

The Researcher

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Welcome to the March 2010 issue of The Researcher

At the end of a long cold winter comes the first issue for 2010 of 'The Researcher'.

In his article, Colin Smith B.L. addresses the area of 'International Humanitarian Law in Subsidiary Protection Applications'. James Healy B.L. discusses the issue of 'The Rights of Minors to be Heard in Asylum Cases'. Pierrot Ngadi of the Congolese Anti-Poverty Network gives an overview of the current situation in the Democratic Republic of Congo (DRC) from a political, economic and human rights perspective. Refugee Legal Service Solicitor Elena Hernandez provides a case study, which raises the issue of 'Domestic Violence and Access to Protection'.

Recent developments in Refugee and Immigration Law are highlighted with case summaries from Mary Fagan of the Refugee Documentation Centre and finally, a selection of UNHCR photographs showing the conditions faced by asylum seekers 'Braving the Cold in Calais'.

Deirdre Houlihan, RDC



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International Humanitarian Law in Subsidiary Protection Applications



COLIN SMITH BL*

1. Introduction

Individuals who have fled their country of origin as a result of armed conflict may be entitled to protection in Ireland even if they are not entitled to refugee status. Such persons may apply for a form of ‘subsidiary protection’ available pursuant to the European Communities (Eligibility for Protection) Regulations 2006 (‘Regulations’), which transposes Council Directive 2004/83/EC (‘Qualification Directive’) into Irish law.¹ A grant of subsidiary protection carries with it an entitlement to certain minimum rights and benefits. The Regulations make the grant of subsidiary protection dependent on a finding by the Minister for Justice, Equality and Law Reform (‘Minister’) that the applicant faces a real risk of ‘serious harm’ if he or she is returned to her country of origin or country of habitual residence.

For the purposes of the Regulations and the Qualification Directive, ‘serious harm’ includes, by virtue of Article 15(c) of the Directive and Regulation 2 of the Regulations, a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’² Thus, in order to ground an application for subsidiary protection in respect of a person fleeing armed conflict, that individual’s legal representative needs to demonstrate (a) the existence of an armed conflict, either international or internal, in

the applicant’s country of origin or country of former habitual residence; (b) that the applicant is a civilian in the context of the armed conflict in question and (c) that there exists a serious and individual threat to the applicant’s life or person by reason of indiscriminate violence.

This article argues that, in seeking to satisfy these requirements, practitioners may look for guidance to the treaties forming the bedrock of international humanitarian law – the four Geneva Conventions of 1949 and their Additional Protocols – and to the jurisprudence of international criminal tribunals which have been established in recent years to punish violations of these rules.³ Member States evidently drew inspiration from these treaties in drafting the Qualifications Directive. Terms such as ‘civilian,’ ‘indiscriminate violence’ and ‘international or internal armed conflict’ are clearly borrowed from international humanitarian law.⁴ This is not to say that definitions and interpretations drawn from international humanitarian law and international criminal law should be decisive in determinations of applications for subsidiary protection status. Rather, practitioners and

³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (First Additional Protocol); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Second Additional Protocol); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007) Not yet published in UNTS (Third Additional Protocol).

⁴ H Storey, ‘EU Refugee Qualification Directive: A Brave New World?’ (2008) 20(1) *International Journal of Refugee Law* 1 at 35.

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¹ European Communities (Eligibility for Protection) Regulations 2006 SI 518/2006 (‘Regulations’) and Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (‘Qualification Directive’).

² Qualification Directive, art 15(c) and Regulations, reg 2.

officials involved in the status determination process should attempt to render decisions in harmony with the treaties, customary rules and general principles of law which form part of international humanitarian law and should interpret this law with reference to the judicial decisions of international courts, including the various international criminal tribunals.

This is especially so given that European asylum law forms part of an international legal system in which rules ought to be, insofar as possible, interpreted in harmony with each other. In this way, it is hoped that consistency and coherence between Irish law, Community law and international law can be maintained within an integrated legal system. This article seeks to provide an introduction to international humanitarian law so that that lawyers and officials involved in the determination of subsidiary protection applications in Ireland may be equipped to act in a manner that reflects their important place within the international legal system.

2. The Qualification Directive and the Irish Regulations

The concept of subsidiary protection in EU law arose from a recognition on the part of Member States that asylum seekers could fall outside the protective regime of the Geneva Convention on the Status of Refugees 1951 and still be in need of international protection.⁵ The various Member States addressed the inadequacy of the refugee definition in their own particular ways. In Ireland the Immigration Act 1999 established an *ad hoc* scheme that gives asylum seekers who have been denied refugee status, and in respect of whom a deportation order has been made, the right to make representations to the Minister for leave to remain in the State on humanitarian grounds.⁶ This scheme was required to ensure the State's compliance with its international law obligations, in particular, the European Convention on Human Rights ('ECHR') and the United Nations Convention against Torture and Other Cruel,

Inhuman and Degrading Treatment.⁷ However, the scheme protects the beneficiary against deportation only; it confers no legal status, no rights, no benefits.

The Qualification Directive, by contrast, requires that Member States establish frameworks by which asylum seekers eligible for subsidiary protection can be identified and protected. It requires not simply that such persons be protected against deportation, but that they be granted rights to residence permits, family unification, employment, education, social welfare, health care, accommodation, and access to integration services.⁸ The Qualification Directive required that its transposition take place before 10 October 2006.⁹ Transposition in Ireland occurred at the eleventh hour: the Regulations were promulgated by the Minister on 9 October 2006 in exercise of powers conferred on him by section 3 of the European Communities Act, 1972, and came into force the next day.¹⁰

Article 2(e) of the Qualification Directive defines a person eligible for subsidiary protection as:

[A] third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin or, in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country.¹¹

⁵ Qualification Directive, recital 5.

⁶ Immigration Act 1999, s 3(3)(b). The factors to which the Minister must have regard in making his decision in relation to the applicant's representations are set out in s 3(6)(a)-(k).

⁷ European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR); Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁸ Qualification Directive, chapter VII and Regulations, regs 16-19. See also H Storey, 'EU Refugee Qualification Directive: A Brave New World?' (2008) 20(1) International Journal of Refugee Law 1, at 6-7.

⁹ Qualification Directive, art 43.

¹⁰ Regulations, preamble.

¹¹ Qualification Directive, art 2(e).

An identical definition appears in the Regulations.¹² Article 15 of the Qualifications Directive and Regulation 2(1) of the Regulations define ‘serious harm’ as:

- (a) death penalty or execution; or
- (b) torture or inhuman and degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.¹³

Article 15(a) and (b) are easily interpreted because they simply repeat obligations which already exist in European human rights law. Protocol 6 to the ECHR commits Contracting Parties to the abolition of the death penalty in peacetime within their own borders, and the judgments of the European Court of Human Rights (‘ECtHR’) in the cases of *Ocalan v. Turkey* and *Bader and Others v. Sweden* suggest that capital punishment has come to be regarded as an unacceptable form of punishment which is inconsistent with Article 2 of the ECHR.¹⁴ As such, deportation of an alien who is likely to be subjected to the death penalty probably constitutes an impermissible violation of that individual’s right to life under the Convention (especially if this is imposed in peacetime or as the outcome of an unfair trial).¹⁵ Furthermore, the ECtHR held in *Soering v. United Kingdom* that a decision to extradite an individual to the United States where he would be exposed to the ‘death row phenomenon’ - a very long time on death row with the ever present and mounting anguish of awaiting execution - would, if implemented, give rise to a breach of Article 3 of the ECHR.¹⁶

Article 15(b) of the Qualification Directive expresses an obligation already imposed on Member States by Article 3 of the ECHR. While the ECtHR recognises the right of Contracting

States to control the entry, residence and expulsion of aliens, expulsion of an individual may engage a Contracting State’s responsibility under Article 3 where substantial grounds have been shown for believing that the person concerned, if deported, would face a real risk of being subjected to torture or inhuman and degrading treatment or punishment.¹⁷ In such a case, Article 3 implies a duty not to deport the person to the country where they are at risk of proscribed ill-treatment.¹⁸ Section 3 of the European Convention on Human Rights Act, 2003 already obliges the Minister to respect the Convention rights of failed asylum seekers when considering whether to make deportation orders, and so deportation of individuals falling within the ambit of Article 15(a) and (b) is already prohibited.¹⁹

Interpretation of Article 15(c) proved more difficult because of an internal contradiction. The Article provides that threats to a civilians’ life or person must be ‘serious and individual’ in order to qualify as serious harm. At the same time, however, it acknowledges that such threats may arise by reason of ‘indiscriminate violence’. The natural meaning of the term ‘indiscriminate violence’ is violence which is not individualised

¹⁷ See for instance *Soering v. the United Kingdom*, Application No. 14038/88, 7 July 1989, and *Chahal v. the United Kingdom*, Application No. 22414/93, 15 November 1996.

¹⁸ *Saadi v. Italy* (Grand Chamber), Application No. 37201/06, 28 February 2008, para 125; *NA v. United Kingdom*, Application No 25904/07, 6 August 2008, para 109.

¹⁹ European Convention on Human Rights Act 2003, s 3. This obligation is wider than that arising under section 4 of the Criminal Justice (UN Convention against Torture) Act, 2000. Section 1 of that Act defines torture as ‘an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person’ for specified purposes, but excluding ‘any such act that arises solely from, or is inherent in or incidental to, lawful sanctions.’ This definition was amended by section 186 of the Criminal Justice Act, 2006, such that ‘torture’ is now limited to such acts or omissions that are ‘done or made, or at the instigation of, or with the consent or acquiescence of a public official.’ This section came into force on 1 August, 2006, pursuant to S.I. No. 390 of 2006. The obligation arising under section 3 of the European Convention on Human Rights Act, 2003, and Article 3 of the Convention contains no requirement of an official sanction. See *Gavrylyuk and Bensaada v. Minister for Justice, Equality and Law Reform*, [2008] IEHC 321, Unreported, High Court, 14 October 2008, *per* Birmingham J, at p 41.

¹² Regulations, reg 2(1)

¹³ Qualification Directive, art 15(a)-(c) and Regulations, reg 2(1).

¹⁴ Protocol No. 6 to the ECHR (adopted 28 April 1983, entered into force 1 March 1985) 1496 UNTS 263; *Ocalan v. Turkey* (Grand Chamber), Application No. 46221/99, 12 May 2005, paras 163-169; *Bader and Others v. Sweden*, Application No. 13284/04, 8 November 2005, paras 41-49.

¹⁵ *Ibid.*

¹⁶ *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989, para 111.

but general; violence to which an entire population (or section thereof) may be subject.²⁰ Interpretation of Article 15(c) is further complicated by Recital 26 of the Qualifications Directive, which states that ‘[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.’²¹ This recital reflects the jurisprudence of the ECtHR. In cases such as *Vilvarajah and Others v. United Kingdom*, *NA v. United Kingdom* and *FH v. Sweden* the Court required that applicants must (except in exceptional circumstances) demonstrate that they would, if deported, face a real and substantive risk of treatment proscribed by Article 3 of the ECHR and that this must not be because of general violence but because of special distinguishing features relating to their personal circumstances.²² Debate therefore centred on whether Article 15(c) of the Directive should be interpreted as providing protection exclusively in situations where Article 3 ECHR (as interpreted by the ECtHR) applied, or whether in fact it offered additional or different protection.

When these issues arose in the case of two Iraqis claiming asylum in the Netherlands, they were referred by the Judicial Division of Council of State to the European Court of Justice (‘ECJ’) for a preliminary ruling pursuant to Articles 68 and 234 EC.²³ The ECJ considered the wording of Article 15(c) in the light of the Recital 19 and the ECtHR case law and concluded that ‘the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances’ and that ‘the existence of such a threat can exceptionally be considered to

be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.’²⁴

In the course of its judgment, the ECJ noted that ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.’²⁵ The converse is also true: the higher the level of indiscriminate violence, the less the onus on the applicant to show that he is specifically affected by the reason of his personal circumstances.

While the judgment of the ECJ in *Elgafaji* addressed the internal contradiction in Article 15(c) of the Qualification Directive, it did not address the meaning of such terms as ‘armed conflict,’ ‘indiscriminate violence’ and ‘civilian.’ For guidance as to the meaning of these words, we should look to the body of law from which they were derived: international humanitarian law.

²⁰ H Battjes, European Parliament Briefing Paper, August 2006, para 3.3.2.

²¹ Qualification Directive, recital 26.

²² *Vilvarajah and Others v. United Kingdom*, Application No.s 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991, para 108; *NA v. United Kingdom*, Application No. 25904/07, 6 August 2008, paras 115; *FH v. Sweden*, Application No. 32621/06, 20 January 2009, paras 89-90.

²³ *M Elgafaji, N Elgafaji v. Staatssecretaris van Justitie*, Decision 200702174/1 of the Judicial Division of the Council of State of the Netherlands, 12 October 2007. See Case Note in (2007)19(4) J Intl Refugee L 765.

²⁴ *M Elgafaji, N Elgafaji v. Staatssecretaris van Justitie*, Case C-465/07, 17 February 2009, para 43.

²⁵ *M Elgafaji, N Elgafaji v. Staatssecretaris van Justitie*, Case C-465/07, 17 February 2009, para 39.

3. The Definition of ‘Armed Conflict’ in International Humanitarian Law and International Criminal Law

As noted above, a victim of armed conflict applying for subsidiary protection must demonstrate the existence of an armed conflict, either international or internal, in their applicant’s country of origin or country of former habitual residence. The concept of armed conflict is central to the body of rules known as ‘international humanitarian law’ which regulates the conduct of hostilities. The modern foundation of this *corpus* of law is to be found in the Hague Conventions of 1899 and 1907 (which fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in international armed conflicts) and in the Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005 (which protect the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities).²⁶ These treaties draw on centuries of international practice and custom and are the most widely ratified and accepted instruments in the entire canon of international law.

International lawyers often describe international humanitarian law as *lex specialis* because its applicability is limited to situations of armed conflict and occupation. Armed conflicts can be divided into two categories (though the line between the two categories is not always easily drawn): international armed conflicts take place between States, while internal armed conflicts take place within States. Internal armed conflicts are, for historical and political reasons, subject to a less detailed regime of regulation than are international armed conflicts. International armed conflicts are regulated by the Hague and Geneva Conventions, by the First and Third Additional Protocols to the Geneva Conventions, and by rules of international customary law. Internal armed conflicts are subject to regulation only by Common Article 3 of the Geneva Conventions and, where the State in question has ratified it, by the Second Additional Protocol. Certain rules of international customary law may also be applicable.

²⁶ International Court of Justice Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons* (1996) 35 ILM 814 at 877, para 75.

Breaches of international humanitarian law can occur in both international and internal armed conflicts. Many such violations of are condemned by international law as ‘war crimes.’ Some are defined as ‘grave breaches’ by the Geneva Conventions themselves; others are criminal by virtue of their recognition as such by customary law. All must be suppressed and punished by States and other belligerent actors. Because of failures by many States to take such actions, a body of law known as ‘international criminal law’ has developed, with international criminal tribunals created by the community of States to try and punish violations of international humanitarian law as well the most heinous violations of international human rights law such as genocide and crimes against humanity.²⁷ Before criminal responsibility for war crimes can be imposed by an international criminal tribunal, the Prosecution must show, *inter alia*, the existence of an armed conflict at the time the alleged crime was committed and that there existed a nexus between that alleged crime and the conflict in question.²⁸ The Tribunals have therefore developed a list of indicative factors which are used to determine the existence of armed conflict. These factors ought to be of use to practitioners in Ireland preparing submissions with a view to establishing the existence of an armed conflict in the context of applications for subsidiary protection, and should be of assistance to the Minister in evaluating and determining such applications.

²⁷ Building on the foundations laid after the Second World War by the International Military Tribunal at Nuremberg, the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) in The Hague has tried 116 individuals for crimes committed during the Balkan wars, and trials continue at the International Criminal Tribunal for Rwanda (‘ICTR’) in Arusha, Tanzania, of individuals accused of involvement in the Rwandan genocide. 110 States are now parties to the Rome Statute of the International Criminal Court (‘ICC’), 1998, which establishes a permanent tribunal in The Hague with jurisdiction over the most serious international crimes. Situations in four countries – the Democratic Republic of Congo, Uganda, the Central African Republic and Sudan’s Darfur region - have already been referred to the ICC, and proceedings are underway in eight cases.

²⁸ W Schabas, *An Introduction to the International Criminal Court* (CUP Cambridge 2007) (3rd edn) 117-119. See also ICTY Trial Chamber Judgment, *Prosecutor v. Haradinaj* (IT-04-84-T), 3 April 2008, para 36.

The test for the existence of an armed conflict was first set out in a seminal decision of the Appeal Chamber of the ICTY in case of *Prosecutor v. Tadic*, wherein the Chamber held that:

[A]n armed conflict exists where there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.²⁹

This test makes assessing the existence of an international armed conflict a relatively simple task: where one State uses armed force against another an international armed conflict is initiated and international humanitarian law comes into force between them.³⁰ There is no requirement of a declaration of war by one State against another and neither is there a requirement that the States involved subjectively believe that an armed conflict is in existence. Thus, it is no longer possible for a State to avoid its international obligations by claiming that a particular military operation is outside the scope of international humanitarian law because formalities have not been complied with or because it does not recognise the existence of an armed conflict.

The situation in relation to internal armed conflict is more complex. The ICTY in *Tadic* set down a two-fold test for the existence of an internal armed conflict in a given State: firstly, there must exist a situation of ‘protracted armed violence’ and, secondly, the parties involved in the violence must be ‘organized’.

As regards the requirement of ‘protracted armed violence,’ the Second Additional Protocol of 1977 (relating to the protection of victims of internal armed conflicts) makes clear that internal armed conflicts must be distinguished from ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of

violence and other acts of a similar nature.’³¹ In *Prosecutor v Rutaganda*, a Trial Chamber of the ICTR trying a leader of the Hutu militia in Rwanda noted that ‘it is clear that mere acts of banditry, internal disturbances and tensions, and un-organized and short-lived insurrections are to be ruled out’.³² A more elaborate exposition of this principle was given in *Prosecutor v Musema*, wherein an ICTR Trial Chamber held that:

Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not ... constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order.³³

The ICTY Appeal Chamber in the *Tadic* decision on the Tribunal’s jurisdiction interpreted ‘protracted armed violence’ to mean ‘the intensity of the conflict.’ When Dusko Tadic was tried for war crimes he committed as a guard in the Bosnian Serb concentration camp at Omarska, the Trial Chamber hearing the case was the first to apply the test for protracted armed violence. Because war crimes charges require a *nexus* to an armed conflict, the Chamber had to determine whether an armed conflict existed in Bosnia-Herzegovina between the Government of Bosnia-Herzegovina in Sarajevo and Bosnian Serb forces between May and December 1992. The Trial Chamber looked at incidences of fighting and shelling, the movements of tanks and artillery, the destruction of buildings, the looting of villages, the number of casualties and the stance adopted by the United Nations (‘UN’) Security Council before concluding that the required intensity of violence had indeed been reached and that an internal armed progress had been in progress during the indictment period.³⁴

²⁹ ICTY Appeal Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadić* (IT-94-1) 2 October 1995, para 10.

³⁰ Pursuant to Article 1(4) of the First Additional Protocol, a state of international armed conflict may exist between a State and a national liberation movement representing a State *in statu crescendi*, but this exception should not distract from the fact that international armed conflict is State-oriented.

³¹ Second Additional Protocol, art 1(2).

³² ICTR Trial Chamber Judgment, *Prosecutor v Rutaganda*, (ICTR-96-3), 6 December 1999, para 92.

³³ ICTR Trial Chamber Judgment, *Prosecutor v Musema*, (ICTR-96-13), 27 January 2000, para 248.

³⁴ ICTY Trial Chamber Judgment, *Prosecutor v. Tadic*, (IT-94-1), 7 May 1997, paras 140-146, 560-568.

Similarly, in *Prosecutor v. Delalic et al.*, an ICTY Trial Chamber pointed to military operations against villages in the vicinity of the Celebici Camp – where Serb prisoners were detained by Bosnian and Croat forces in appalling conditions – by the various ethnic factions as evidence of the existence of an armed conflict in the Konjic municipality and in Bosnia-Herzegovina as a whole between its declaration of independence in March 1992 and the conclusion of the Dayton Peace Agreement in November 1995.³⁵ The Trial Chamber also noted that the fighting had attracted the attention of the UN Security Council, which acted under Chapter VII of the UN Charter.³⁶ In *Prosecutor v. Slobodan Milosevic*, the judges trying the case of the former Yugoslav President determined the existence of an armed conflict in Kosovo during the indictment period of January to March 1999 by reference to the intense fighting between Kosovo Liberation Army ('KLA') guerrillas and the Serbian police between 1996 and the end of 1998 and the series of massive Serbian offensives against Kosovo Albanian villages between August 1998 and March 1999 involving Serbian armed forces including special military and paramilitary groups.³⁷

In a series of subsequent war crimes cases the ICTY examined the specific circumstances to determine whether in fact an internal armed conflict existed during the indictment period in the area where the crimes were alleged to have been committed.³⁸ In its judgment in the case of *Prosecutor v. Haradinaj* an ICTY Trial Chamber

summarized the indicative factors used by the Trial Chambers to assess the intensity of various conflicts. These include:

[T]he number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of the conflict.³⁹

The second part of the test for the existence of an internal armed conflict is that the groups involved in the fighting possess the minimum level of organisation. In the *Tadic* case the Trial Chamber had to assess whether the Government of Bosnia-Herzegovina and the Bosnian Serb forces arrayed against them had the requisite level of organisation. The Chamber found that the Republic of Bosnia-Herzegovina was an organised political entity with institutions dedicated to the public defence and that it had become a State *de iure* on 22 May 1992. Examining the organisational structure of the Bosnian Serb Republika Srpska, the Chamber noted that it effectively controlled a significant part of Bosnia-Herzegovina from its 'capital' at Pale and that its forces, which had formerly comprised part of the Yugoslav National Army ('JNA'), were subject to effective military discipline. The Chamber concluded that both entities were sufficiently organised.⁴⁰

In the *Slobodan Milosevic* case, the Trial Chamber examined whether the KLA qualified as an 'organised armed group' during the indictment period, and noted that the KLA possessed an official joint command structure, headquarters, designated zones of operation and logistical capabilities.⁴¹ In *Prosecutor v. Limaj et al.* the Trial Chamber interpreted the existence of a KLA hierarchy, disciplinary rules and a corps of

³⁵ ICTY Trial Chamber Judgment, *Prosecutor v. Delalic et al.*, (IT-96-21) 16 November 1998, paras 129-130, 133-134, 182-192.

³⁶ ICTY Trial Chamber Judgment, *Prosecutor v. Delalic et al.*, (IT-96-21) 16 November 1998, para 190.

³⁷ ICTY Trial Chamber Decision on Motion for Judgment of Acquittal, *Prosecutor v. Slobodan Milosevic*, (IT-02-54-T), 16 June 2004, paras 14-40.

³⁸ ICTY Appeal Chamber Judgment, *Prosecutor v. Kordic and Cerkez*, (IT-95-14), 17 December 2004, paras 334-341; ICTY Trial Chamber Judgment, *Prosecutor v. Halilovic*, (IT-01-48), 16 November 2005, paras 6, 8, 24, 160-173; ICTY Trial Chamber Judgment, *Prosecutor v. Limaj et al.*, (IT-03-66), 30 November 2005, paras 83-84, 93, 135-173; ICTY Trial Chamber Judgment, *Prosecutor v. Hadzihasanovic et al.*, (IT-01-47), 15 March 2006 paras 7, 14, 20-25; ICTY Trial Chamber Judgment, *Prosecutor v. Martić*, (IT-95-11), 12 June 2007, paras 41, 343-347; ICTY Trial Chamber Judgment, *Prosecutor v. Mrksic*, (IT-95-13/1) 27 September 2007, paras 39-40, 407-408, 419-422.

³⁹ ICTY Trial Chamber Judgment, *Prosecutor v. Haradinaj* (IT-04-84), 3 April 2008, para 36.

⁴⁰ ICTY Trial Chamber Judgment, *Prosecutor v. Tadic*, (IT-94-1), 7 May 1997, paras 562-568.

⁴¹ ICTY Trial Chamber Decision on Motion for Judgment of Acquittal, *Prosecutor v. Slobodan Milosevic*, (IT-02-54-T), 16 June 2004, paras 14, 22-25 and 40.

military police as evidence of the growing formality and effectiveness of organisational structures and of the progress towards ensuring discipline and coordination within the armed group.⁴² The same considerations were taken into account in *Prosecutor v. Haradinaj*.⁴³ In all three cases, the Trial Chambers held that these factors suggested a level of organisation in the KLA which could secure compliance with applicable international humanitarian law. In *Prosecutor v. Mrksic et al.*, the Trial Chamber had to determine whether the opposing Serbian and Croatian forces satisfied the 'organisation' requirement. The Chamber examined the composition of both armed forces - noting their numbers, their location, their level of training, their arms and their hierarchical structures - before concluding that both satisfied the 'organised armed groups' criterion.⁴⁴

The *Tadic* test for the existence of an internal armed conflict has found broad acceptance and has been codified by the Rome Statute of the ICC.⁴⁵ In deciding whether to issue a warrant of arrest for President Omar Al Bashir of Sudan on charges of crimes against humanity and war crimes, Pre-Trial Chamber I of the ICC concluded that there were reasonable grounds to believe that an armed conflict existed in the Darfur region from March 2003 to at least mid-July 2004 between the Sudanese government in Khartoum and the Sudan Liberation Movement/Army, the Justice and Equality Movement and other armed groups.⁴⁶ The Chamber reached this conclusion based on evidence submitted by the Prosecutor of sustained military operations in the region, rebel control and administration of Sudanese territory and the

capacity of the warring factions to conclude cease-fire agreements.⁴⁷

Based on the foregoing, the existence of an international armed conflict can be demonstrated by evidence of the resort to armed violence between States. The existence of an internal armed conflict will be established where there is evidence of protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. Indicators of protracted armed violence include the number, duration and intensity of military confrontations, the type of military equipment used by the belligerents, the number and size of weapons fired, the number and type of combatants taking part in the fighting, the number of casualties, the level of destruction, the displaced persons and the attitude of the UN. Factors indicative of the requisite level of organisation in the context of armed groups include the existence of a command structure and a disciplinary system, the existence of an operational headquarters, the group's control and administration of territory, the ability of the group to gain access to men and materiel, the level of training of combatants, the group's ability to plan, coordinate and execute aggressive and defensive operations, the ability of the group to speak with one voice and the capacity of the group to negotiate, conclude and adhere to agreements such as cease-fires and peace accords.

Information in relation to the existence of such factors is generally available from news sources as well as from international organisations such as the UN and the International Committee of the Red Cross, and should be included in any application for subsidiary protection made under Article 15(c) to demonstrate the existence of an armed conflict in the applicant's country of origin or country of former habitual residence. Needless to say, the absence of evidence of the existence of an international or internal armed conflict within the meaning of those terms in international humanitarian law will weaken an application for subsidiary protection under Article 15(c), though it need not be decisive.

⁴² ICTY Trial Chamber Judgment, *Prosecutor v. Limaj et al.*, (IT-03-66), 30 November 2005, paras 129, 171-173.

⁴³ ICTY Trial Chamber Judgment, *Prosecutor v. Haradinaj* (IT-04-84), 3 April 2008, paras 63-89.

⁴⁴ ICTY Trial Chamber Judgment, *Prosecutor v. Mrksic*, (IT-95-13/1) 27 September 2007, paras 409-418.

⁴⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 8(2)(f).

⁴⁶ ICC Pre-Trial Chamber Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir*, (ICC-02/05-01/09-3), 4 March 2009, para 70.

⁴⁷ ICC Pre-Trial Chamber Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir*, (ICC-02/05-01/09-3), 4 March 2009, paras 55-70

4. 'Indiscriminate Violence' and the 'Civilian' in International Humanitarian Law

The use of the terms 'civilian' and 'indiscriminate violence' in the Qualifications Directive and the Regulations recall one of the most fundamental principles in international humanitarian law: the principle of distinction. This basic rule was codified by Article 48 of the First Additional Protocol, applicable in situations of international armed conflict:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁴⁸

Article 50 of the First Additional Protocol defines the term 'civilian' for the purposes of international humanitarian law as a residual category comprising all those individuals who have not attained combatant status by incorporating themselves into the armed forces of the belligerents and by complying with certain requirements such as, *inter alia*, wearing a 'fixed distinctive sign,' carrying their arms 'openly', operating under 'responsible command' and respecting in their operations the 'laws and customs of war.'⁴⁹ Thus, everyone who is not a combatant is, *ipso facto*, a civilian. Indeed, the term should also be understood to include former combatants who have renounced military activities and have demonstrably returned to civilian life.⁵⁰

Indiscriminate attacks are prohibited by international humanitarian law. These attacks are defined by Article 51(4) of the First Additional Protocol as

- (a) those which are not directed at a specific military objective;

⁴⁸ First Additional Protocol, art 48.

⁴⁹ First Additional Protocol, art 50. The criteria for combatant status are set out in Article 4 of the Third Geneva Convention and Article 43 of the First Additional Protocol.

⁵⁰ UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence, January 2008, p 7.

- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
- and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Thus, the term 'civilian' for the purposes of the Qualifications Directive and the Regulations is properly understood as including any person not actively taking part in hostilities, and 'indiscriminate violence' should be taken to refer to violence which fails to distinguish between combatant and civilian; between military objectives and civilian objects.⁵¹ Practitioners seeking to show that an applicant for subsidiary protection status falls within the rubric of Article 15(c) may wish to refer to these provisions in the context of country of origin information to buttress their argument that the applicant is entitled to succeed, and they may likewise be used by the Minister and his or her officials to determine whether the application is well-founded.

5. The British Approach

The proposition that recourse may be had to international humanitarian law and to the jurisprudence of the international criminal tribunals in defining terms used in Article 15(c) has not been uncontroversial in the United Kingdom.

Much of the jurisprudence of the Asylum and Immigration Tribunal (AIT) expressly recognises the value of reference to international humanitarian law and international criminal law. For instance, in the case of *HH and others* the

⁵¹ Article 51 of the First Additional Protocol even provides examples of attacks which are to be considered indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

AIT was called upon to determine applications for subsidiary protection pursuant to the paragraph 339C of the Immigration Rules (which provision gives effect to the Qualifications Directive in British law) made by Somalis fleeing armed violence in Mogadishu. In doing so it recognised that the reference to international or internal armed conflict in Article 15(c) of the Qualifications Directive ‘appears to touch upon concepts relevant to international humanitarian law or the law of armed conflict.’⁵² For guidance as to the meaning of the terms ‘armed conflict,’ ‘civilian’ and ‘indiscriminate violence,’ the Tribunal looked to, *inter alia*, the Geneva Conventions of 1949 and their Protocols, the authoritative *Commentary* to the Conventions by the eminent Swiss jurist Jean Pictet, the *Manual of the Law of Armed Conflict* produced by the United Kingdom’s Ministry of Defence, the writings of various academics and the jurisprudence of the international criminal tribunals.⁵³ In deciding whether there has in fact existed an armed conflict in Somalia such as to ground the Applicants’ application for subsidiary protection, the Tribunal assessed whether the violence between the Transitional Federal Government and various Somali militias was sufficiently protracted and whether the various armed groups possessed the requisite level of organisation to satisfy the test for the existence of an armed conflict set down by the ICTY in *Tadic*. The Tribunal then considered the military capacity of the warring factions, the number of combatants involved in the fighting, the types of weapons used by the belligerents, the casualty figures and the attitude to the violence adopted by the United Nations before concluding that ‘on the evidence before it, Mogadishu is in a state of internal armed conflict.’⁵⁴

The approach of the AIT in *HH* was followed in the case of *AM & AM*, when, in evaluating the applications from subsidiary protection of two Somali nationals, the Tribunal observed that evidence from the ground suggested that the requirements of protracted violence and organization were satisfied and that an internal

⁵² *HH (Mogadishu: armed conflict: risk) Somalia CG* [2008] UKAIT 00022, para 255.

⁵³ *HH (Mogadishu: armed conflict: risk) Somalia CG* [2008] UKAIT 00022, paras 312-334.

⁵⁴ *HH (Mogadishu: armed conflict: risk) Somalia CG* [2008] UKAIT 00022, para 335-341.

armed conflict was in existence not simply in Mogadishu but throughout central and Southern Somalia.⁵⁵

By contrast, in *QD and AH v. Secretary of State for the Home Department*, the Court of Appeal held that the terms derived from international humanitarian law present in Article 15(c) should be given an autonomous meaning appropriate to the object and purpose of the Directive.⁵⁶ The Court cautioned that reference to international humanitarian law should not be allowed ‘to introduce an unarticulated gloss of a fundamental kind into a Directive which goes far wider in its purposes than states of armed conflict,’ and even went so far as to hold that undue faithfulness to international humanitarian law had led the AIT ‘to construe “indiscriminate violence” and “life or person” too narrowly, to construe “individual” too broadly, and to set the threshold of risk too high.’⁵⁷ The Court even rejected the definition of armed conflict derived from international humanitarian law, and held that:

[T]he phrase ‘situations of international or internal armed conflict’ in art 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*.⁵⁸

In rejecting the relevance of international humanitarian law the Court of Appeal failed to appreciate its own role in the international legal system and missed an opportunity to move asylum law in a direction more in tune with the

⁵⁵ *AM & AM (armed conflict: risk categories) Somalia CG* [2008] UKAIT 00091, paras 128-149. See also the case of *Lukman Hameed Mohammed v. Secretary of State for the Home Department*, AA/14710/2006, 13 September 2007, (unreported), in which the Tribunal considered international humanitarian law in determining whether an internal armed conflict existed in Iraq in August 2007.

⁵⁶ *QD v. Secretary of State for the Home Department (UNHCR intervener), AH v. Secretary of State for the Home Department (UNHCR intervener)* [2009] EWCA Civ 620.

⁵⁷ *QD v. Secretary of State for the Home Department (UNHCR intervener), AH v. Secretary of State for the Home Department (UNHCR intervener)* [2009] EWCA Civ 620, para 18.

⁵⁸ *QD v. Secretary of State for the Home Department (UNHCR intervener), AH v. Secretary of State for the Home Department (UNHCR intervener)* [2009] EWCA Civ 620, para 35.

reality of modern conflict. The Court should have acknowledged the relevance of international humanitarian law and should have interpreted and developed it to meet the needs of persons displaced by violence.

Over the past fifteen years, international criminal law has contributed greatly to the development of international humanitarian law. There is no reason why international asylum law should not have a comparable influence. If, as the Court of Appeal submits, the definition of armed conflict in international humanitarian law as set out in the jurisprudence of the international criminal tribunals is not fit for purpose, then it is for asylum determination bodies to address the issue and to move international humanitarian law in what it considers to be a more positive direction. Simply to ignore international humanitarian law as a source of guidance is to endanger international law's unitary system.

Community law plays an important part in this system, a part recognised by the ECJ in *Van Gend en Loos* and in the Irish constitutional order by the Third Amendment to the Constitution (and all subsequent amendments dealing with Ireland's relationship with the entities that would become the EU).⁵⁹ Fragmentation of international law – the advent of a myriad of self-contained systems in which practitioners and academics are isolated from each other – constitutes a serious threat to the unity of the discipline. For this reason the eminent jurists of the UN International Law Commission have warned that fragmentation of international law should, insofar as possible, be avoided. They insist that no body of international rules can be allowed to become a self-contained regime.⁶⁰ The concepts of 'armed conflict,' of 'indiscriminate violence,' of 'civilians' as they exist in European asylum law ought not to be 'autonomous' from the meaning given to these

terms within the mainstream of the international humanitarian law discourse. The main objective of the Qualification Directive is 'on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.'⁶¹ For this objective to be achieved it is essential that coherence and consistency be maintained within the European asylum system and that the 'common criteria' applied be in consonant with the rules comprising the legal system on the global level.

Accordingly, the approach adopted by the Court of Appeal in *QD and AH* ought not to be adopted in this jurisdiction. Rather, Irish practitioners should endeavour to interpret Article 15(c) of the Qualification Directive in harmony with international law, as interpreted by the international criminal tribunals and the courts of other Member States.

6. Conclusion

Legal practitioners preparing applications for subsidiary protection on behalf of persons who have fled their countries of origin as a result of armed conflict should feel confident in drawing guidance from international humanitarian law and international criminal law in addressing issues such as the existence of an armed conflict, the nature of the violence and the civilian status of the applicant with reference to available country of origin information. Similarly, officials involved in determining such applications may find recourse to these bodies of law instructive in deciding whether such applications are well founded. In my opinion, it is imperative that Irish lawyers, officials and judges recognise that they have an important place within the international legal system, and that European asylum law and the concept of subsidiary protection allows them to engage with an important corpus of international rules governing the use of force. An approach to subsidiary protection which seeks to harmonise the protective intention of asylum law with international humanitarian law affords an opportunity to influence both bodies of rules for the better while maintaining the integrity of the international legal system.

⁵⁹ *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] ECR 1 (*Van Gend en Loos*); Constitution of Ireland, 1937, art 29.

⁶⁰ International Law Commission Report 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' 1 May-9 June and 3 July-11 August 2006. On the relationship between international humanitarian law and asylum law, see S Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law' (2001) 83 *Intl Rev of the Red Cross* 651.

⁶¹ Qualification Directive, recital 6.

Braving the Cold in Calais

Many boys and young men from places like Afghanistan, Eritrea, Iran, Iraq, Somalia and the Sudan end up in the northern French port of Calais after a long and dangerous journey. Some have fled their countries to escape persecution, conflict or forced recruitment, others are looking for a better life. Calais has become a transit point where people smugglers have established networks to take these men to other European countries.



Young men from Afghanistan and Iraq examine the clothes they received from charities in Calais. © UNHCR/H.Caux



Khaled and his friends gather in a field near the City Hall in Calais. He has been hanging around in the city for several months, hoping to cross the English Channel to the United Kingdom. © UNHCR/H.Caux



Men and boys walk along the road that leads to the Channel Tunnel, which links France and England by rail. They will return to their makeshift settlements in a nearby wood. © UNHCR/H.Caux



Seen from Calais, the White Cliffs of Dover appear tantalizingly close to the men and boys who yearn to cross the sea to England.

© UNHCR/H.Caux



Since the destruction of “The Jungle,” some of the former inhabitants and recent arrivals in Calais have built new shelters, but most of these are also destroyed during nightly police raids. © UNHCR/H.Caux



In the bitter cold, a fire helps to keep up spirits at an encampment near Calais.

© UNHCR/H.Caux



An Afghan teenager meets up with friends in a field in Calais before searching for a place to sleep. © UNHCR/H.Caux

THE RIGHTS OF MINORS TO BE HEARD IN ASYLUM CASES



James Healy, B.L.

The question of whether Minor Applicant's have the right to be seen and heard in asylum applications, both at First Instance and later on Appeal, before the Refugee Appeals Tribunal, has been a question of some debate. An unaccompanied Minor applicant has the right to appear before the Refugee Applications Commissioner and give a Section 11 Interview whereas an accompanied minor, with one or both of his or her parents does not appear to have such right. If one of the minor's parents signs a form presented to him or her by the Refugee Applications Commissioner, states that he or she wishes the minor's claim to form part of the parents claim then despite the fact that the minor may have suffered personal persecution in their right, that may not have been witnessed by either parent, and allied to the fact that the Minor may be of an age and maturity where his or her evidence is admissible, the child's case will not be determined in its own right.

Paragraph 215 of the UNHCR Handbook states that "where a minor is no longer a child but an adolescent, it will be easier to determine refugee status as in the case of an adult, although this again will depend upon the actual degree of the adolescent's maturity. It can be assumed that – in the absence of indications to the contrary – a person of 16 or over may be regarded as sufficiently mature to have a well founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature. They may have a will and fear of their own, but these may not have the same significance as in the case of an adult." Paragraph 216 of the Handbook goes on to state that "It should however, be stressed that these are only guidelines and that a minor's mental maturity must normally be determined in light of his personal, family and cultural background."

As already referred to above, a parent of a minor, which is usually the mother, is presented with a form by the Refugee Applications Commissioner to ascertain whether the parent wishes to have the minor's claim included as part of their own claim. They usually do, without their informed consent and at a time when the parent usually has no legal advice, as such a form is usually presented to them when he or she are making their own application for asylum.

The subsequent notification from the Office of the Refugee Applications Commissioner only invites the parent or next friend to attend the Section 11 Interview to the exclusion of the children and this was averted to by Finnegan J. in the Supreme Court in his judgment in the case of **A.N. & Others–v-Minister for Justice & Another**, dated 18th October, 2007, where he stated in the course of his judgment that the letter to the next friend to attend the interview contained the following:-

"Unfortunately there are no facilities for children in the Department so arrangements should be made to have them looked after while you attend the interview"

Finnegan J. went on to state that "because of this the children did not attend the interview and only the next friend attended." The learned Judge went on to state that "The minors, save as above, considered at the interview and the report of the interview which was prepared "contains no mention of the minors other than the threat to kill them and on its face relates only to the next friend" before he went on to hold that:-

"Taking guidance from the E.C.H.R. Handbook I am satisfied that on an application by a parent of a minor child the Minister under the non-statutory regime could deal with that application without having regard to the minor. If the application succeeds the minor should be given refugee status. If the application is unsuccessful then the minor is entitled to apply for refugee status based on his own circumstances and reasons. The E.C.H.R. Handbook does not envisage the parent's application as being also an application on behalf of the minor nor that on failure of the parent's application the status of the minor should be determined without regard to his individual circumstances or reasons." Thus the Minister was in error in treating the next friend application as

being one on behalf of the minors also. The next friend's application was not an application by the minors but if successful, applying the principle of family unity, would benefit them. In the present case there was no application by or on behalf of the minors. Accordingly on the central issue on the application for judicial review there had been no application by or on behalf of the minors and the Immigration Act 1999 section 3(2)(f) did not apply to them: the basis upon which the Minister purported to make deportation orders in relation to the minors did not exist. I would answer the first point certified in the negative."

The second question certified to Finnegan J. in the Supreme Court in respect of this case, which as stated by him did not arise for consideration, related to, whether in considering an application for asylum made by or on behalf of an accompanied minor the Minister is obliged to consider the application of an accompanied minor in his or her own right separately and distinctly from that of the accompanying parent and whether for that purpose the Minister is obliged to:-

- (a) Ascertain the views of the minor and more particularly the fears of the minor related to the application for a declaration of refugee status.
- (b) Ascertain the capacity of the minor to express his or her views directly and
- (c) Interview the minor unless such interview would cause unnecessary hardship and trauma on the minor.

Although there does not appear to be any reference in the UNHCR Handbook or decided case law in the above respect on hearing a child in asylum applications, this matter was considered by Finlay Geoghegan J. in a child abduction case of **M.N. -v- R.N.** (High Court – 3rd December, 2008) where the father of the child sought an order, pursuant to the Hague Convention, for the return of the child forthwith to the EU Member State of his habitual residence. The Respondent to the proceedings was the mother of the child.

Finlay Geoghegan stated in the opening paragraph of her judgment that it is the common case that the application is brought for the purpose of seeking from the Court an Order that the child be interviewed and assessed for the

purpose of the proceedings. This application is based upon the obligation imposed on the Court by Article 11(2) of Council Regulation (EC) 2201/2003 which provides:-

"When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity"

It is, correctly, common case between the parties that, being the provision of an EC Regulation, the obligation imposed thereby is binding upon the Court in hearing these proceedings and the Court has jurisdiction to make the type of Order sought pursuant to Article 11(2) if it is warranted on the facts of the application. The disputes in this application relate to the criteria according to which, or manner in which, the Court should determine whether it is "inappropriate having regard to his or her age or degree of maturity" to give a child an opportunity to be heard during the proceedings and whether, on the facts of this application, it is inappropriate.

In the course of her judgment the learned Judge stated that "Neither the Hague Convention, which children up to the age of 16 years are subjected to, nor the Child Abduction and Enforcement of Custody Orders Act, 1991, refer expressly to the rights of the child to be heard in proceedings. However, Article 13 of the Convention gives the Court a discretion to refuse to order the return of the child "if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views". Neither the Act of 1991 nor the Rules of the Superior Courts make any express provision as to how the Court is to assess any alleged objections to the return made by the child, or how it should determine whether the child has attained a degree of maturity where it is appropriate to take account of its views.

Since the coming into force of Council Regulation (EC) No 2201/2003 Counsel for the Respondent submitted that Article 11(2) of that Regulation should be construed in such a way as to give effect to the right of the child to be heard, as recognised in Article 12 of the United Nations Conventions on the Rights of the Child, ratified

by Ireland on 28th September, 1992. This provides:-

“(1) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law”.

The Judge went on to state that the recitals to Regulation 2201/2003 do not expressly refer to Article 12 of the United Nations Convention of the Rights of the Child. However, in relation to hearing the child, they state at paragraph 19:

“The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable” and further at paragraph 33:-

“This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union”

Article 24 of the Charter of Fundamental Rights of the European Union provides:-

“(1) Children have the right to such protection and care as is necessary. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity

(2) In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be the primary consideration

(3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to their interests.”

Finlay Geoghegan J. in holding that on the facts of this application, that the child in question, who was six years of age, appeared from the evidence of the parents, to be of a maturity at least consistent with his chronological age, that she did not find that *prima facie* he is a child not capable of forming his own views, that it appears unavoidable that a Judge making such a decision must rely on his or her own general experience and common sense in relation to anyone who has contact with normal six year olds, know that they are capable of forming their own views about matters of direct relevance to them in their ordinary everyday life, based her decision on the following conclusions, some of which conclusions she stated were not in dispute between the parties, but merit restatement to make those matters, which were in dispute, comprehensible:-

1. A mandatory positive obligation is placed on a Court by Article 11(2) to provide a child with an opportunity to be heard, subject only to the exception where “this appears inappropriate having regard to his or her age or degree of maturity”, see **R -v- R** (2007) IEHC 423 in which I agreed with similar views expressed by Thorpe LJ., Smith LJ and Munby J. in the Court of Appeal in England and Wales in **Re F (a Child)** (2007). E.W.C.A Civ. 468. The starting point is that a child should be heard. The Court is only relieved of the obligation where it is established that it would be inappropriate for the reasons stated.
2. In Hague Convention proceedings to which Article 11(2) applies, the issue as to whether or not the Court should give a child an opportunity to be heard is a separate and distinct issue from an issue which may arise subsequently in the proceedings, as to the appropriate weight, if any, to be given by the Court to the views expressed by the child in determining any substantive issue in the application for the return of the child.
3. Baroness Hale of Richmond in **Re D** (2006) U.K.H.L. 51 having referred to Article 11(2) stated, albeit obiter, at paragraph 58 of her speech that “Although strictly this only applies to cases within the European Union, the principle is in my view of universal application and consistent with our

international obligations under Article 12 of the United Nations Convention of the Rights of the Child. It applies, not only when a defence under Article 13 has been raised, but also in any case in which a Court is being asked to apply Article 12 and direct the summary return of the child – in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child, as already stated, not to be confused with giving effect to his views”.

4. Insofar as I have stated that hearing the child is not to be confused with determining what weight should be attached to any views expressed, I believe that I am saying the same as did Baroness Hale in the final sentence above. A determination as to whether or not to give effect to the child’s views is a further subset of determining the weight, if any, to be attached to those views.
5. In this application, I am only determining whether or not the child should be given an opportunity to be heard. The fact that, on this application, I determine that the child should be heard, does not determine the weight, if any, which may be attached to those views by a judge determining the substantive application for the return of the child.
6. How should the Court determine the age or degree of maturity at which it is appropriate to give the child an opportunity to be heard? It appears to me to be permissible to have regard to Article 12 of the UN Convention of the Rights of the Child and that it is of assistance in answering the question that I have put, for the following reasons. Recital 33 of Regulation 2201/2003 refers expressly to the Regulation seeking to ensure respect for the fundamental rights of the child as set out in Article 24 of the EU Charter of Fundamental Rights. Article 11(2) should be construed so as to give effect to the rights of Article 24. This appears to be the right of all children to “express their views freely” and then to have those views taken into account “in accordance with their age and maturity”. The right to “express views freely” is the right also referred to in Article 12 of the UN Convention of the Rights of the Child. The UN Convention of the Rights of the Child has

been acceded to by many, if not all of the EU Member States and it appears to me probable, having regard to the wording of Article 24 of the EU Charter of Fundamental Rights and Article 12 of the UN Convention on the Rights of the Child, that they intended to guarantee a similar, if not the same right to children. I am reinforced in that view by the view formed by Baroness Hale in the passage referred to above, that the obligation imposed by Article 11(2) is consistent with the United Kingdom’s obligations under Article 12 of the UN Convention of the Rights of the Child.

7. Article 12 of the UN Convention on the Rights of the Child, however, expressly identifies the category of children to whom the right is assured. It obliges States to assure to the child “who is capable of forming his or her own views” the right to express those views freely. Notwithstanding the absence of any similar category identification it appears to me to be probable that Article 24 is only intended to assure the right to “express their views” to a similar category of children. Such a right assumes that the child has a view which he is permitted to express. It is the child’s own view which Article 24 grants him the right to express and this presupposes that the child is capable of forming his own views.
8. Applying Article 11(2) so as to respect the rights granted to a child in Article 24 of the EU Charter of Fundamental Rights (and having regard to the starting point of hearing the child as set out above) I have therefore concluded that the primary consideration of the Court in determining whether or not a child should be given the opportunity to be heard is whether the child on the evidence that appears *prima facie* to be an age or level of maturity at which he is probably capable of forming his own views. I say *prima facie* for the following reason.

9. In our procedural system, where there is no mechanism readily available to the Court to obtain an independent professional assessment in a speedy or simple way, as to the probable level of maturity of a child and capability, or not, to form his own views without making the type of order now requested, it appears that the Court should form what only be a prima facie view of the capability of the child to form his own views having regard to the age of the child and the evidence adduced on Affidavit by the parties, while recognising that the latter may not be objective. If the Court were to seek a separate professional assessment of the maturity and capability of the child to form his own views before determining whether he should be heard, this would both lengthen proceedings and make them more costly if it then were decided that the child should be given an opportunity to be heard. The Order to be made on this application will both allow the child to be heard and the Court to obtain a professional assessment of the level of maturity of the child which will then assist the Court in deciding the distinct issue as to the weight, if any to the views expressed by the child. This approach appears to be also consistent with the construction of Article 11(2) according to which not hearing the child is an exception to the general obligation.
10. In accordance with Article 24(3) of the EU Charter of Fundamental Rights, the child's best interests must be the primary consideration in the judicial determination.
11. In general, the weight to be attached to the views expressed by a six year old, will be less than that to be attached to the views of say a fifteen year old.
12. On the facts of this application, the child is age six years and appears from the Affidavit evidence of the parents to be of a maturity at least consistent with his chronological age. On those facts, I do not find that *prima facie* he is a child not capable of forming his own views in the sense that I have outlined above. It appears to me to be unavoidable that a Judge making such a decision must rely on his or her own general experience and common sense. Anyone who has had contact

with normal six year olds know that they are capable of forming their own views about matters of direct relevance to them in their ordinary everyday life.

Although this judgment related to a Child Abduction case, the issues to be decided at that stage were not the Substantive issues but the issues in respect of the right of a child to be heard, to express their views freely if it appears appropriate, having regard to the child's age and maturity, the giving effect to those views and determining what weight should be attached to any views expressed by the child, in actions concerning them. It appears quite clear from the learned and reasoned judgment of Finlay Geoghegan J in this case, in relying on decided case law, the various EU Directives and Regulations and particularly Article 12 of the UN Convention of the Rights of the Child and Article 24 of EU Charter of Fundamental Rights, that a child who is capable of forming his or her own views and has a view or views to express, should be given an opportunity to express those views freely, and what weight should be attached to these views of the child should be determined in accordance with the age and maturity of the child.

This judgment should go in some way to answering the second question that had been certified to the Supreme Court, as outlined above, in the case of **A.N. & Others –v- Minister for Justice & Others**, (supra) but which that Court stated did not arise by reason of deciding that there had been no application for asylum on behalf of the minors.

In relation to Applicant's who have family members accompanying them when making application for asylum, the standard procedure at the Office of the Refugee Applications Commissioner's Office, is that one of the parent's, usually the mother, of the minor(s) and at a time when they have no independent legal advise, is interviewed to ascertain whether he or she wishes to have her child or children included in her own application. If he or she does so consent, they are requested to sign a form to have such child or children included with their own application. This situation pertains if the child or minor is under 18 years of age.

The question arises from the judgment of Finlay Geoghegan whether minor applicant's who accompany their parent or parents should be given the opportunity by the Office of the Refugee Applications Commissioner of expressing their own views in relation to having their application included with one of their parents, or whether they wish to make their own separate application. In this regard the consent form signed by the parent, does not mention whether the minor has consented to have their own application included with that of one of their parents, if the child is at an age and maturity to make such a decision. The question further arises of whether the parent of the child or minor can sign away the child or minor's right to a separate application for asylum without their child's consent. This issue is pertinent to children in their teens and particularly minors between the ages of 16 and 18 years with regard to whom paragraph 215 of the UNHCR Handbook state that "it can be assumed that – in the absence of indications to the contrary – a person of 16 or over may be regarded as sufficiently mature to have a well founded fear of persecution"

If the parent of the child or minor consent to have the child or minor's application for asylum included with their own application, the letter from the Office of the Refugee Applications Commissioner inviting the parent to attend for interview is specifically addressed to the parent, with no invitation to the child or minor to attend. Albeit, they may be of an age and maturity to express their own views freely, state what had happened to them in the Country of Origin, which in some instances may not have been witnessed by the parent giving the interview on their behalf and also to express their views of their well founded fear of future persecution if returned. As already set out above this situation was specifically alluded to by the Supreme Court, in the case of **A.N. & Others –v- Minister for Justice & Others** (supra) when holding that there was no application for asylum for those reasons on behalf of the minors, when stating in the judgment that the letter to the next friend requesting her to attend for interview contained the following: "Unfortunately there are no facilities for children in the Department, so arrangements should be made to have them looked after while you attend for interview" and

the judgment further stated that because of this the children did not attend at the interview.

The standard formula used by the Refugee Applications Commissioner, in applications where the parent has signed consent to have the child or minors application included with their own application is, that at the outset of the interview, the Authorised Officer of the Refugee Applications Commissioner informs the parent that "Any issues in respect of you child(ren) should be raised here to-day". Given that the child or minor has not been invited, does not attend the parents interview or has not been seen or heard, the more appropriate procedure, in this scribes view, would be for the interviewer having interviewed the parent in relation to his or her persecution, to then proceed to interview the parent in relation to the child(ren) or minors in relation to their own personal persecution and fears of return to their Country of Origin. Then in the Section 13 Report make a separate assessment of the child(ren) or minors persecution, applying the EU Directives, UNHCR Handbook provisions, Conventions, Charter of Rights, case law, etc that specifically apply to child(ren), or minors, before going on to make an overall assessment and decision in relation to the family as a whole, as envisaged by the Supreme Court decision in **A.N & Others –v- Minister for Justice & Others** (supra) under the principle of family unity.

On appeal, to the Refugee Appeals Tribunal, a more or less similar procedure pertains to that at the Office of the Refugee Applications Commissioner, with the parent Applicant only invited to attend and the standard notification given to such parent "There are no facilities for children at the Office of the Refugee Appeals Tribunal. You must make arrangements for someone to mind your children elsewhere while you are attending your appeal hearing". This results in the child or minor not attending the appeals hearing, not been seen or heard or given an opportunity to express their views or fears freely and afterwards no separate assessment made in respect of their claim in accordance with the special legislation applicable to children as outlined above and no application of the principle of family unity.

While the provisions of the 1989 EU Convention of the Rights of the Child, (which incorporates applying the Best Interests of the Child) has been ratified by Ireland since 28th September, 1992, it has not been signed into domestic law here, and would appear to apply here only indirectly through the application of Article 24 of the EU Charter of Fundamental Rights, as held by Finlay Geoghegan J. in the **M.N. -v- R.N** case (supra). However, the Preamble to Council Directive 2004/83/EC, which relates to “minimum standards for the qualification and status of third party nationals or stateless persons as refugees” which states at Section 12 that “The ‘best interest of the child’ should be a primary consideration of Member States when implementing this directive” has been transposed into Irish Domestic law, by statutory instrument, in the adoption of the European Communities (Eligibility for Protection) Regulations, 2006, as confirmed by Cooke J. in the cases of **Dokie (A Minor) and Ajibola -v- Refugee Applications Commissioner & Others** (High Court 19th January, 2010) and accordingly the provisions of this Section of the Directive should apply, in applying the Best Interests of the Child in asylum matters.

Article 12 (1) of Council Directive 2005/85/EC, of the 1st December, 2005, states that “Member States may determine in national legislation the cases in which a minor shall be given an opportunity of a personal interview”. While no transposition of this Directive, by means of normal statutory instrument, under the European Communities Act, 1972 has taken place, it was accepted by Cooke J. in the above cases, that the view taken was that as the minimum standards for procedures required by the Directive were already catered for and put in place in the arrangements and provisions of the 1996 Act, as it then stood, mechanical transposition of a Directive by legislative action at national level is not always necessary if existing laws already provide for objectives sought to be achieved. However the 1996 Act, as it then stood or Regulations made thereunder, made no provision for the opportunity of a personal interview for a minor and to the best of this scribes knowledge, no national legislation prior or subsequent to the Directive has been introduced by this Member State to determine cases in which a minor shall be given an opportunity of a personal interview,

However, there may be light at the end of the tunnel, as the recently published 118 page report by the Oireachtas Committee on Children’s Rights has proposed new wording on Article 42 of the Constitution, which will be voted on in a Referendum later this year. The substance of the provisions begins with a new Article 42.1.2 whereby the State recognises the natural and imprescriptible rights of all children and undertakes, as far as practical, to protect and vindicate those rights. Article 42.1.3 will require that the welfare and best interests of the child must be the first and paramount consideration in areas of family law decision-making. This will require children’s interests to be paramount, not just in judicial proceedings, but in the resolution of all disputes, including the determination of the broad issues of “care and upbringing”. Article 42.2. truly breaks new ground by proposing to require the State to recognise and vindicate the rights of “all children as individuals”, in clear recognition of the status of children as right-holders, independent of adults. These rights include the right to care and protection, to education and the right of the child’s voice to be heard in any proceedings affecting the child, having regard to the child’s age and maturity. This will include the duty to listen to children here which will have the effect of ensuring that children are heard as well as seen, which will have a major impact on the processing of children or minor’s application for asylum in this jurisdiction, if the proposals are put to the people, and passed at Referendum. Article 42.4 sets a new threshold based on proportionality in relation to the State and the Child.

While it can be said that the proposals are not perfect, they go in some way to ally the criticisms of the United Nations Committee on the Rights of the Child, who have urged Ireland to undertake meaningful constitutional reform in this regard, by ensuring a rights based approach to policies and practices affecting children. They reflect a new model for the treatment of children and a redrawing of the responsibilities of the State, and should ensure a greater respect for children’s rights in practice and in law, to include those of asylum seekers who are children or minors.



Democratic Republic of Congo DRC

Pierrot Ngadi

Chairperson

Congolese Anti-Poverty Network

The CAPN is a Congolese networking organisation working in partnership with local and international bodies to tackle poverty and to further economic, social and cultural development within Congolese communities.

Its work involves establishing a partnership based on trust and transparent procedures and best practices, promoting and supporting formal and informal education and other social sectors in order to improve the standards living of Congolese people, encouraging exchange visits between different groups to strengthen partnerships, empowering women and people with special needs and initiate actions of development and providing human rights education in communities.

VALUES

The CAPN wants a society in which Congolese people are welcome, respected and safe, and in which they can achieve their full potential.

Executive summary

DRC is currently in a crucial testing phase of its young democracy. Having finally emerged from the long dictatorship of Mobutu in the mid 1990s, Congo was plunged into 10 years of almost continuous war which drew in forces from nine other African countries. After brokering a peace deal through negotiations in Nairobi and Pretoria in 2003, the transitional Government of President Joseph Kabila successfully held national elections in 2006, the first in four decades. So far, however, the hope generated by these momentous events has not been fulfilled and the period since the elections has been characterised by a failure to reach a final political solution with the remaining rebel groups in the East and continued armed conflict causing death and displacement of civilians and an alarming rate of sexual violence related to the conflict in the east.

Congo's vast mineral wealth, whilst having the potential to economically transform the country, has throughout its history been a source of conflict and misery for its people. Ensuring that the Congolese State receives a fair share of the revenue from mineral concessions controlled by multi-national companies and that this revenue in turn derives real benefits for ordinary Congolese citizens, rather than simply enriching the top leadership and fuelling conflict, is of the utmost importance if DRC is to make real progress.

The general Human Rights situation in DRC remains grave. Despite positive progress with historic and largely successful elections in 2006, the delicate beginning of the democratization process, numerous peace accords, and the current improvement in relations between Rwanda / Uganda and DRC, serious violations of civic and political rights persist.

There has been a marked increase in reported human rights violations perpetrated by armed groups and Government security forces during 2009. More than 600 civilians have been killed and 800,000 people have fled their homes during 2009. Sexual violence continues at alarming rate, especially in conflict zones. Impunity has become entrenched in society where there is little fear of consequences of crimes due to - among other factors - the extremely weak national judicial system. Gender inequality and oppression of women are deeply rooted in society, and are sustained through discriminatory laws. The young fragile Democratisation process is hampered by numerous logistical and procedural challenges, and the seeming lack of urgency to progress fundamental aspects such as decentralisation, holding of local elections, and engagement of the populace.

This briefing will highlight the following as areas of particular importance to the establishment of peace and security and development in DRC;

- Conflict in the east
- Security Sector Reform
- Impunity
- Democratic Rights - particularly the current decentralisation process and participation in the political process
- The position of women in society, and extreme levels of Gender Based Violence
- Mining industry

Conflict in the East

The humanitarian situation remains critical in the Kivus and Orientale Province. Large-scale population displacements, human rights violations including rapes, killings and lootings, impeded humanitarian access, and security incidents against humanitarian workers persist.

The military Operation Kimia II has inflicted immense suffering on civilians. Despite some gains in the fight against the Democratic Forces for the Liberation of Rwanda (FDLR) by forcing the rebels to abandon a number of the lucrative mining areas that help sustain their insurgency, at least 600 civilians have been killed and 800,000 people have fled their homes during 2009.

The total number of internally displaced persons (IDPs) in the Democratic Republic of the Congo is currently estimated at 2.2 million⁶². Of these, an estimated 1.7 million people remain displaced in the Kivus, with more than 400,000 persons having fled their homes since the beginning of the military operations against FDLR in January 2009.

However, as of the first week of November, almost half of the population displaced from the territory of Masisi in North Kivu, have started to return to their native villages⁶³.

In Haut and Bas Uélé in Province Orientale, where nearly 270,000 are estimated to have been displaced due to continued LRA attacks, a worrying trend has emerged whereby LRA attacks appeared to target displaced populations benefiting from humanitarian assistance. Furthermore, joint Ugandan-Congolese military operations against the LRA have succeeded only in dispersing the militants over a greater geographic area and increasing retributions against the local population.

Humanitarian access is severely impeded due to clashes in South Kivu, humanitarian organizations based in the Fizi Territory, have relocated their staff to Uvira, next to the border with Burundi, due to worsened insecurity in the area.

Insecurity in the Masisi Territory (North Kivu) remains high, with several incidents of robbery of humanitarian workers reported in November 2009.

Recommendations

- The Government should invest in a comprehensive, multipronged approach towards disarming the FDLR with a greater focus on non-military strategies and emphasizing protection of civilians
- Ensure humanitarian access in areas of insecurity and the safety of humanitarian workers
- Where areas have been secured of armed forces, Government must ensure continued security is maintained and civilians are not put at further risk
- Agree a concerted set of non-military DDRRR measures to secure the disarmament of a maximum number of militia fighters.
- As military operations continue against the FDLR leadership, efforts by the DRC government to encourage voluntary repatriation of FDLR combatants and their dependants should be strengthened and properly resourced

Security Sector Reform

Day to day harassment of citizens by the National Army and Police in DRC is the norm. Citizens endure relentless persecution by State security forces, including illegal extortion or taxes, arbitrary arrests and beatings – the extremes of such conduct was highlighted during the recent expulsions between Angola and DRC, where those crossing the border were beaten, sexually violated and robbed by State authorities.

Concurrently, at the other side of the country, mass killings, rape and displacement at the hands of National army, and other armed groups, continues, particularly in the Kivu Provinces.

The FARDC has recently been accused of the deliberate killing of civilians between the towns of Nyabiondo and Pinga in North Kivu⁶⁴. Increased pressure by civil society and the discovery of a mass grave of 62 civilians, including women and children in Lukweti North

⁶² Twenty-ninth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo September 2009

⁶³ OCHA Humanitarian Action in the Democratic Republic of the Congo Weekly Report, 6 November 2009

⁶⁴ Human rights Watch November 2009 Eastern DR Congo: Surge in Army Atrocities <http://www.hrw.org/en/news/2009/11/02/eastern-dr-congo-surge-army-atrocities>

Kivu in October 2009 has led to a decision by MONUC to suspend support to certain units of the FARDC.

Some progress in Security Sector Reform has been achieved; the Council of Ministers agreed and submitted for approval to Parliament three draft laws relating to Army reform on the organization and functioning of the armed forces; the organization, composition, attribution and functioning of the High Defense Council; and the status of FARDC military personnel.

Regarding police reform, the main legal framework guiding the process was adopted by the Council of Ministers at the end of June 2009.

An issue of concern is the rapid integration of non-State armed groups into the National Army FARDC, which has proved highly problematic. The “integration” took place with little or no planning, limited outside support, and while military operations were taking place. Former enemies that just weeks earlier been engaged in heavy combat against one another, were rapidly joined together in a supposed cohesive unit.

Many Civil society groups and the Group of Experts on DRC⁶⁵ have expressed concerns over this integration procedure and reported evidence that a number of former CNDP military officers who are now in FARDC are operating parallel command structures, demonstrating the weaknesses of the integration process, and the risks of potential disintegration.

Furthermore, Integration occurred without proper monitoring or vetting, allowing known human rights violators to integrate into the National Army. For example, the Group of Experts reported that General Bosco Ntaganda, the former military chief of staff of CNDP who is on an arrest warrant for war crimes from the International Criminal Court, is acting as a de facto FARDC deputy commander for military operations in the Kivus.

Recommendations

- Establish a credible, independent mechanism to monitor and report human rights violations
- Establish an independent vetting mechanism to remove and exclude, with appropriate due process, members of the security forces responsible for serious human rights violations
- Review the integration process and carry out an evaluation of the status to date, with a focus on removal of known human rights abusers, and addressing parallel command structures

Justice/Impunity

The advancement of justice in is a huge challenge in DRC, given the extremely weak national judicial system and the pervasive atmosphere of impunity for perpetrators of human rights abuses at all levels. Despite the numerous ceasefires and peace accords, active conflict continues in various parts of the East, and elsewhere, criminality and human rights abuses continue unabated despite the advent of so-called ‘peace’.

The Congolese justice system suffers an almost complete lack of capacity at all levels – from extremely poor physical infrastructure, to untrained or corrupt police and judiciary to a lack of political will to see the rule of law established. As such, impunity has become entrenched in society whereby belligerents operate without fear of consequences and victims see little point in reporting crimes. Even in the few cases where convictions are secured, many perpetrators are able to buy their freedom or simply escape from one of DRC’s archaic prisons.

Institutional reform and reconstruction of the justice sector must be accompanied by transitional measures to deal with the legacy of DRC’s wars and the massive human rights abuses that resulted. This must be further complemented by adequate measures to prosecute large-scale perpetrators of human rights abuses through the International Criminal Court.

There have, nevertheless, been some signs of progress. On 15 July 2009, Congolese authorities announced the dismissal and retirement of more than 150 judges and prosecutors as part of an anti-corruption drive announced by President Kabila. On 31 July, the President further instructed the retirement of more than 1,000 civil servants from a range of Congolese Government

⁶⁵ Group of Experts on the Democratic Republic of the Congo Letter dated 14 May 2009 from the Chairman of the Security Council Committee addressed to the President of the Security Council

Ministries, some of whom were alleged to be involved in corrupt practices.

Progress has been made in the area of military justice with 35 FARDC officers and soldiers, including two commanding officers, tried for crimes related to human rights violations in 2009 by the military operational court in North Kivu. In South Kivu, the military operational court tried 10 FARDC elements since it became operational on 12 July 2009.

The enforcement of a zero-tolerance policy within FARDC with respect to discipline and human rights violations, including sexual and gender-based violence is yet to be seen on a grand scale with direct impact in isolated areas.

Recommendations

- Prioritize reform and rehabilitation of the justice system and establish an independent transitional justice mechanism
- Ensure that the military courts respect fair trial standards, including the right to appeal, and to ensure that the commanders under whom violations are committed are also held to account
- Enforce ICC Arrest Warrant on Bosco Ntaganda for War Crimes Charges

Democratic Rights

Decentralisation is a key provision of the new Congolese constitution adopted in 2006 and a fundamental step in the development of the Congolese State after more than a decade of war. The new Constitution establishes decentralisation as a new means of governance of local public affairs, whilst also protecting the unity of the Congolese State. Decentralisation is translated as the free administration and autonomy of the Provinces and the 'Decentralised Territorial Entities' (ETDs). The Constitution establishes that the power of the State will be exercised at three levels – the Central Government, the Provinces and the ETDs. Furthermore, the Constitution establishes that 40% of revenue generated can be retained at source in the Provinces and that this revenue is to be shared with the ETDs. This is a welcome departure from the decades of excessive and dictatorial central government control.

However neither the 26 new Provinces⁶⁶ nor the ETDs are as yet in place as a result of the absence of the relevant legal framework, inadequate infrastructure on the ground and a lack of funding. Whilst several pieces of key legislation were passed by the National Assembly in 2008, several more remain, and the Constitutional provision that the new Provinces should be established by May 2010 is in danger of not being met. Consequently the Government are now actively promoting the idea of a Constitutional amendment to give them more time.

Local elections - with representatives to be elected to 26 new provinces as well as several hundred ETDs, local elections were originally scheduled for late 2008, then mid 2009 and now early 2010, however no date has been specified and there are concerns it could slip further. The Independent Electoral Commission has stated that the local elections cannot take place any later than March 2010 if they are to avoid interfering with the 2011 National and Presidential elections.

On 31 July 2009, the Independent Electoral Commission (IEC) announced the postponement of the voter registration update in the provinces beyond Kinshasa, which was due to start on 2 August. The principal reason cited for the delay related to the revision of the list of territorial entities, which had only been approved by provincial assemblies in four of the ten provinces by mid August. Delays in the disbursement of Congolese Government funds hampered the work of IEC. While some of the Government's total anticipated contribution towards the local elections of \$32 million was disbursed earlier in the year, an amount of \$8.6 million was still pending for the voter registration update.

⁶⁶ Compared to the current 11

Political participation and restriction of political opposition has been a contentious issue in DRC in recent years. In Bas Congo Province, in 2007 State agents acting under Presidential authority reportedly used excessive force against Bunda Dia Kongo (BDK), a politico-religious movement that advocates a return to African authenticity, greater control of resources by the indigenous Bakongo people and Provincial autonomy within a Federal system. The movement gained substantial popularity in the years up to 2007 resulting in increasing tension between its followers and the State. In August 2006, the BDK allied themselves with Presidential rival Jean Pierre Bemba. This tension reached a climax in February 2007 when its leader Ne Muanda Nsemi lost the Bas-Congo vice-Gubernatorial election in a vote that is widely believed to have been rigged.

The resulting legal challenges and violent protests led to a severe government crackdown in early 2007 and again in March 2008 that, according to Human Rights Watch, resulted in the deaths and arbitrary executions of several hundred alleged BDK adherents at the hands of State security forces. United Nations investigators further corroborated this information, saying that there appeared to have been a deliberate effort to wipe out the movement. Over 200 BDK supporters and others were killed and the BDK's meeting places were systematically destroyed⁶⁷.

Recommendations

- Congolese authorities must finalise all outstanding legislation including the list and demarcation of the ETDs, without which the voter registration process cannot proceed.
- Government must complete the voter registration process by extending it nationwide
- Adequate financial resources for the local elections must be secured and disbursed.
- Ensure that the population, political actors, territorial authorities, civil society and religious confessions understand the technicalities and modalities of the transfer of powers and resources, and their engagement in the process
- Ensure adherence to the International Covenant on Civil and Political Rights whereby members

of the political opposition, media, and civil society are permitted to exercise their rights to free expression, association, and assembly

- Investigate and prosecute violations of the rights and crimes against human rights defenders and political opponents

Women's Human Rights

As highlighted in the March 2009 joint report to the UN of seven thematic special procedures in DRC, gender inequality and oppression of women are deeply rooted in society, and are sustained through discriminatory laws.

This is particularly evident in the political sphere. Despite a Constitutional provision⁶⁸ that guarantees equality in all institutions of the State, a 2008 United Nations Statistics Division source indicated that the proportion of seats held by women in Parliament decreased from 12 per cent in 2005 to 8.4 per cent in 2008. The CEDAW⁶⁹ committee also noted this situation in its concluding comments to DRC's 2006 report and recommended special measures, such as quotas and timeframes be put in place. Despite this, no action has been taken and women remain deeply under-represented in the Government, National and Provincial Assemblies.

The CEDAW Committee also recommended that all necessary measures be taken without delay to put an end to all forms of violence against women and the impunity of perpetrators, including a law on violence against women. In August 2006 a new law came into force, redefining rape to include both sexes as well as all forms of penetration. The law also covers other forms of sexual violence: sexual slavery, mutilation, forced prostitution and forced marriage. While the law is a welcome legal provision, justice systems and national structures and processes to ensure the implementation of this law are vital. The Presidents 'Zero tolerance' campaign against sexual violence in July 2009, is a further step towards addressing the issue of impunity, but results have yet to be seen on the ground.

The disturbing levels of sexual violence in DRC have been well documented, yet incidents of rape and sexual assault persist, especially in conflict

⁶⁷ "We Will Crush You" The Restriction of Political Space In the Democratic Republic of Congo Human Rights Watch December 2008

⁶⁸ Article 14 of the 2006 Constitution

⁶⁹ Convention on the Elimination of All Forms of Discrimination against Women 7-25 August 2006

areas. In 2008 alone, nearly 16,000 rapes were reported in Congo. Since January 2009 attacks on civilians have increased, with both government soldiers and militia fighters accused of violent sexual crimes.⁷⁰

In July President Kabila announced the enforcement of a zero-tolerance policy within FARDC with respect to discipline and human rights violations, including sexual and gender-based violence. Since July, several rape trials have been opened, one leading to the conviction of two high-level officers.

Recommendations

- Implement and monitor the application of the 2006 law on sexual violence
- Develop mechanisms to facilitate prosecutions of perpetrators of sexual violence in line with UNSC Resolutions 1325, 1820, 1888 and 1889
- Legislate to enact Article 14 of the Constitution which requires parity in all Institutions of the State

Mining Industry

Congo's vast wealth in natural resources represents both its greatest potential for development and, to date, its greatest curse. Having been fundamental to the recent conflict and the long years of corrupt dictatorship, finding a solution whereby the vast revenues result in concrete benefits to ordinary Congolese citizens is crucial to DRC's long-term viability as a state.

Reports have shown that all the main warring parties are heavily involved in the mineral trade in North and South Kivu⁷¹. This practice is not limited to rebel groups. Soldiers from the Congolese national army, and their commanders, are also deeply involved in mining in both provinces. The most blatant example of FARDC involvement in mining is Bisie, the largest cassiterite mine in the region⁷².

This illicit unregulated abuse of resources clearly fuels the on-going military operations, thereby perpetuating associated human rights abuses, and

prohibits the Congolese people from benefitting from of the wealth of their country.

The Congolese Government has signed up to the Extractives Industries Transparency Initiative (EITI) but little concrete action has been taken and the process of awarding and reviewing mineral contracts is still opaque and devoid of popular consultation and input.

Recommendations

The Government should undertake a thorough review of the mining legislation with a view to improving transparency, ensuring links between the mineral trade and armed groups is eradicated, and the entire sector is reformed to the benefit of the citizens of DRC.



⁷⁰ Human Rights Watch September 2009 'Stopping Rape as a Weapon of War in Congo'

⁷¹ Group of Experts on the Democratic Republic of the Congo Letter dated 14 May 2009 from the Chairman of the Security Council Committee addressed to the President of the Security Council

⁷² Global Witness Report: War and the Militarisation of mining in eastern Congo Report – 21/07/2009

Recent Developments in Refugee and Immigration Law

Mary Fagan, RDC.

***B & Ors v MJELR & Anor.*, Unreported, High Court, Cooke J., 14th of July 2009, [2009] IEHC 332**

JUDICIAL REVIEW – CERTIORARI – FAIR PROCEDURES – FAILURE TO CONSIDER COUNTRY OF ORIGIN INFORMATION - GHANA

Facts

The applicants were granted leave to apply for an order of certiorari to quash the RAT's decision affirming ORAC's recommendation that they be refused refugee status. Leave was granted on the basis of a single ground viz. that the Tribunal had erred and/or acted in breach of fair procedures in failing to consider and/or make an express reference to country of origin information submitted by the applicants in relation to Ghana.

The first named applicant claimed to have been born in Nigeria of Ghanaian parents. Before ORAC, her claim for refugee status was founded on her fear of persecution based on her personal history and events in Nigeria including prostitution, domestic abuse and threats of ritual sacrifice made against her eldest child one of the second named applicants. After the notice of appeal had been lodged with the Tribunal but prior to consideration of the appeal by the Tribunal member, in the course of further submissions a well founded fear of being persecuted in Ghana on the basis of membership of a series of particular social groups was raised for the first time. The first named applicant claimed fear of persecution if returned to Ghana based on her inability to survive there without reverting to prostitution. She claimed that she would be exploited by pimps, subjected to beatings and torture and feared that she would be unable to obtain effective protection from the Ghanaian authorities or society in general. The submission then referred to and quoted extensive country of origin information relating to the circumstances of social groups in Ghana.

Findings

Held by Cooke J. in refusing the application that the single ground for which leave was granted had not been substantiated. The Tribunal member's duty to consider all of the evidence only applies to evidence which is relevant to a material issue which requires to be adjudicated upon in the appeal. In the instant case, prior to the matter coming before the Tribunal, the first named applicant had expressed no fear of persecution in Ghana. Up to and including the notice of appeal, the claim for refugee status was based on past mistreatment in Nigeria. Accordingly, when the case came before the Tribunal there was no evidence upon which fear of a particular form of persecution in Ghana might have been substantiated. All the Tribunal had before it in relation to persecution in Ghana was a hypothetical case advanced in the legal submissions which did not require consideration of the country of origin information on Ghana. In the circumstances, there was no factual or evidential basis before the Tribunal which required it to examine and make a ruling on the country of origin information. Accordingly, the Tribunal's failure to consider the Ghanaian country information did not constitute an error of law.



Emmanuela Igiba (a minor suing by her mother and next friend Philomena Igiba) & Ors v The Minister for Justice, Equality and Law Reform, Unreported, High Court, Clark J., 2nd of December 2009

JUDICIAL REVIEW – LEAVE – DEPORTATION ORDER – IRISH CITIZEN CHILD – ERROR OF LAW - INSURMOUNTABLE OBSTACLES TEST - REASONABLENESS TEST – IDENTIFICATION OF A SUBSTANTIAL REASON REQUIRING DEPORTATION OF A PARENT OF AN IRISH CITIZEN CHILD – IMMIGRATION CONTROL – PROPORTIONATE AND REASONABLE DECISION –BALANCING THE CONSTITUTIONAL AND CONVENTION RIGHTS OF THE CITIZEN CHILD

Facts

The applicants, a mother and her three children sought leave to judicially review the Respondent's refusal to revoke a deportation order made against the mother in July 2006. Two of the children and the mother were Nigerian nationals. The youngest child was an Irish citizen. They contended that the respondent (a) erred in law by applying the *Mahmood* "insurmountable obstacles" test rather than the *Oguekwe* "reasonableness test", (b) failed to identify a sufficient "substantial reason" requiring the deportation of the parent of an Irish citizen child by not identifying a reason specific to the facts of the case which outweighed the constitutional and Convention rights involved and (c) failed to reach a reasonable and proportionate decision.

The mother entered the State in March 2003 alone and eight months pregnant. On her arrival she made an application for asylum which she did not pursue. The Irish citizen child was born a few weeks later and having obtained a passport for her, she took the child to the UK where they both resided until at least late 2006. During this period they travelled back and forth to Nigeria. She only admitted to living in the U.K. between 2003 and 2006 in May 2009 when the fact that she had left the country after the birth of the citizen child was uncovered. In 2004, unaware that the applicant mother had left the country, the respondent wrote to her at the address she had given informing her of his intention to deport her. No response was received. In July 2006 the respondent signed a deportation order and notification of the making of the order was sent to her last address in Ireland. According to the applicant mother she re-entered the State with her three children in

December 2006. In October 2008 an application to revoke the deportation order and a leave to remain application on behalf of the two older children were made. The respondent affirmed the deportation order against the mother and signed deportation orders in respect of the two older children. The applicants sought leave to judicially review these decisions. At the hearing of the leave application the Court raised concerns about the mother's intention to leave the citizen child in Ireland should she be deported. As it was agreed that this might be a material change of circumstances, the respondent assented to consider a fresh application for revocation. The new application which was an expansion of the earlier submissions on the impact of deportation on the welfare, wellbeing and education of the children contained for the first time an admission of the absence from the State between 2003 and 2006. Leaving the Irish citizen child behind in Ireland was not adverted to. The respondent re-examined the file. He found that there were no insurmountable obstacles to the applicants establishing a family life in Nigeria and noted the applicant mother's flagrant disregard for the State's immigration laws. He identified the State's interest in the control of immigration and the absence of a less restrictive process than deportation as a "substantial reason" requiring deportation.

Findings

Held by Clark J. in refusing the leave sought that the applicants had failed to establish substantial grounds for contending that the respondent's decision ought to be quashed.

There is no substantive difference between the "insurmountable obstacles" test as distilled in *Mahmood* and the "reasonableness test" in *Oguekwe*. Asking whether there are any insurmountable obstacles to the family returning with the deportee is essentially the same as asking whether it would be reasonable to expect family members to establish family life elsewhere. Accordingly, the respondent had not erred in law by applying the "insurmountable obstacles" test.

Where a fact-specific analysis and a weighing of the competing interest is carried out, there is no obligation to identify an applicant – specific reason when identifying a sufficient "substantial reason". In the instant case, each of the competing rights in their fact-specific context was

considered and then balanced against the rights of the State. The respondent was clearly aware of the consequences of the deportation on the applicants. In the circumstances, it was open to him to identify general reasons of immigration control associated with the common good as a “substantial reason” requiring the deportation. The flagrant disregard of the immigration laws by the applicant mother which was remarked upon by the respondent and her lack of candour in relation to her immigration history contributed towards the respondent’s identification of a “substantial reason” which would outweigh the applicants’ interests. In the circumstances and particularly having regard to the Supreme Court’s decision in *A.O. and D.L. v The Minister for Justice Equality and Law Reform* as to what constitutes “substantial reason”, the applicants failed to make a case in relation to ground (b).

The question of whether the decision was proportionate and reasonable depended on the facts of the case. The constitutional and Convention rights of the applicants while weighty were not absolute and could be outweighed by matters associated with the common good. The respondent was required to conduct a fact-specific assessment of the constitutional and Convention rights of the citizen child and the family, balance those rights against the interests of the State and make a decision which did not impact unnecessarily on those involved.

In this particular case the family would not be ruptured by deportation. Given that the applicants had only tenuous links to the State and had not established any firm roots or links to the community in Ireland there could be no serious interference with their private life insofar as it was linked to Ireland. Furthermore, there was no real or serious obstacles to the family establishing a family life in Nigeria. None of the child applicants have been in the State for any appreciable length of time rather they have lived outside the State for much of their lives and their father had never been present as a member of the family in Ireland. The applicant mother who had had deliberately flouted the immigration laws and the two oldest children had never been lawfully in the State. The respondent being aware of all the foregoing factors, his decision to deport was not disproportionate or unreasonable.

Cases Cited

R (Mahmood v Secretary of State for the Home Department,) [2001] 1 W.L.R. 840, *Oguekwe v The Minister for Justice Equality and Law Reform* [2008] 2 I.L.R.M. 481, *H.L.Y.(Yang) v The Minister for Justice Equality and Law Reform* [2009] IEHC 96, *Alli v The Minister for Justice Equality and Law Reform* (Unreported, High Court, Feeney J., 11th of June 2009), *Asibor v The Minister for Justice Equality and Law Reform* [2009] I.E.H.C. 235, *Osunde v The Minister for Justice Equality and Law Reform* (Unreported, High Court, Cooke J., 14th of October 2009), *R v Secretary of State for the Home Department, ex parte Razgar* [2004] 2 A.C.368



Case Study: Domestic Violence and Access to Protection.



Elena Hernandez, RLS Solicitor

Section I: Legal Problem

Does a claim made by a woman seeking refuge for 'domestic violence' qualify for international protection?

1. Are women victims of 'domestic violence' eligible for Refugee Status on the grounds of membership of a particular social group? Are women, members of a particular social group of persons who share a common characteristic other than their risk of being persecuted? Are they perceived as a group by society?
2. If women constitute the majority of the population in the world how can they constitute a particular social group?
3. As Domestic Violence is Not State perpetrated violence; it is perpetrated by particular individuals (non state actors); why would this amount to persecution and in what circumstances would it qualify for protection?

Background:

Definition of gender: Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another.⁷³

Historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women have gone unrecognised. In this regard, it should be noted that harmful practices in breach of international human rights law and standards

(e.g.: Forced sterilization and abortion, FGM, rape) cannot be justified on the basis of historical, traditional, religious, or cultural grounds. In the past decade, however, the analysis and understanding of sex and gender in the refugee context have advanced substantially in case law, in State Laws in various member States of The European Union and the Common Law world.⁷⁴

The determination process

It is essential to have a full picture of the asylum-seeker's personality, background and personal experiences, as well as an analysis and up-to-date knowledge of the historic, geographic and culturally specific circumstances in the country of origin. Making generalisations about women or men is not helpful and in doing so, critical differences which may be relevant to a particular case, can be overlooked.

Domestic Violence and Asylum:

Domestic violence as persecution

Rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, **domestic violence** and trafficking are acts which inflict severe pain and suffering (both mental and physical) and have been used as forms of persecution, whether perpetrated by State or private actors.

State responsibility

Commentators such as Goldberg have correctly pointed out that the state has an affirmative obligation to prevent, investigate, prosecute and punish violations of human rights. The failure or refusal to act is equivalent to the commission of the act itself in assessing culpability because, in its failure to respond the state gives the abuser freedom to act with impunity: "[t]hese failures are acts of persecution, accomplished with the acquiescence, if not overt complicity, of the state".⁷⁵ The argument that the state is complicit in the maintenance of intimate violence against women is one strategy for attaching liability to states for human rights abuses occurring in the private sphere. UNHCR's position on the issue of non-state agents of persecution is crystal clear from para. 65 of its Handbook. It states:

⁷³ UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of art 1.A of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. 7 May 2002.

⁷⁴ Crawley, H. (2001) "Refugees and Gender" (2001) Jordans. RWLG.

⁷⁵ Goldberg, P. (1993) "Anyplace but home: asylum in the United States for women fleeing intimate violence" (1993) 26(3) Cornell International L.J. 565 – 604.

“Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.... Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”

From para. 65 it is clear that the UNHCR’s view is that if the authorities are unable to offer effective protection — irrespective of their willingness — persecution from agents other than state organs or organs linked to the state can lead to recognition as a refugee (unless the temporary absence of protection is merely incidental). For example, Art. 26 of the International Covenant on Civil and Political Rights (ICCPR) provides that “all persons ... are entitled without any discrimination to the equal protection of the law”.⁷⁶

Failure of state protection

Gender-related claims demand an analysis of any form of discrimination by the State in failing to extend protection to individuals against certain types of harm. **If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution.** Particular cases of domestic violence for example are analysed in this context.

State tolerance of ‘Domestic violence’ which is a serious discriminatory act committed by private individuals, can also be considered persecution when the authorities refuse, or are unable to offer effective protection.

Persecution, in practice, is often the result of acts of persons who are not controlled by any state authority. Some states dismiss most gender-related claims on this reasoning. Therefore, even if considered a member of a particular social group, female asylum seekers may face obstacles to having their refugee status recognised if adjudicators maintain that state responsibility for persecution must be established. While the

refugee definition does not intrinsically exclude women’s experiences, it has been argued that in practice the public/private distinction leads to situations in which much of what women do and what is done to them, is seen as irrelevant to refugee law.

Analysis: Religion

When a woman does not fulfil her assigned role or refuses to abide by the codes and is or might be punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion. For example, in certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other actors of persecution may perceive the failure of a woman to conform to this role, as a failure to practice or to hold certain religious beliefs and also as holding an unacceptable political opinion. This is particularly true in societies where there is little separation between religious and State institutions, laws and doctrines.

Analysis: Member of a particular social group

The size of the group has sometimes been used as a basis for refusing to recognise ‘women’ generally as a particular social group. However, this argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate, or that every member of the group is at risk of persecution. It is well-accepted that it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context.

Analysis: Political Opinion

Considering that domestic violence is a private act and it tends to serve an individual purpose, i.e. in general, a male looking to oppress the victim in a domestic environment; in most cases the State does not interfere or take responsibility for same, thus failing in their duty to protect the victim’s basic Human Rights. Therefore, it could be argued that there is a policy implicit in this lack of action by the State to protect the victims; as it could be pointed out that the State is unwilling to protect those women. Hence, this lack of protection can be considered an omission and a

⁷⁶ 999 U.N.T.S. 171.

political statement coming from the State in question, **All violence against women should be considered political violence** unless the State is willing to offer the appropriate protection.⁷⁷

Section II: The Facts

Yasmeen's* case:

1. Yasmeen is a woman in her late 30's from a Middle Eastern country. She is a Muslim and belongs to an ethnic group. Yasmeen's father used to be an influential and respected man in his city. Her family possessed land and a business and her father was one of the leaders of the community. Yasmeen explains that her life changed after the Islamic Revolution when Islam started governing the lives of persons in that Middle Eastern country and women lost most of their civil and political rights. Honour and reputation became paramount for families.
2. When Yasmeen was 17 years old, one of the villagers called Muhammed started harassing her. He would run after her in the village, calling her name aloud and tried approaching her when she was alone. Yasmeen started having problems with her father as a result of this, as her honour and the family honour were at stake. One of Yasmeen's brothers requested Muhammed to stop. There was a fight and Muhammed swore revenge.
3. One day Muhammed approached Yasmeen's father and requested to marry her. Yasmeen refused. After a few weeks Muhammed, his brother and a friend kidnapped Yasmeen by putting her in a car and taking her away from the village. Yasmeen became a 'runaway girl' and her family disowned her. She could not go back home. Muhammed took her to a house outside the village, and beat and raped her. She was kept in hiding for a while by her kidnappers, after which they took her to the house of one of Muhammed's family members.
4. Muhammed approached Yasmeen's father in order to get permission to marry her. Yasmeen's

father told Muhammed that Yasmeen was not anymore his daughter. She found herself alone, dishonoured and disowned. Muhammed forced her to marry him.

5. After they got married they went to live with Muhammed's family in the North region of that Middle Eastern country. Since Yasmeen got married, she was severely beaten and sexually abused by her husband. She was also ill-treated by other family members who despised her. When Yasmeen got pregnant, one of Muhammed's aunts helped her to go to the hospital. Muhammed was furious when he learned that she had gone out of the house and beat her severely. She gave birth to a baby boy. The baby boy was taken away from her and raised by her husband's mother as she was considered not fit to breed him.
6. After Yasmeen gave birth to her first child her family tried to approach her and offered help. However Muhammed refused any help and did not allow her to stay with her mother. When Yasmeen got pregnant a second time, she was allowed to spend some time with her family. After she gave birth to a baby girl, she went to go back to live with her husband and his family. Yasmeen's daughter was also taken by her husband's mother. The beatings and mistreatment continued. Yasmeen discovered that her husband was drinking alcohol and taking drugs on a regular basis. Yasmeen could not go out alone and lived isolated from her husband's family.
7. After a few years of marriage Yasmeen's family offered her husband to pay for an apartment where they could live on their own. Yasmeen's father would also pay for the expenses. Yasmeen's husband's addictions and debts took all the income, and kept on beating and abusing her.
8. Yasmeen's family offered her husband the opportunity to participate in the family business and send him to Singapore for 3 years. Yasmeen and her children went to live with her husband's family. They also mistreated her. She was expelled from the house. Yasmeen wanted to take her children with her but she could not. Yasmeen reported to the authorities that she could not see her children. No action was taken.

⁷⁷ Guy Goodwin-Gill and Jane McAdam. (2007) "The Refugee in International Law" (2007) Third Edition. Oxford. 81-84.

* All personal details contained in this case have been altered to protect the true identity of the people involved.

9. Yasmeen moved with her parents to the capital city, where she then applied for a divorce. The divorce was not granted, as her husband would not consent to such.
10. When her husband returned from Singapore, he came looking for her. She did not want to see him, but he told her that her children were in the car. When Yasmeen approached the car she was again kidnapped and taken to his family home. She was beaten by her husband all the there.
11. As Yasmeen's husband had no work, they returned to the capital city where Yasmeen's father paid for accommodation and food for them. After a while they went to live in Syria, where Yasmeen's husband worked as a smuggler in the carpet business. They returned to their country and on their return her husband was arrested and imprisoned due to debts he owed.
12. Once her husband was released they went to live with his family. Yasmeen's husband travelled to Syria very often. He expelled her from the house. After her husband expelled her from the house, Yasmeen applied for a divorce for the second time, as she had been disowned by him. The judges never answered Yasmeen's application.
13. Yasmeen went to live with her parents, where she attempted to kill herself several times. Yasmeen's husband harassed her on the phone and she was not allowed to see her children anymore.
14. Yasmeen's husband was imprisoned again a few years later and Yasmeen applied for a divorce for the third time. When her husband learned that she had applied for the divorce, he threatened that when he was released he would kill her.
15. Yasmeen's brother, who was living abroad decided to take her to the European country where he was living. Yasmeen applied for asylum in the European country looking for protection.
16. Yasmeen left her country without her husband's permission which is against the law in that Middle Eastern country. She fears the Middle Eastern country's authorities as a consequence.

Section III: Legal Approaches

In this case, in order to determine if Yasmeen's claim for asylum should be considered and if refugee status should be granted, we must analyse whether the above mentioned facts comply with art 1.A.2 of the Geneva Convention 1951 and the New York Protocol 1967 and if so, how.

1. Well founded fear of persecution on the following grounds:

The well-founded fear of being persecuted must be related to one or more of the Convention grounds. That is, it must be "for reasons of" race, religion, nationality, membership of a particular social group, or political opinion. The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole or dominant cause. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground. Attribution of the Convention ground to the claimant by the State or non-State actor of persecution is sufficient to establish the required causal connection. Yasmeen could claim persecution on any/all of the following grounds;

1. Political Opinion.
2. Membership to a particular social group
3. Religion.

2. Country of Origin Information and facts.

The analysis of COI from that country reveals the following

There is no State protection for victims of domestic violence.

There is a systematic discrimination of women seeking to divorce or accessing divorce proceedings.

There are Legal restrictions on women's freedom of movement and other civil and political rights in that country.

3. International Law and Jurisprudence

Although the principle of non discrimination on the grounds of sex is now well established in international law, gender was not included in article 1.A.2 as the basis for a well founded fear of persecution. The need for protection in this field has nevertheless being recognized. There are women seeking asylum from domestic violence

as in the case outlined above. One of the major problems, for female victims of sexual violence, and in particular domestic violence, is that it is perceived as “domestic”, meaning private and the act of an individual, and therefore not attributable to the State and/or other political structure. Intimate violence has proved a more problematic form of persecution for decision-makers to grasp, compared to female genital mutilation and other forms of sexual violence, which are gaining increasing acceptance as forms of persecution. Unfortunately, acts that occur in the private sphere are often perceived as being part and parcel of a relationship and this view presents difficulties regarding the woman’s relationship with the State. This woman-and-State relationship becomes less clear and direct.

As mentioned before, domestic violence is a private act and it tends to serve an individual purpose, i.e. in general, a male looking to oppress the victim in a domestic environment; in most cases the State does not interfere or take responsibility for same, failing then in their duty to protect the victim’s basic Human Rights. Again we should come back to the legal analysis of political opinion and it could be envisaged that there is a policy implicit in this lack of action by the State to protect the victims; therefore one could argue that the State is unwilling to protect those women. (committing a crime by omission) Internationally this lack of protection is considered an omission and a political statement, **all violence against women should be considered political violence** unless the State is willing to offer the appropriate protection.

Another factor that should be taken into consideration will be the religious confession of the State and its connection with the law. Oftentimes, if a female victim of domestic violence seeks protection from the authorities, she is perceived by the State as defying the system by making her situation public. This is considered a breach of the moral codes imposed to women in such societies.

4. Conclusion and Legal Approaches

3 possible legal approaches for Yasmeen’s case/legal team

Yasmeen is a victim of domestic violence. She has attempted to separate from her husband. She has attempted internal relocation as a way to

avoid the violence. She has requested the protection of the authorities. She has defied the moral and religious codes of her society. The State has not offered protection.

She is therefore being persecuted on the following grounds:

1. **Political opinion.** Yasmeen has publicly shown her disagreement with the State policies towards domestic violence.
2. **Religion:** She has defied the moral and religious codes of her society.
3. **Membership to a particular social group:** Namely women who are victims of domestic violence.

She fears for her life, is outside of her country of origin and the State in this case is unwilling to protect her.

Another legal approach could be the fact that the lack of state protection constitutes discrimination that can amount to persecution. Discrimination in this case will constitute a ‘serious harm’ within the meaning of persecution.

UNHCR Gender-related persecution guidelines 2002 state that this persecution can mean not only the fact itself as well as the serious violation of Human Rights.⁷⁸

The 1991 UNHCR Guidelines on the Protection of Refugee Women note that women in a number of countries who face violence as severe as death for violating social mores should be considered a membership of a particular social group for the purposes of determining refugee status.⁷⁹

CEDAW⁸⁰ states in Article 3 that “the State should Guarantee of Basic Human Rights and fundamental freedoms”. The lack of State protection for Yasmeen means that there is a breach in the guarantee of Basic Human Rights of women subjected to domestic Violence in that Middle Eastern country, **The 1991 UNHCR guidelines urge recognition of sexual violence**

⁷⁸ UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of art 1.A of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. 7 May 2002.

⁷⁹ Guidelines on the Protection of Refugee Women and in particular para.54 (UNHCR, July 1991).

⁸⁰ Convention on the Elimination of all forms of discrimination against Women. 1979

as a form of persecution “when it is used by or with the consent or acquiescence of those acting in a official capacity to intimidate or punish”.

For the reasons outlined above and considering:

1. The grounds. 2. The lack of state protection (the state is unwilling to protect). 3. There is no internal protection or relocation alternative available for her. 4. The well founded fear that if she returns she will be killed by her husband and or subjected to torture, inhuman or degrading treatment, as well as face imprisonment. Yasmeen should be granted asylum and receive the protection of the authorities according to the Geneva Convention 1951 and receive refugee status in a European country.

Legal authorities:

- Geneva Convention 1951 relating to the Status of Refugees. Article 1. A. 2
- The EC Qualification Directive 2004/83. Article 2.C and Art 4.
- The Declaration on the Elimination of Violence against Women. Article 2.
- UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of art 1.A of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. 7 May 2002.
- Convention on the Elimination of All Forms of Discrimination Against Women. 1979
- International Covenant on Civil and Political Rights (ICCPR). Article 26.

Case law:

- Jebari vs Turkey. ECHR 11/07/2000.
http://www.echr.coe.int/Eng/press/2000/jul_aug/jabari%20jud%20epress.htm
- Rv Immigration Appeals Tribunal ex parte Shah; Islam v secretary of State for the Home Department, (1999) “AC 629. (UK Judicial Decision holding Pakistani women accused of adultery feared persecution based on their social group)
- Aguirre-Cervantes v INS, 242 F 3d 1169 (9th cir 2001 (US judicial decision granting asylum to a Mexican woman based on physical abuse by father)
- CEDAW- UN Human Rights Committee Jurisprudence: CEDAW/C/38/D/10/2005.

Declared inadmissible only on the basis that domestic remedies had not yet been exhausted.

<http://www2.ohchr.org/english/law/jurisprudence.htm>



Recent Developments in UNHCR Ireland

Yolanda Kennedy, Associate External Relations Officer, UNHCR Ireland.

Since January 2009 the Brussels-based Representation of UNHCR (the United Nations High Commissioner for Refugees) has implemented a number of structural reforms, as part of an ongoing regionalisation process within UNHCR globally.

The Regional Representation, having previously been responsible for the Benelux countries is now responsible for overseeing and supporting UNHCR’s Representations and Offices in Austria, Belgium, France, Germany, the Netherlands, Liechtenstein, Luxembourg, Monaco, Switzerland, the UK and Ireland. The Irish Office will continue to exercise the organisation’s Mandate in Ireland with enhanced support from the Regional Representation.

The structural reforms have been developed with the aim of enhancing protection and operational delivery by bringing decision-making and support closer to the field as well as by maximising the resources UNHCR has available for its populations of concern. The changes are expected to strengthen and reinforce UNHCR’s regional presence in Western Europe and to increase operational responsiveness to developing EU-wide policies.

A high level Regional Representative has been accredited to the countries within the new Regional structure, including Ireland and national UNHCR offices will continue to develop the UNHCR’s presence at national level. In Ireland, the UNHCR Office has undergone a number of changes as part of the Regionalisation process. In November last year, the High Commissioner for Refugees appointed Sophie Magennis to the post of Head of Office and additional appointments to three posts at the Office have been made or are in train further to an open recruitment procedure.