

Völkerrecht als Wertordnung

Common Values in International Law

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Christian Tomuschat

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The Concept of Membership of a Particular Social Group in Refugee Law

ROGER ERRERA

I. The concept of membership of a particular social group	134
1. The sources	134
2. Exploring the concept of membership of a particular social group : principles	135
The two basic starting points	
a) Interpreting the Convention relating to the Status of Refugees	135
b) Taking into account two new developments	136
II. The expanding case law on membership of a particular social group	138
1. Three issues: persecution, perception, voluntary association	139
a) Persecution and perception	139
b) Voluntary association	141
2. Jurisprudential applications of the concept of membership of a particular social group	142
III. Gender-related persecution and membership of a particular social group	143
1. General remarks	143
a) An increased awareness of gender-related persecution	143
b) The issues of State-related persecution and of protection	144
2. Exploring areas of gender-based persecution and the uses of the concept of membership of a particular social group	144
a) Sexual orientation	145
b) Issues relating specifically to women	147

Under article 1, section A (2) of the Convention relating to the Status of Refugees of 1951, a refugee is someone 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 ...” (the rest of the sentence relates to stateless persons).

The notion of protection is the key concept of the Convention and of the responsibilities of the States Parties. The two key components of the definition of a refugee under the Convention are a well-founded fear of persecution and a causal link with one, or a combination, of the five grounds listed in article 1, section A (2).

This essay is divided into three parts: I will first explore the concept of “membership of a particular social group” (Part I). Then I will make comments on the expanding case law and the uses of that concept (Part II). Part III deals with gender-based persecution and membership of a particular social group.

I. The concept of membership of a particular social group

1. The sources

In addition to those to be found in case law, there are several kinds of sources. The “travaux préparatoires” of the Convention are not very useful in this respect: This ground was added at a late stage without much debate, following a proposal of the Swedish delegation. The other sources are (1) the expanding literature on refugee law: the books by A. Grahl-Madsen,¹ G. Goodwin-Gill,² J. Hathaway,³ F. Tiberghien,⁴ D. Martin,⁵ E. Guild,⁶ C. Teitgen-Colly and D. Alland,⁷ journals such as the *International Journal of Refugee Law*, the reports of the conferences organised by the International Association of Refugee Law Judges (hereinafter referred to as “IARLJ”)⁸ as well as the *Country by Country Handbook* produced by it,⁹ and (2) those coming from UNHCR: the *Handbook*,¹⁰ guidelines, the conclusions and recommendations of the Executive Committee, submissions on behalf of the HCR before domestic or international courts and, recently, the outcome of a consultation held by UNHCR.¹¹

¹ A. Grahl-Madsen, *The Status of Refugees in International Law*, The Hague/Boston/London, Sijthoff, 1966.

² G. Goodwin-Gill, *The Refugee in International Law*, Oxford, Clarendon Press, 2nd ed. 1996.

³ J. Hathaway, *The Law of Refugee Status*, London, 1991.

⁴ F. Tiberghien, *La protection des réfugiés en France*, Aix-en-Provence and Paris, Presses universitaires d’Aix-Marseille and Economica, 2nd ed. 1988); see also his essay, « Demandeurs d’asile et réfugiés : évolutions récentes et la jurisprudence (1988-1997) », in Commission de Recours des Réfugiés (CRR), *Le droit des réfugiés en France*, with a foreword by M. Combarous, Paris, Economica, 2000.

⁵ D. Martin, “Reforming asylum adjudication: on navigating the coast of Bohemia”, 138 *Univ. Penn. L.J.* 1247 (1990).

⁶ E. Guild, *The Developing Immigration and Asylum Policies of the European Union*, The Hague, Kluwer, 1996.

⁷ D. Alland and C. Teitgen-Colly, *Traité du droit de l’asile*, Paris, Presses universitaires de France, 2002.

⁸ “Asylum”, London, 1996; *Refugee and asylum law*, Utrecht, 1997; *The realities of refugee determination on the eve of a new millenium: the role of the judiciary / Les réalités de la détermination du statut de réfugié à l’aube du nouveau millénaire: le rôle du système judiciaire*, Ottawa, 1999; *The changing nature of persecution/La nature changeante de la persécution*, Bern, 2001; *Stemming the tide or keeping the balance – The role of the judiciary / Endiguer ou réguler les flux migratoires – Le rôle du juge*, Auckland, 2002; *The asylum process and the rule of law*, Manak Publications, Delhi, 2006.

⁹ A. Brown, Ed., *Asylum Practice and Procedure: Country by Country Handbook*, London, 1999.

¹⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, UNHCR, 1992.

¹¹ E. Feller, V. Turk and F. N. Nicholson, Eds., *Refugee Protection in International Law. UNHCR’s Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003.

2. Exploring the concept of membership of a particular social group: principles

The UNHCR *Handbook* uses very general terms (paragraphs 77 to 79):

(e) Membership of a particular social group

77. A 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution."

Courts are not engaged here in an exercise of theoretical sociology or anthropology, interesting or valuable as it might be, but in legal reasoning, that is in defining the contents of a legal category, to which legal consequences are attached, essential for the determination of the fate of many individuals and their families. In doing so, their first duty is to give clear guidance to lower courts, administrative agencies, aliens applying for refugee status and to those who advise and help them: lawyers and NGOs.

The two basic starting points

a) *Interpreting the Convention relating to the Status of Refugees*

Since what is at issue is the interpretation and application of a treaty, the first starting point is the Vienna Convention on the Law of Treaties. The rules contained in article 31, paragraphs 1 and 2 apply. According to article 31, paragraph 1, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The words "object and purpose" refer to *the* key concept of the Convention relating to the Status of Refugees, that of protection. According to the Preamble to this Convention – which is part of the context according to article 31, paragraph 2 of the Vienna Convention – its aim is "to assure refugees the widest possible exercise of ... fundamental rights and freedoms" (second preambular paragraph) and to extend the scope of their protection. Consequently, the concept of "membership of a particular social group" must be considered as an autonomous one, one of the five grounds enumerated in article 1, section A (2). It may have links with one or several of the other grounds, in the same way as there is persecution based on both race and religion. It is not, however, a "catchall" category which is either redundant or all-inclusive, a kind of "safety net".

b) *Taking into account two new developments*

The second starting point is the following: Since this concept cannot and should not be interpreted in isolation from that of protection, one has to take into account two developments: new forms of persecution and of conflicts and the contents of international human rights instruments.

aa) *New forms of persecution and of conflicts*

The first development is a factual one – the emergence of new forms of persecution and of conflicts: persecution by non-State agents, the State being either powerless or an accomplice; civil wars accompanied by mass killings and exodus of populations (Rwanda, Kosovo, Sudan); total collapse of the State, giving way to general anarchy or to the coexistence of a number of *de facto* authorities; combination of civil war and international armed conflict (Yugoslavia in the 1990's).

bb) *International human rights instruments*

The second development is a legal one: the contents of international human rights instruments. These were virtually nonexistent in 1951, with the sole exception of the following treaties: the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the four Geneva Conventions of 1949. The European Convention on Human Rights (ECHR) had just been signed but was not yet in force at that time. A remarkable development of the past half century was the parallel elaboration of three international legal corpora relating to human rights, international humanitarian law and refugee law.

Human rights

The UN Convention Relating to the Status of Stateless Persons of 1954; the entry into force of the ECHR; the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; the two UN Covenants of 1966; the American Convention on Human Rights of 1969; the UN Convention on the Elimination of All Forms of Discrimination against Women of 1979; the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987; the UN Convention on the Rights of the Child of 1989; the Statute of the International Criminal Tribunal for the Former Yugoslavia of 1993; the Statute of the International Criminal Tribunal for Rwanda of 1994 and the Rome Statute of the International Criminal Court of 1998.

There has been an evolution in four respects: the combination of universal (UN) and regional (Europe, the Americas) instruments, the elaboration of conventions relating to the rights of specific categories of persons (children,

women) and of conventions prohibiting certain acts (discrimination, torture), and, finally, the creation of international criminal courts.¹²

International humanitarian law

The two Protocols Additional to the Geneva Conventions of 1977. The scope of international humanitarian law was hereby extended in three directions: (1) as to the categories of persons protected: starting with the military, it now includes civilian populations; (2) as to the situations covered: from war to armed conflicts, international or not;¹³ and (3) as to the rights mentioned: as shown by article 3 common to the Geneva Conventions of 1949. In its Advisory Opinion on the legality of the threat or use of nuclear weapons of 1996, the ICJ affirmed that the predominant principle of humanitarian law is what has been called the "Martens Clause" (see The Hague Convention II of 1899 with Respect to the Laws and Customs of War on Land, reiterated in article 1, paragraph 2 of Protocol I (Additional Protocol to the Geneva Conventions)).

Refugee law

The Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities of 1990 (Dublin Convention); the Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders of 1990; the Council Directive of 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof; the Council Directive of 2003 laying down minimum standards for the reception of asylum seekers; the Council Regulation of 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national;

¹² For general evaluations of the UN system see Ph. Alston, Ed., *The UN and Human Rights. A Critical Appraisal*, Oxford, Clarendon Press, 1992; E. Klein, Ed., *The Monitoring System of Human Rights Treaty Obligations*, Berlin, A. Spitz, 1998; Ph. Alston and J. Crawford, Eds., *The Future of the UN Human Rights Treaty Monitoring*, Cambridge, Cambridge University Press, 2000; A. Bayevsky, *The UN Human Rights Treaty System: Universality at the Crossroads*, Ardsley (NY), Transnational Publishers, 2001.

¹³ Collected texts in E. David, F. Tulkens and D. Vandermeersch, Eds., *Code de droit international humanitaire*, Brussels, Bruylant, 2002. See D. Momtaz, *Le droit international humanitaire applicable aux conflits armés non internationaux*, The Hague, RCADI, Vol. 292, 2001, p. 9.

the Council Directive of 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

One novelty is the emergence of what can be called regional refugee law. This development has taken place inside the EU, following the "communitarization" of subjects like asylum and immigration since the Treaty of Amsterdam. Although the Convention relating to the Status of Refugees is usually mentioned in EU instruments, what has taken place amounts in fact to a deliberate and substantial revision of this Convention in a restrictive direction.

Something is quite clear in this context: The European Court of Human Rights often rightly says that the Convention is a "living instrument". So is the Convention relating to the Status of Refugees, especially when it comes to the application of the concept of "membership of a particular social group".

II. The expanding case law on membership of a particular social group

In the *Shah* case, Lord Hope said: "In general terms a social group may be said to exist when a group of people with a particular characteristic is recognized as a distinct group by society. The concept of a group means that we [are] dealing here with people who are grouped together because they share a characteristic not shared by others, not with individuals. The word 'social' means that we are being asked to identify a group of people which is recognized as a particular social group by society. ... The rule that the group must exist independently of the persecution is useful, because persecution alone cannot be used to define the group. But it must not be applied outside its proper context. This point has been well made by Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (1996). At pp. 47-48 he observes that the importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others".¹⁴

Years earlier, in 1985, in *In re Acosta*,¹⁵ the US Board of Immigration Appeals held the following about the concept of membership of a particular social group: "We interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership." Whatever the common characteristic that defines the group might be, it must be one that the members of the group cannot change because it is

¹⁴ *R v. Immigration Appeal Tribunal and another, Ex parte Shah*, House of Lords, (1999) 2 AC 629, (1999) 2 All England Law Reports (All ER) 545.

¹⁵ *Acosta-Solorzano v. INS*, Int. Dec. 289- (1985) I and N 211.

“fundamental to individual identity or conscience”. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution.

Building on *Acosta* and other Canadian cases,¹⁶ the Canadian Supreme Court went further in *Ward*¹⁷ and defined three categories: (1) “groups defined by an innate, unchangeable characteristic”, e.g. gender, linguistic background and sexual orientation; (2) “groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association”, e.g. human rights activists; and (3) “groups associated by a former voluntary status, unalterable due to historical permanence”.

1. Three issues: persecution, perception, voluntary association

a) Persecution and perception

In *Shah*, the House of Lords held that a “particular social group within the meaning of article 1, section A (2) of the Convention had to exist independently of the persecution so that persecution alone could not be relied on to prove the group’s existence”. Disagreeing with G. Goodwin-Gill’s views¹⁸ according to which “treatment amounting to persecution remains relevant in identifying a particular social group, when it reflects State policy towards a particular clan”, Lord Justice Laws, in a paper delivered while *Shah* was pending before the House of Lords, wrote: “... the application of the term ‘particular social group’ in any given case must arise, if it arises at all, entirely independently of any risk of persecution which the putative group faces If persecution or its risk has any part to play in the identification of a particular social group, it must constitute either a necessary or a sufficient condition for that identification. Both are hopeless because persecution cannot constitute a condition for the identification of a social group at all.”¹⁹

I would suggest a more qualified view, if only because the issue of persecution is linked here with that of perception. In his conclusions before the *Conseil d’État* in a 1997 case relating to an Algerian transsexual, the *Commissaire du gouvernement* (a member of the Court, the name is

¹⁶ *Minister of Employment and Immigration v. Mayers*, (1993) F.C. 154 (C.A.); *Cheng v. Canada* (Minister of Employment and Immigration) (1993) 2 F.C. 314 (C.A.).

¹⁷ *Canada (Attorney General) v. Ward*, (1993) A.S.C.R.689; see K. Daley and N. Kelley, “Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence”, 12 *International Journal of Refugee Law* 148 (2000); P. Duquette, « L’interprétation en droit canadien de la notion de groupe social », in *The realities of refugee determination ...*, op. cit. (note 8), at 105; A. Macklin, *Canada (Attorney General) v. Ward: a Review Essay*, 6 *International Journal of Refugee Law* 362 (1994).

¹⁸ Goodwin-Gill, op. cit. (note 2), at 362.

¹⁹ “Particular Social Group”, in *The realities of refugee determination*, op. cit. (note 8), at 96-97.

misleading), Mr. Combrexelle said: “The group may consist in a number of individuals devoid of links and of collective structures, but having common characteristics ... The only condition is that this group has a social existence, that is that it be perceived and recognised by society as a specific whole.” He added: “The social group then can be said to consist in a number of individuals, defined by common characteristics inherent to the person whom society, in a given context, designates to apply discriminatory measures.” In its observations presented in the *Diop* case,²⁰ the French office for the protection of refugees and stateless persons (Office français de protection des réfugiés et apatrides – OFPRA –), the governmental agency in charge of deciding on refugee status applications stated the following:

“If the values of the society or the state of origin are based on a system of social exclusion of individuals who do not conform to norms and criteria relating to origin, birth or behavior defined by the majority social structure, the individuals, if they are subjected to discriminatory measures organised by the State, encouraged or condoned by it, may be said to be members of a socially defined group within the meaning of the Geneva Convention” relating to the Status of Refugees.²¹

A similar view was expressed by McHugh J in *Applicant A v. Minister for Immigration and Ethnic Affairs*:²² “... while persecutory acts cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.” The importance of perception by society of the particularity of the social group was mentioned in *Skenderaj*, decided in 2002.²³ It does not seem, however, that such a perception should always be a requirement: in *Applicant S*, the Australian High Court held that the Federal Court had erred in law by requiring that there had to be an evidence before the Tribunal that would support the claim that Afghan society perceived young able-bodied men as comprising a separate group.²⁴

²⁰ A case of female genital mutilation, decided by the Commission de Recours des Réfugiés, September 18, 1991. I commented it in *Public Law*, 1993, 196.

²¹ Quoted in Alland and Teitgen-Colly, op. cit. (note 7), at 426, n. 2.

²² 71 *Australian Law Journal Reports (ALJR)* 381, 402, quoted by Schiemann IJ in *Montoya v. Secretary of State for the Home Department* (2002) EWCA Civ 620, at § 19.

²³ *Skenderaj v. Secretary of State for the Home Department*, (2002) EWCA Civ 567, (2002) 4 All ER 555.

²⁴ *Applicant S v. Minister for Immigration and Multicultural Affairs*, 2004 HCA 25, 77 *Administrative Law Decisions (ALD)* 541 (per Gleeson, Gummow and Kirby, JJ).

The UNHCR 2002 Guidelines on gender-related persecution wisely adopted an open attitude:

"... 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." (§ 29)

b) Voluntary association

This criterion has been mentioned in a number of American decisions. In *Hernandez-Montiel*, the US Court of appeal for the 9th circuit held that for purposes of asylum under the Immigration and Nationality Act, a "particular social group" is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities of its members that members either cannot or should not be required to change it.²⁵ The emphasis on that notion was even stronger in *Sanchez-Trujillo* where the same Court of appeal held: "Particular social group implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."²⁶

Two final remarks. As Kirby, J. noted in *Dranichkinov*: "... an applicant faces a paradox in identifying the 'particular social group' that he or she relied on in cases of this kind. Defining the group widely increases the ease of establishing membership of that group and, to that extent, of fulfilling a requirement of the Convention definition. However, the wider the definition of the 'group' propounded, the more difficult it may be for the applicant to show that the suggested fear is one of 'persecution' which is 'well-founded' and exists for reasons of membership of that social group."²⁷ The second remark was offered by Auld, L.J. in *Skenderaj*: "... there is potential for a broad range of collectivities. Whether there is a particular social group of which a claimant is a member is essentially a mixed question of fact, policy and judgment in the context of the society in which it is claimed to exist."²⁸

²⁵ *Geovanni Hernandez-Montiel v. INS*, August 24, 2000, 225 F.3d 1084.

²⁶ *Sanchez-Trujillo v. INS*, 801 F.2nd 1571. The Court noted that it was the only Circuit Court to suggest such a requirement.

²⁷ *Dranichkinov v. Minister for Immigration and Multicultural Affairs*, HCA 26 (May 8, 2003).

²⁸ See generally James C. Hathaway and Michelle Foster, *Membership of a particular social group. Discussion Paper No. 4. Advanced Refugee Law Workshop*. International Association of Refugee Law Judges, Auckland, New Zealand, October 2002, *International Journal of Refugee Law*, Vol. 15, No. 3, 478 (2003).

2. Jurisprudential applications of the concept of membership of a particular social group

What is striking is the general convergence of case law in different legal systems, even if the explicit reasoning is not always identical. Without overtly using the same categories as the American or Canadian case law analysed above, the French case law of the Refugee Appeals Board (Commission de Recours des Réfugiés – CRR –) has led to comparable results. Refugee status has thus been granted to individuals on the ground of their social origin, when it was the basis for their persecution, e.g. to Romanians of "bourgeois" origin,²⁹ Vietnamese of Chinese origin, traders and industrialists persecuted on ethnic and social grounds,³⁰ "counter-revolutionary "Chinese"³¹ or Chinese of "bourgeois" origin.³²

In *Aguirre Cervantes*,³³ the US Court of appeal for the 9th circuit held, in the case of a 19-year-old Mexican woman who experienced abuse and beatings of her father, who was determined to dominate the family, that her immediate family constituted a particular social group. In *Lukwago*,³⁴ the Court of appeal for the 3rd circuit held that the class of former child-soldiers who escaped from the rebel group in Uganda fit within the statutory definition of a particular social group. The US BIA granted refugee status on the same ground to members of the Marehan subclan of Somalia who have ties of kinship and linguistic commonalities,³⁵ and to former members of the national police of El Salvador.³⁶ The Australian High Court did the same in a case relating to Chinese nationals born in Australia to unmarried Chinese parents in contravention of approved guidelines in China ("Black children"): "Once it is accepted that 'black children' are a social group for the purposes of the Convention, that they are treated differently from other children and that, in the case of the appellant, the different treatment he is likely to receive amounts to persecution, there is little scope for concluding that that treatment is for a reason other than his being a black child".³⁷

²⁹ CRR, September 24, 1984, *Bastaké*; October 8, 1984, *Doiescu*.

³⁰ CRR, April 28, 1988, *Le Thoi*.

³¹ CRR, March 18, *Fang*.

³² CRR, September 19, 1988, *Zhang*; June 15, 1989, *Zeng*; see also, for Cambodia under the Khmer rouge, CRR, July 12, 1985, *Thach So*; November 26, 1985, *Chea*; February 2, 1987, *Yea*; for Laos, December 5, 1985, *Haynh Lao*; December 20, 1985, *Rathiojhackdy*. See CRR, *Le droit des réfugiés en France, op. cit.* (note 4), at 176 ff.

³³ *Aguirre Cervantes v. INS*, 242 F.3rd 1169.

³⁴ *Lukwago v. J. Ashcroft*, 329 F.3rd 157.

³⁵ *Ir Re H.*, 21, I and N., Dec. 819 (BIA 1990), mentioned in *Castellano-Chacon v. INS*, 341 F.3rd 533.

³⁶ *Matter of Fuentes*, 19 I and N, Dec 658 (BIA 1988), *id.*

³⁷ *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, 170 ALR 553.

III. Gender-related persecution and membership of a particular social group

Before exploring gender-based persecution and membership of a particular social group, some general remarks will be made.

1. General remarks

a) An increased awareness of gender-related persecution

Over the past fifteen or twenty years, there has been a growing awareness of gender-related persecution. And there are numerous indications of this development at both the international and national level.

aa) At the international level:

(1) The preoccupation of UNHCR was illustrated by a number of instruments and initiatives: The 1988 International Consultation on Refugee Women; the 1995 Guidelines on Refugee Women; the 1996 Symposium of Gender-Based Persecution; the Conclusions of the Executive Committee; the 2002 Guidelines on Gender-Related Persecution; the Global Consultations on International Protection.

(2) The case law of the ICTFY and the Rome Statute of the International Criminal Court (articles 6 to 8) deserve special attention: sexual violence may, in certain circumstances, constitute a war crime and a crime against humanity.

(3) New instruments relating to the international protection of human rights have emphasized the rights of women.

(4) The role of NGOs must also be mentioned.

bb) At the national level:

(1) publication of guidelines in a number of countries;³⁸

(2) substantial progress in case law and state practice;³⁹

(3) inclusion of express references in recent statutes.⁴⁰

cc) The growing legal literature on gender-based persecution.⁴¹

³⁸ United States (1995); Australia (1996); Canada (1996); Netherlands (1997); United Kingdom (2000). NGOs were consulted during their drafting.

³⁹ See *supra* at p. 138 ff.

⁴⁰ Ireland (1996); Sweden (1997); Switzerland (1992).

⁴¹ In addition to the general studies on refugee law mentioned *supra*, see H. Crawley, *Women as Asylum Seekers: A Legal Handbook*, London, ILPA, 1997; *id.*, *Refugees and Gender: Law and Process*, Bristol, Jordans, 2001; D. Anker, "Refugee Status and Violence Against Women in the 'Domestic' Sphere: The Non-State Action Question", in *The changing nature of persecution ...*, *op. cit.* (note 8), at 92; N. Kelley, "Report on the International Consultation on Refugee Women", Geneva, 15-19 November 1988, with particular reference to protection problem, 1, no. 2, *International Journal of Refugee Law*, 233 (1989); Anders B. Johnson, "The International Protection of Women Refugees. A Summary of Principal Problems and Issues", *ibid.*, at 221; David A. Martin, "Gender cases: Doubts and Questions", in *The changing nature of persecution ...*, *op. cit.* (note 8), at 102; "UNHCR Symposium on Gender-Based Persecution", Geneva, 22-23 February 1996, *International Journal of Refugee Law*, special issue, Autumn 1997; T. Spijkerboer,



b) The issues of State-related persecution and of protection

These two issues apply to refugee law generally but they have a special relevance here, the basic principle being always the individual examination and assessment of the particular circumstances of each case.

aa) Persecution

One of the two basic elements in this context is the level of harm: serious harm, rising to the level of a grave violation of fundamental human rights. The other element is action relating to fundamental rights as guaranteed by the above-mentioned main international human rights instruments. The notions of adverse discrimination, degrading treatment, and sexual violence are particularly relevant here.

Another element must be taken into account: When persecution, and especially gender-persecution, is through law as a given public policy, several questions must be asked, such as: Is the policy inherently persecutory? Is it used as a means of persecution on one of the Convention grounds? Is it administered through persecutory means? Is the penalty for non-compliance disproportionately severe?

bb) The absence of State protection

The concept of protection, domestic and international, is at the heart of the Convention relating to the Status of Refugees and of the definition of a refugee. The case of persecution coming from the State is the simplest one. Matters are less obvious in the following four cases: persecution condoned by the State, persecution tolerated by it, refusal of the State to intervene because it is unable to provide adequate protection, dissolution of State authority in a way that there is no authority at all, or a number of *de facto* local powers. In all four cases, the issue of non-State agents of persecution arises. This is especially true in cases of gender-related persecution.

The case law of most countries takes into consideration these different situations with a degree of liberalism or of severity that varies. The general tendency is to take more and more into account the non-State origin of persecution.

2. Exploring areas of gender-based persecution and the uses of the concept of membership of a particular social group

Two main areas will be studied: sexual orientation and issues relating to women.

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Gender and Refugee status, Dartmouth; N. Kelley, "The Convention Refugee Determination and Gender-based Persecution: A Decade's Progress", 13, no. 4, *International Journal of Refugee Law*, 559 (2002).

a) Sexual orientation

Sexual orientation may lead to recognition of refugee status on the ground of membership of a particular social group provided that a number of conditions are met. Two examples will be discussed: homosexuals and transsexuals.

aa) Homosexuals

Refugee status was granted on this ground where individuals having disclosed their homosexuality and having demonstrated it in their external behaviour were exposed to criminal prosecution specific to it and/or to various forms of harassment. The wording of *Djellal* illustrates the use of the concept of membership of a particular social group: "Under the prevailing conditions in Algeria, individuals admitting to be homosexual and intending to make it manifest in their external behaviour are, for this reason, exposed to effective criminal prosecution based on provisions making homosexuality an offence and to police surveillance as well as harassment; under these conditions, the fear Mr. Djellal can reasonably have because of his behaviour in case he returns to Algeria must be regarded as a result of his membership of a particular social group within the meaning of article 1, section A (2) of the Convention relating to the Status of Refugees."⁴²

In a case decided in 2003, the Australian High Court adopted the same position: The case dealt with two Bangladeshi homosexuals, both men. The Refugee Review Tribunal found that in Bangladesh homosexual men are a particular social group. It also found that the two applicants suffered no serious harm by reason of their homosexuality. They had clearly conducted themselves in a discreet manner. There was no reason to suppose that they would not continue to do so if they returned home now. The Federal Court dismissed the appeal. The High Court, per McHugh and Kirby, JJ, held that the Tribunal erred in subdividing the genus of homosexual males in Bangladesh into two groups, discreet and non-discreet homosexual men, in stating that they were required or expected to live discreetly in order to avoid harm. The Court held: "...persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their

⁴² CRR (France), *Djellal*, May 12, 1999, Rec., at 46; see also *K.*, May 23, 2002, *id.* at 35; *Aourai*, February 22, 2000, *id.*, at 45 (Algeria); *Gedion*, May 23, 2002, *id.* at 35 (Ethiopia); *Albu*, April 3, 2000, *id.*, at 46 (Romania).

membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality."⁴³ In *Hernandez-Montiel*, the US Court of Appeal for the 9th circuit held that gay men with female sexual identity constitute a particular social group in Mexico.⁴⁴ In other cases, refugee status has been granted by the French CRR without mentioning the membership of a particular group. Refugee status has been denied when persecution on the ground of homosexuality and well-founded fear were not established.⁴⁵

bb) Transsexuals

The French CRR has dealt with this issue in a number of cases. The *Ourbih* case is emblematic.

He applied for refugee status claiming that, as an Algerian transsexual, he had been physically and morally harassed by his family both in Algeria and in France, where he had been living since 1980. His position in Algeria was a marginal one. He suffered from exclusion as well as persecution both by extremist Islamists and by public authorities condoning the murder of transsexuals by such extremists. This, the CRR held, does not lead to regarding him as a member of a particular social group within the meaning of the Convention.⁴⁶ On appeal on points of law ("cassation") the *Conseil d'Etat* quashed the CRR's decision. The CRR, it held, should have examined whether the details provided by O. on the situation of transsexuals in Algeria were sufficient to consider them a group, the members of which would, in view of the common characteristics defining them in the eyes of public authorities and of the Algerian society, be exposed to persecution.⁴⁷ On remand, the CRR granted refugee status to O., affirming that, under the above-mentioned conditions and in the light of the persecution deliberately tolerated by Algerian authorities, his well-founded fear was based on his membership of a particular social group.⁴⁸

This is an important decision since it mentions – inevitably – persecution as an element of the definition of a social group. In another case relating to a transsexual applicant, the CRR upheld the denial of refugee status, holding

⁴³ *Appellant S 395/2002 and Appellant S 396/2002 v. Minister for Immigration and Multicultural Affairs*, 2003 HCA 71; 2003 ALR 112, at § 40.

⁴⁴ *Geovanni Hernandez-Montiel v. INS*, 225 F.3d 1084.

⁴⁵ CRR, *Popescu*, May 9, 2000, Rec. at 47 (Romania); *M.*, June 20, 2001, Rec. at 48 (Armenia); *Ensaad*, May 22, 2000, Rec. at 45, upheld by the *Conseil d'Etat* in *Ensaad*, January 10, 2003, Rec. p. 31 (Algeria); *Bader*, February 6, 2001, Rec. at 49 (Jordan); *Pan*, December 19, 2003, Rec. at 39 (China).

⁴⁶ *Ourbih*, July 7, 1995, Rec. at 52.

⁴⁷ *Ourbih*, June 23, 1997, Rec. at 261.

⁴⁸ *O.*, May 15, 1998, Rec. at 37.

that the fear of the applicant was no longer well-founded in view of substantial changes in the law of Ecuador allowing a legal change of sex and abolishing the offence of homosexuality.⁴⁹

b) Issues relating specifically to women

Three areas will be studied: social mores, the Chinese one-child policy and female genital mutilation.

aa) Social mores

In a number of societies, women are regarded as inferior beings and, according to the prevailing social and cultural mores, are treated as such by public authorities and by society at large, including their own families. When they refuse to conform and to behave as expected, often at a very great risk for them, can they be held to constitute a particular social group within the meaning of the Convention and be granted refugee status?

The answer is not an easy or an immediate one. We have to combine here the different criteria of the definition of membership of a social group, and of persecution.

The case law of most countries takes into account the following three elements: the specific nature of the kind of persecution directed against these women, the individual situation of the claimant and the conceptual as well as practical dangers of extending the scope of the concept of a particular social group.

The case law of the French CRR, on the one hand, seems to reflect some reluctance to consider women in such situations as members of a particular social group and to grant them refugee status on this ground. A number of decisions uphold the denial of refugee status by affirming that the applicant has not produced evidence allowing her to be considered as belonging to a whole of persons ("un ensemble") that is both circumscribed and sufficiently identifiable so as to constitute a social group within the meaning of the Convention.⁵⁰ Other decisions state that the claimant does not establish that

⁴⁹ *Guaman Velasquez*, June 5, 2001, Rec. at 48 (Ecuador).

⁵⁰ *Talata*, February 26, 2002, Rec. at 33 (emancipated Algerian woman refusing the *sharia* and to consent to an imposed marriage); *Khaddouma*, February 2, 2002, Rec. at 33 (Algerian woman claiming to have fled Algeria to escape her brother's pressure to conform to the *sharia* and accept an arranged marriage, and lacking protection in case of return to Algeria); *Hadj Ahmed*, November 3, 2000, Rec. at 46 (divorced Algerian woman with a child claiming to be a privileged target for Islamists); *Kebe*, May 7, 2001, Rec. at 47 (Malian woman claiming to have left her country to escape an arranged marriage with an older and polygamous man and to lack protection); *Kanaté*, April 18, 2002, Rec. at 33 (Guinean woman claiming to have fled Guinea after her refusal of a local custom consisting in having a child by her companion's brother); *Douzindkzaita*, November 4, 2002, Rec. at 34 (divorced Uzbek woman).

she has been persecuted "qua woman" within the meaning of article 1, section A (2),⁵¹ or that the circumstances of the case, assuming they are established, are not within the scope of article 1, section A (2).⁵²

On the other hand, refugee status has been granted more liberally in a number of cases, whenever the actual situation of the claimant justified it. One may distinguish several categories of such decisions:

- Some grant refugee status while expressly holding that the applicant cannot, in the circumstances, claim to belong to a particular social group. The decisions do not mention any of the four other Convention grounds. Here are two relevant examples: the first one is the *Elkebir* decision: Miss Elkebir came into France from Algeria at the age of 2, in 1973, with her family. She lived there until 1985. Her family went back to Algeria in 1985. She attended a lycee in Oran but had to interrupt her studies in 1988 because of the policy of Arabisation. She then worked for a company in the town where her parents lived. She was there the victim of violent harassment by Islamists in view of her professional activity and her refusal to conform to imposed ways of life. After such aggression she left Algeria. The CRR's decision can be summed up as follows: (1) Algerian laws relating to women apply to all of them without distinction. The fact that some of them intend to challenge them does not allow to hold that they belong, for this only reason, to a particular social group for the purposes of the Convention. This is a rejection of Miss E.'s claim to be recognized as a member of the social group constituted by Algerian women who are modernists, francophone, Westernized, educated and having a professional activity. Such a claim can in no way succeed. (2) However, Algerian authorities that knew the acts directed against Miss E. deliberately refrained from action. They must thus be regarded as having voluntarily tolerated such behaviour. In such circumstances, the personal fears of Miss E. in case of return to Algeria are justified.⁵³

A recent decision has confirmed *Elkebir*. The applicant claimed to be persecuted as a member of a social group composed of francophone and isolated women. The wording is the same as that of the 1994 decision. The circumstances are horrendous.⁵⁴

- Other decisions grant refugee status on the ground of political opinion but their wording and description of the circumstances clearly indicate also a gender-based persecution. In *Sallari ép. Osmani*,⁵⁵ the CRR granted refugee

⁵¹ *Lezha, ép. Lleshi*, July 3, 2002, Rec. at 42 (for an Albanian woman claiming to have been subjected to pressure in order to enter a prostitution network).

⁵² *Shanaz*, July 11, 2002, Rec. at 41 (for a Pakistani woman pregnant outside marriage, abandoned by her family and her companion and fearing to be the victim of a 'crime of honour' in her country).

⁵³ CRR, *Elkebir*, July 22, 1994, *Actualité juridique droit administratif (AJDA)* 1995, 22, note Mallol.

⁵⁴ *Mme Kheddache, ép. Rahim*, February 4, 2003, Rec. at 37 and 41.

⁵⁵ February 18, 1999, Rec. at 33.

status to an Afghan woman. Many members of her family had been persecuted on political grounds. She was dismissed from her job as a teacher when the Taliban took power and was subjected to grave discrimination. She participated in the activities of an association defending the rights of women. In a 2002 case,⁵⁶ the applicant was a Mongolian woman of Kazakh origin. Being a Muslim, she got married to a Buddhist, upon which she was kidnapped by her parents, beaten and sequestered. Her husband was attacked and sent to prison when he complained to the authorities. She was sequestered by her family, forcing her to live with an older man, a Muslim. She then fled to France. In *Sheikh*,⁵⁷ refugee status was granted to a woman from Bangladesh who was active in a movement for the emancipation of women and was persecuted on this ground.

• Some decisions do not mention any of the five Convention grounds, even reject them, and grant refugee status, again on the ground of gender-related persecution. Here is an illustration: the claimant was a man, not a woman. The facts were as follows: He was an Iraqi, of Mandeian faith. He received death threats from members of the personal guard of Oudai Hussain, Saddam Hussain's older son, for having refused to allow his daughter to participate in "evenings" organised by the latter. O. Hussain systematically committed crimes against kidnapped women and had their families persecuted; all this was voluntarily tolerated by Iraqi authorities. This was aggravated by a 1984 Supreme Court decision withholding from the parents of Mandeian women the right to consent to their marriage.⁵⁸

Recent decisions have granted refugee status to women refusing to accept imposed or arranged marriage and exposed, for this reason, to a "crime of honour". The decisions rightly stress the importance of the perception, by society at large, of the women.⁵⁹

Women subjected to wife abuse in Trinidad were held to be a particular social group by the Canadian Federal Court of appeal.⁶⁰

The English case law can best be illustrated by the decision of the House of Lords in the *Shah and Islam* cases.⁶¹ They related to Pakistani women suffering violence in their country after their husbands had falsely accused them of adultery. The House of Lords held that a "particular social group"

within the meaning of article 1, section A (2) of the Convention had to exist independently of the persecution, so that persecution alone could not be relied on to prove the group's existence, but that cohesiveness was not an essential requirement. Due to the fact that in Pakistan women were discriminated against as a group in matters of fundamental human rights and the State did not give them protection because they were perceived as not being entitled to the same human rights as men, women in Pakistan constituted a "particular social group" which was more narrowly defined by the unifying characteristics of gender, of being suspected of adultery and of lacking protection from the State and public authorities.

Although not all members of the group were persecuted, the applicants' well-founded fear of persecution, which was sanctioned or tolerated by the State, was for reasons of membership of a particular social group. Accordingly, they were entitled to asylum under the Convention.

bb) The Chinese one-child policy

Under the official Chinese one-child policy, giving birth to more than one child may lead to coercive measures against the mother (including forced abortion or sterilization), the father and the children. Is it possible to grant them refugee status on the ground of membership of a particular social group, taking into account either the policy itself or the way it is enforced and the penalties for non-compliance? Answers vary, the general tendency being that of extreme caution, if not refusal.

Under the existing French case law, the answer is in the negative for mothers, fathers and children. The reasoning is as follows: The Chinese birth control policy does not lead, by itself, to the granting of refugee status in the absence of individual well-founded fear of persecution based on one of the five Convention grounds. In the *Cheng* case (she was a mother of five children), the Conseil d'État added that the risk of repression to which she was exposed could not lead to regard her as belonging to a particular social group within the meaning of the Convention.⁶² In the *Zhang, ép. Yan* case, the CRR held that the fact of an inability to be the mother of a second child leads to the same conclusion.⁶³ The *Wang* case related to the fourth and fifth children of a family of six. The two girls' births were not declared by their parents and they were given to a friend. The alleged applicants' persecution was held not to be established; the same applied to their fear in case of return.⁶⁴

Other countries seem to express the same reluctance. In *Chan*, the Canadian Supreme Court did not adopt the view of La Forest J that Chinese applicants resisting coercive family practices may constitute a particular social group and found that a fear of forced sterilization was not objectively well-founded. The

⁵⁶ *Tsesenbaatar, ép. Luusanpunsag*, April 19, 2002, Rec. at 30.

⁵⁷ May 22, 2000, Rec. at 26.

⁵⁸ June 21, 2002, Rec. at 31.

⁵⁹ CRR, *Tas*, March 15, 2005; *Ozkan*, April 11, 2005 (Turkey); *Nazia*, October 15, 2004, Rec. at 33 (Pakistan).

⁶⁰ *Mayers v. Canada (Minister of Employment and Immigration)* 1992 ACWSJ 13290; 36 A.C.W.S. 3d 839.

⁶¹ *R v. Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah, Islam v. Secretary of State for the Home Department* (1999) 2 WLR 1015; (1999) 1 N.I.R. 144; (1999) 2 A.C. 629.

⁶² *Mme Cheng*, December 20, 1993, Rec. at 780; *RGDIP* 1995, 156, note Alland.

⁶³ *Mme Zhang, ép. Yan*, February 4, 2003, Rec. at 38.

⁶⁴ CRR, *Wang*, February 28, 2003.

same solution was adopted by the US BIA in *Chang*.⁶⁵ The Australian High Court followed the same path.⁶⁶ In the same country, however, the children of a three-child family were held to constitute a particular social group.⁶⁷

cc) *Female genital mutilation*

The very nature and extreme gravity of female genital mutilation (hereinafter referred to as "FGM") in its different forms and its widespread practice in many countries in Africa and elsewhere has led frequently to the granting of refugee status, with or without expressly mentioning the membership of a particular social group.⁶⁸ In both cases, the guiding concept is that of gender-related persecution specifically directed against women. The CRR decisions granting refugee status on this ground are extremely detailed and describe graphically the situation of the applicants and the way they and their daughters have been treated by family and local authorities, the attitude of public authorities, and the overall consequences for them.⁶⁹ The CRR particularly takes into account (a) the fact that the State of origin knowingly tolerates such acts, or does not act when there are complaints by victims and (b) social attitudes and the behaviour of local population and of society at large.⁷⁰ The US Court of appeal for the 6th and 9th circuit took similar decisions recently.⁷¹

Refugee status was denied when the only fact alleged was that the woman had been subjected to FGM against her will,⁷² or when it was not established that FGM was encouraged or voluntarily tolerated by public authorities.⁷³ Similar examples can be found in a Canadian⁷⁴ or German⁷⁵ case.

⁶⁵ *Matter of Chang*, 20 INS Dec.38 (BIA 1989).

⁶⁶ See *Applicant and Another v. Minister for Immigration and Ethnic Affairs and Another*, (1997) 190 CLR 225; 142 ALR 331.

⁶⁷ *Chen Shu Hai v. Minister for Immigration and Ethnic Affairs*, (2000) 170 ALR 553.

⁶⁸ See CRR *Sissoko*, Rec. at 44; *A.*, same date, Rec. at 47; *Kinda*, March 19, 2001, Rec. at 46. The recent case law is more precise and uses explicitly the notion of membership of a particular social group: see *Mme Diakhaté, ép. Ndiangue*, February 22, 2005; *Mlle Ndigumudji*, March 30, 2004, Rec. at 32.

⁶⁹ See the cases mentioned in note 68.

⁷⁰ See *X.*, September 19, 1991, which I commented in *Public Law*, 1993, 196

⁷¹ *Y. Abay and B. Amare v. J. Ashcroft and INS*, 368 F.3d.634, relating to an Ethiopian woman and her minor daughter; *Mohammed v. Gonzales*, 400 F.3d 785, relating to a Somali woman: "the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law."

⁷² CRR *Soumah*, December 7, 2001, Rec. at 25 (Guinea).

⁷³ CRR *Talata*, February 26, 2002, Rec. at 22 (Ghana); *Owusu*, May 15, 2002, Rec. at 55 (same country).

⁷⁴ *Annan v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division) (1995) 3 FC, July 6, 1995.

⁷⁵ Frankfurt Administrative Court, October 23, 1996, 5 E 33532/94.A (3).