

Context

- 1 The Convention relating to the Status of Refugees (hereafter: the Geneva Convention) was not the first Convention dealing with refugees. It was preceded by several different legal instruments, dealing with vast amounts of people fleeing from war, genocide, internal conflicts etc. These instruments however were established to meet the needs of those specific groups of refugees, and mostly written after the events had already occurred.
- 2 It took until July 28 1951, before the definition we now know best was agreed upon; not designed afterwards and only for specific groups, but written to serve as a means of dealing with the concept of ‘refugee’ in general and in the future. However, written in the fifties, just after the Second World War, it’s obvious from the original text of the Convention that focus was especially on events that had happened shortly before in Europe. Therefore, the original text defines as refugee a person who needs shelter from events that occurred before 1 January 1951 (the so called Temporal Limit). Moreover, countries wishing to accede to the Convention were given the opportunity to choose whether or not they would accept as refugees those who fled from events occurring in Europe before 1 January 1951 or those who fled from events occurring in Europe or elsewhere before 1 January 1951 (the so called Geographical limit).
- 3 The temporal limit was finally lifted with the 1967 Protocol of New York, and over time, most countries have abandoned the geographical limits. Which brings us to the definition of refugee as it is at the moment:
- 4 “Any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”

Interpreting the Convention

- 5 Before taking a closer look at the principles of refugee protection and the different reasons for recognition as a refugee, it's good to keep in mind that there is no global court entrusted with interpreting the Convention. Defining concepts such as "well-founded fear", "race", "religion" etc. is therefore done at a national level: and it's up to us, the judges, to decide what these concepts mean in an individual case. Not an easy job, because politicians will – for various reasons – be likely to try and keep as many aliens as possible away from their borders (though hopefully trying not to act contrary to the principles of the Convention). For us, judges, it takes courage and good understanding of the meaning of the Convention to make sure that those people who meet the requirements will be protected from refoulement, regardless of national policies.
Luckily, the United Nations Refugee Agency (UNHCR) provides us with its "Handbook and Guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", which was recently reissued in December 2011. It's not a binding instrument, but definitely very useful as an important source for interpretation, as you will see as we take a closer look at the reasons (mostly called; grounds) that may lead to the recognition as refugee.

Principles of refugee protection

6 Reading the definition

Any person who [...] is outside the country of his nationality
One cannot be a refugee inside the country of nationality, because international protection cannot come into play as long as someone inside his country.

A well-founded fear

‘Fear’ is a state of mind and a subjective condition: I myself may fear persecution. But is that fear real? Therefore, the words well-founded were added: the subjective (personal) frame of mind must be supported by an objective situation.

of persecution

Being punished after having committed a criminal offence is prosecution, not persecution. Fleeing from prosecution is fleeing from justice, whereas fleeing from persecution is fleeing from injustice. However, criminal prosecution may be abused in order to conceal the fact that it really is all about persecution: prosecuting someone for distributing pamphlets, criticising the authorities, may in fact be persecuting because of a political opinion.

Persecution is normally related to actions, taken by the authorities of a country. But not necessarily. Actions taken by non-state agents may also amount to persecution, if at least national authorities are unable or unwilling to offer effective protection.

7 Recognizing a refugee

To begin with, it’s important to realize that recognising someone as a refugee does not make him a refugee; it simply declares him to be one. According to the Handbook: “A person does not become a refugee because of his recognition: he is recognized because he is a refugee.”

Secondly, the process of recognition is a two-step process. It begins with the assessment of all the relevant facts of the case, including the question whether or not the facts stated by the asylum seeker are found credible. After that, the definitions of the Convention have to be applied to those facts. I will not elaborate on the first step (Sebastian will do so later this morning), but I will focus on the grounds that may make someone a refugee.

Thirdly, bear in mind that the Convention grounds are not mutually exclusive: an asylum seeker may be eligible for refugee status under more than one ground and there’s definitely some overlap.

Grounds

8 Race

Race should be understood in the widest way possible, including all kinds of ethnic groups that are referred to as “races” in common usage or language. Discrimination on racial grounds will be the case if a person’s human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences.

Example:

9 Religion

The right to religion includes the freedom to deny religion or change one’s religion, as well as the freedom to manifest religion in private or in public, in teaching, practice, worship and observance.

Persecution for reasons of religion may consist of prohibition of any of those rights, or in serious measures of discrimination imposed on persons asserting any of these rights.

10 Nationality

Nationality is not just “citizenship”. It refers also to membership of an ethnic or linguistic group. And as you see, there may be some overlap with race.

It may not always be easy to distinguish between persecution for reasons of nationality or race and persecution for reasons of *political opinion* when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific “nationality”.

11 Political opinion

The asylum seeker will have to show that he has a fear of persecution for holding opinions, that differ from those of the Government and that are not tolerated by the authorities. It presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant.

12 Membership of a particular social group

This is perhaps the ground with the least clarity, as it is not defined and hardly commented on in the “travaux préparatoires”. As a matter of fact, it was the result of an amendment hardly motivated.

According to the Handbook, a “particular social group” normally comprises persons of similar background, habits or social status, and membership of such a particular social group may be at the root of persecution because there is no confidence in the group’s loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government’s policies.

- 13 UNHCR has provided Guidelines on several topics, including the 2002 Guidelines on the concept of ‘Membership of a particular social group.’ In these guidelines, you will find several indications which may be of help in finding what is or is not relevant in order to define a particular social group:
- a group cannot be defined as a particular social group solely because it’s suffers from or fears for persecution, but the fact that persecutory action is taken against some people may help to identify them as a group. A perfectly understandable example is given by judge McHugh in a widely cited decision from the High Court of Australia:
“while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify [...] a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.”
 - there is no requirement that members of the group know or even associate with each other; in other words, there is no need for cohesiveness.
 - It’s not necessary that all members of the group risk persecution. Certain members may be able to hide the characteristics the members of the group share.
 - Size doesn’t matter: a group may be just one family. Or it may be the majority of the population. As long as the group as such is at risk of persecution because of some shared characteristic, it may be regarded as a particular social group.

Different approaches to define a group

- 14 In order to provide for some tools to be able to better define the concept of a group, two different approaches have dominated in decision making:

The “protected characteristics approach” or “immutability approach”

In this approach, it is examined whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.

An immutable characteristic may be:

- Innate (meaning you were born with it), such a sex or ethnicity;
- Unchangeable, such as the historical fact of a past association (like a friendship or cooperation), occupation or status.

A ‘characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it’ may be identified by using the human rights norms.

In decisions from courts and administrative bodies all over the world, applying this approach has led to the conclusion that for example woman, homosexuals, families etc. may constitute a particular social group.

15 The “social perception approach”

In this approach, it is examined whether or not a group shares a common characteristic which make it cognizable (kenbaar) in society or sets it apart from society at large.

In decisions from courts and administrative bodies all over the world, also applying this approach has led to the conclusion that for example woman, homosexuals, families etc. may constitute a particular social group.

16 The combined approach

The two above mentioned, different approaches may easily converge and it’s mainly for academics to discuss on the matter. In everyday practice however, it’s sometimes hard to distinguish between the two, and perhaps therefore UNHCR in its Guidelines came up with a new approach, combining the two mentioned, in order to avoid discussion and fill possible gaps. The definition given in the Guidelines reads as follows:

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

17 In other words: a particular social group is a group:

- with an innate, unchangeable characteristic; and/or
- with a former status of any kind, that cannot be changed; and/or
- with a voluntary characteristic, that is so fundamental to its human dignity, that it cannot be compelled to forsake it.

18 **Examples**

It will be obvious that, even applying the approach as suggested in the UNHCR Guidelines, the outcome of the discussion on the matter will vary enormously and will inevitably be highly dependent on the underlying facts and circumstances.

Some examples of applicants who were recognized as members of a particular social group:

- members of the nobility of a former Eastern European kingdom;
- members of the landed gentry in pre-communist Romania
- farmers in areas of military operations in El Salvador
- a former funeral director and his wife engaged in the private sector in pre-communist Poland
- a woman from Trinidad subject to spousal abuse over 15 years
- homosexual and bisexual men and women in countries where their sexual conduct, even with adults and in private, is illegal;
- dispossessed landlords who have abandoned their claim to property after revolution, but are still subject to stigma;
- unmarried women in a Moslem country without the protection of a male relative living in that country;
- members of the Tamil minority fleeing from Sri Lanka;
- young males who have evaded or deserted from compulsory military service in countries engaged in active military operations condemned by the international community;
- members of stigmatised professional groups and trade unions;
- soldiers of the army of the former regime in South Vietnam;
- Roman Catholics and ethnic Chinese fleeing from Vietnam;
- Freemasons escaping from Cuba.

21 Some examples of applicants who were not recognized as members of a particular social group:

- the "capitalist class" in a former East European country;
- an Indian woman who had married out of her caste;
- members of a recreational club;
- a person accused of corruption in Ghana;
- a person who had been a member of an Irish terrorist group and was suspected, in Ireland, of permitting hostages to escape;
- a Bolivian migrant drug offender fearful of punishment as a drug informant if he were returned to Bolivia;
- a member of the wealthy Sikh community returning to the Punjab with money which would be subject to the risk of robbery and extortion;
- an Iranian seaman imprisoned in Australia for importation of illegal drugs liable to further heavy punishment if returned to Iran;
- a stepson of a Columbian storekeeper whose shop was blown up by a drugs cartel when he refused to trade for them.

Some specific cases

24 CJEU C-199/12 homosexuals

The case concerned three homosexual men from Sierra Leone, Uganda and Senegal who applied for asylum in the Netherlands. They claimed that they should be granted refugee status on the ground that they have reason to fear persecution in their respective countries of origin on account of their homosexuality. They claimed, in particular, to have been subject, in different respects, to violent reactions by their families and entourage, or to acts of repression by the authorities in their respective countries.

According to the decision of the CJEU:

- in Sierra Leone homosexual acts are punishable by a sentence of imprisonment of 10 years to life;
- in Uganda, anyone found guilty of an offence described as ‘carnal knowledge of any person against the order of nature’ is liable to a term of imprisonment for which the maximum sentence is life;
- in Senegal, any person found guilty of homosexual acts is to be sentenced to a term of imprisonment of 1 to 5 years and a fine of approximately EUR 150 to EUR 2000.

25 The first question the Court had to answer to, was whether homosexuals may be regarded as being members of a particular social group. In answering that question, the Court finds (relating to a European Directive that in this matter doesn’t differ much from the Geneva Convention) that in order to be regarded as a particular social group:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. As far as this requirement is concerned, the Court finds that “a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it”;

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- that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society. As far as this requirement is concerned, the Court finds that “it should be acknowledged that the existence of criminal laws, which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different.”

Therefore, the Court concludes that homosexuals from these countries must be regarded as forming a particular social group.

27 ECtHR 23505/09, Women

Though women are definitely a very special group within society, sharing an innate, unchangeable characteristic, and pretty easily recognizable, they are not in itself a 'particular social group'. But under specific circumstances, that may be the case.

On July 20 2010, the European Court of Human Rights decided on a case, brought before it by Ms N, an Afghan woman. Though this case concerned the applicability of article 3 of the European Convention on Human Rights, it may also shed some light on the definition of a 'particular social group'.

Ms. N and her husband applied for asylum in Sweden in August 2004, stating they feared persecution because the husband had been a politically active member of the communist party. Their claims were rejected. On appeal, Ms N stated that she separated from her husband in June 2005 and now lived alone. She intended to divorce, but her husband opposed to it. Ms. Claimed that, as a result of her separation and intention to get a divorce:

- she had been criticised by some of X's friends, been called a "bad woman" and some other Afghans had spread untrue rumours about her;
- she had broken with Afghan traditions which meant that she risked serious persecution if forced to return to her home country;
- she would not be able to obtain a divorce in Afghanistan and by trying to obtain a divorce in Sweden she had dishonoured both her own and X's family;
- consequently, her own family had disowned her and she would risk reprisals from X's family;
- It would also be impossible for her to find work and, since she and her husband had no children, she would be a social outcast.
- she further mentioned that the punishment for adultery in Afghanistan was stoning.

28 In its assessment, the Court pointed on some special features regarding Afghan women in a situation like the one of the applicant:

- because Ms. N had lived in Sweden for five years, she may be perceived as not conforming to the gender roles ascribed to her by Afghan society, tradition and legal system
- she has demonstrated a real and genuine intention of not living with her husband, and her husband opposes that wish
- if Ms. N was to be deported to Afghanistan, her husband may decide to resume their married life together against the applicant's wish

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- according to Shiite Personal Status Law, women are required to comply with their husbands' sexual requests and to obtain permission to leave the home

- figures indicate that currently up to 80% of Afghan women are affected by domestic violence and authorities see violence against women as legitimate, so they do not prosecute in such cases
- most women will not seek help because of their fears of police abuse or corruption, or their fears of retaliation by perpetrators of violence
- low social status and social stigmas deter women from going against their families to pursue justice, particularly in cases of domestic abuse.

30 But perhaps more interesting is what the Court says in general about unaccompanied women or women lacking a male "tutor" (divorced women, unmarried women who are not virgins, and women whose engagements to be married have been broken): they face limitations on conducting a normal social life:

- Unless they marry, which is very difficult given the social stigma associated with these women, social rejection and discrimination continue to be the norm.

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- Many Afghan women are prevented from leaving the family compound without a burqa and a male companion, who has to be a husband or a close relative.
- Women without male support and protection generally lack the means of survival, given the social restrictions on women living alone, including the limitations on their freedom of movement. This is reflected in the absence of solutions available to the few women able to access domestic violence shelters.

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- Unable to live independently, they face years of quasi-detention, prompting many to return to abusive family situations. The results of such "reconciliation" are generally not monitored and abuse or honour crimes committed upon return are often done with impunity."

33 **Principle of non refoulement**

Article 33 of the Convention: No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

In fact, article 33 may be looked upon as the key element of the Convention: it protects those who are recognized as refugees from being sent back to the frontier of their country of nationality or any other frontier of a territory where they would be in danger of being persecuted.

There are exemptions to the principle of non refoulement, but they fall outside the scope of this presentation, which has now come to an end.

34 Thank you very much for your kind attention. If you have any questions relating to my presentation, please do not hesitate to do so. Now, or later on.