also available on the web: www.unhcr.org/refworld. Other valuable sources include the European Country of Origin Network (www.ecoi.net); Canadian Immigration and Refugee Board Country Reports and Research Queries, the UK Home Office Country Reports; Danish Directorate of Immigration Country Reports; the UN Office of the High Commissioner for Human Rights is also a rich source of UN-based human rights country reports, etc (www.ohchr.org). Also see Refugee Survey Quarterly, Vol 16, (1997), 'Special Issue on Refugee-Related Sites on the World Wide Web'. Needless to say, the availability of country of origin and human rights information available on the World Wide Web continues to grow at a remarkable pace.

community and national authorities should continue to cooperate in, is training of decision makers and judges. The IARLJ training materials for refugee law judges are well-prepared and useful.²⁹ UNHCR has also developed a range of materials which can be used for specific training purposes. Given the importance, complexity, growth and international character of asylum decision making, consideration should be given to establishing an international training college for refugee law judges. Servicing an expert, up-to-date database where not only judgments, but guidelines, training materials and practice guidance in multiple languages is disseminated and shared would be of further use. Training of decision makers and judges should go beyond a detailed study of the law and could benefit from an inter-disciplinary approach and exposure to psychology, anthropology, human geography and the use and limits of expert and forensic evidence.

Finally, it is a reasonable suggestion that there is a need to improve monitoring of the implementation of the 1951 Convention and 1967 Protocol. As part of the UNHCR Global Consultations process, Walter Kälin produced a study on existing and possible future mechanisms to supervise implementation of international refugee law standards.³⁰ A number of Kälin's recommendations are clearly ambitious, such as establishing a Sub-Committee on Review and Monitoring and a judicial body "entrusted with the task of making preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR".³¹ Such far-reaching proposals require considerable political will and support by states and other actors, something which is presently lacking. These proposals to enhance supervision of the international refugee instruments are nonetheless worth keeping in mind for the future.

Conclusion

It is commonly expressed that "each asylum claim is unique". While this may be true, international refugee protection standards developed over the last half century are also unique, and their implementation has underpinned a vast body of jurisprudence and practice which can guide both states and UNHCR in their refugee status determination functions.

However desirable it may seem, we may never reach a satisfactory level of harmonised practice in the area of determination of refugee status. But increased uniformity of asylum practice and decision-making should remain an objective. More recently, European states have adopted binding Directives which reaffirm existing international refugee law standards and set forth common minimum standards in the asylum field. How these minimum standards will be transposed into national practice is an ongoing process being closely watched by UNHCR and other actors. How asylum practices develop in Europe more generally, will also be scrutinised by other

²⁹ Pre-Conference Workshop for New Refugee Law Judges Training Materials, 18-20 April 2005 (on file with the author). The IARLJ training materials were developed by the Immigration and Refugee Board of Canada, The Centre for Refugee Studies, York University, Canada and UNHCR. Contact information for the IARLJ is available at: www.iarjlj.nl

³⁰ Walter Kälin, *op cit*, at pp 613-666.

³¹ *Ibid*, at pp 657-658.

countries and regions. It must be acknowledged that asylum practice in Europe sets an important example which goes well beyond the European space.

Other parts of the world, including developing states hosting significant refugee populations must be encouraged and supported to ensure that international refugee law standards are upheld. In real 'refugee protection' terms, the needs of developing countries may be quite different than the requirements of western industrialised states. Promotion of universal legal standards and procedural guarantees should nevertheless continue to form the backbone of our common interventions and programmes, as well as material and other support to states struggling to cope with displaced populations.

Forced displacement of refugees is a phenomenon closely linked to global justice (or lack thereof) and the continuation of inter-state and particularly today, intra-state war and conflict. The potential for conflict in the world continues to be great.³² A study by Castles, Crawley and Loughna found that it is "the existence of conflict in a country – including the repression and discrimination of minorities, ethnic conflicts and war – that is the primary underlying cause of forced migration to the EU." Although the authors were careful to point out that by reaching this conclusion "is not to say that all of those who seek asylum in the EU who originate from these countries are in need of protection" as refugees, their concern was with establishing whether there are "general causal connections between the principle nationalities constituting asylum flows to the EU and the conflict situations in the countries of origin". The authors concluded that "this would certainly appear to be the case."³³

The above conclusion is the sort of background 'evidence' which forms the basis upon which many asylum claims are presented. It is a common and increasingly frequent story. The considerable challenge is how to ensure that those who are deserving of international protection as refugees are recognised. The absolute truth may never be known, but assessing the truth fairly and in accordance with international standards, practices and principles - which is the obligation of all decision makers – are steps in the right direction.

And if we can make further improvements globally in the areas of sharing information and experiences with all parties, training decision makers and other asylum

³² Troeller has observed that "since the end of the Cold War, over 50 states have undergone major transformations, approximately 100 armed conflicts have been fought, over 4 million persons have died as a result of armed conflict or political violence, and the UNHCR has seen the number of persons under its care rise from 15 million in 1990 to over 27 million in 1995. The magnitude of the latter figure is better appreciated when one considers that in 1970 UNHCR was responsible for 2 million refugees". Civilians have always suffered in conflicts, yet there is a difference between "the nature of warfare at the beginning of the twentieth century and contemporary conflicts". Whereby at the turn of the century approximately 5% of casualties in armed conflicts were civilians, 90% of casualties in modern conflicts are civilians. In conclusion, "those fortunate enough to survive are refugees". Gary Troeller, 'Refugees and human displacement in contemporary international relations: Reconciling state and individual sovereignty', in *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State*, Edward Newman and Joanne van Selms, eds, United Nations University Press, Tokyo, New York, Paris, 2003, at p 55.

³³ Stephen Castles, Heaven Crawley and Sean Loughna, *States of Conflict: Causes and patterns of forced displacement to the EU and policy responses*, The Institute for Public Policy Research, London, 2003, p 28. The countries examined in the study were the top 10 countries of origin of asylum-seekers coming to EU countries during the period 1990-2000. These countries are: Yugoslavia, Romania, Turkey, Iraq, Afghanistan, Bosnia and Herzegovina, Sri Lanka, Iran, Somalia and the DRC (Zaire).

professionals and ensuring basic procedural guarantees in the asylum process, this should better our chances of 'getting it right'.

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