

The Many Faces of “Prima Facie”: Group-Based Evidence in Refugee Status Determination

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Abstract

The majority of the world's refugees have secured a legal status without resort to an individual examination of their claims. The practice of “group” determination, particularly in Africa, is interesting in several aspects, not least in that it allows a real-time assessment of a need for international protection. While these positive aspects should not be lost as many jurisdictions in the developing world are equipping themselves with individual asylum procedures, it is equally important to clarify, and hopefully to harmonize, the procedural and evidentiary standards applicable to group determination.

How presumptions operate—including their rebuttal or removal—is a question worth examining, and not only with regard to refugee status determination (RSD) in mass influx situations. Legal presumptions and other evidentiary shortcuts have also been introduced into individual RSD procedures in industrialized states. These include mechanisms that are highly problematic from a protection point of view, such as the “safe country of origin” presumption of a “manifestly unfounded” claim. However, administrative bodies and courts have also, from time to time, used some form of prima facie admission of evidence in order to lighten the burden of asylum applicants, while speeding up the RSD process.

Furthermore, this article argues that extralegal presumptions, based on implicit value judgments about national or subnational groups, almost invariably colour the interviewing and decision-making processes in individual cases. This finding makes it all the more necessary : to (i) to re-assess the significance of “risk-group affiliation” as an element of the refugee definition; and (ii) formally recognize the role of evidentiary shortcuts in RSD, and recommend appropriate standards for their operation.

Résumé

La majorité des réfugiés du monde ont obtenu un statut légal sans examen individuel de leurs revendications. La pratique de la détermination collective de la qualité de réfugié, particulièrement en Afrique, est intéressante par plusieurs aspects, non des moindres étant qu'elle permet une évaluation « en temps réel » du besoin de la protection internationale. Bien qu'il soit important de ne pas perdre de vue ces aspects positifs — alors que beaucoup de juridictions dans les pays en voie de développement adoptent des procédures de détermination du droit d'asile au niveau individuel — il est également important d'éclaircir, et aussi peut-être d'harmoniser, les normes en matière de procédures et en matière d'élément de preuve applicables à la détermination collective.

Comment fonctionnent les présomptions — y compris leur réfutation — est une question qui vaut la peine d'être étudiée de plus près, et cela pas seulement dans le contexte de la Détermination du statut de réfugié (DSR) dans des situations de mouvement collectif. La présomption légale et les raccourcis en matière de règles de preuve ont aussi été introduits dans des procédures de DSR individuel dans les pays industrialisés. Parmi, on retrouve certains mécanismes qui posent problème d'un point de vue de la protection, tel la présomption de « revendication manifestement non fondée » dans des cas de « pays sans risque ». D'autre part, des entités administratives et des tribunaux ont aussi, de temps à autre, fait usage d'une forme quelconque d'admission de preuve prima facie dans le but d'alléger le fardeau des demandeurs d'asile tout en donnant un coup d'accélération au processus de DSR.

En outre, cet article fait valoir que les présomptions extrajudiciaires fondées sur des jugements de valeur implicites concernant des groupes nationaux et sous-nationaux, exercent presque à tout coup un effet pervers sur les processus

d'interview et de prise de décision dans les cas individuels. Cette conclusion rend encore plus impératif le besoin de : (i) réévaluer la signification d' « affiliation à des groupes à risque » en tant qu'élément dans la définition du réfugié; et (ii) reconnaître formellement le rôle que jouent les raccourcis en matière de règles de preuve dans la DSR et recommander des normes appropriées pour leur utilisation.

Introduction

This article is about determination of refugee status on a group basis. More specifically, I explore how refugee status determination (RSD) processes take group characteristics into account for the distribution of the burden of proof between the individual asylum seeker and the state from which protection is sought. For the sake of conciseness I focus on first-instance decision making, and I make no distinction between those procedures within which an oral hearing is an integral part of decision making and those within which the processes of interview and adjudication are clearly separated.

Group-based determination of refugee status is usually associated with instances of large-scale influx of asylum seekers from a same country or cluster of countries. The most authoritative reference on the subject is to be found in UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*,¹ and this is, therefore, where my inquiry will start. Paragraph 44 of the *Handbook* reads as follows:

While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been under circumstances indicating that members of the group could be considered individually as refugees. In such situations, the need to provide assistance is extremely urgent and it may not be possible for purely practical reasons to carry out individual determination of refugee status for each member of the group. Recourse has therefore been had to the so-called "group determination" of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.

A critical reading of this text gives rise to a couple of issues. First, it is not immediately clear where a "norm" is to be found, according to which refugee status must be determined on an individual basis; nor what this "individual basis" actually covers. While it is beyond the scope of this article to consider the broader implications of this normative statement, some of these will inevitably surface during the course of my inquiry. At this stage, however, I would like to focus on another problematic aspect of the above-quoted paragraph from the *Handbook*, which seems to have escaped the attention of most commentators.

Whereas the second sentence of this paragraph appears to encapsulate the logic of the whole, it is in effect dispensable—in other words, the entire paragraph still makes perfect sense if one jumps over the second sentence and connects the third sentence immediately with the first one. This is because the text actually conflates two distinct and different (albeit possibly overlapping) scenarios, in only one of which the size of the influx matters.

There can be no question that a large-scale influx of asylum seekers may trigger an emergency in host countries, *i.e.* it is capable of overwhelming the processing resources of these countries to the point where, as the *Handbook* puts it, it is no longer *possible* to carry out individual examination of refugee claims. However, does this scenario exhaust the mentioned "circumstances indicating that members of the group could be considered individually as refugees"?

Certainly not, in my view. Such circumstances can be found, within or without a mass influx scenario, wherever a clearly identifiable segment of the population of a country is patently and systematically persecuted, and any number of the persecuted group's members seek protection across the border. In this scenario, the rationale for group determination is not that individual screening is *not possible*—instead, it is that such detailed screening is *not necessary*.

Of course, there have been and will be situations in which resort to group-based determination is both a matter of efficiency and the result of an objective analysis of the causes of the flow. Nonetheless, the distinction between *not possible* and *not necessary* remains essential, because it makes clear that group-based determination is not a mechanism reserved for mass influx situations. To the contrary, my contention is that a measure of group-based determination is inherent in *any* process applying the refugee definition to individual asylum seekers, regardless of their numbers.

Let it be clear that I am referring here to the refugee definition contained in Article 1 A(2) of the Refugee Convention, as amended by the 1967 Protocol. Some commentators have asserted that the extensive use of group-based determination by African states is a corollary to the "expanded" refugee definition in the 1969 OAU Convention, and that this instrument is the main source and authority for *prima facie* recognition of refugee status.² As we have noted elsewhere, this erroneous construction has been readily exploited by European policy makers, always keen to stress regional differences if these can back an argument in favour of a dubious "protection in the region" doctrine.³

Refugee grounds such as "events seriously disturbing public order in either part or the whole"⁴ of the country of origin may indeed evoke the threat of massive displacement. But so may persecution on ethnic or religious grounds. In any event, as explained above, the notion of "group" in RSD does

not only (nor even mainly) refer to the size of the asylum-seeking caseload, but indeed to the very motivation of their flight.

It does not take a legal expert to notice that the Convention refugee definition is intended to protect persons who fear persecution because of their membership in a group. Four of the five grounds stipulated by Article 1A(2)—race, religion, nationality, and particular social group—cannot be construed as anything but “groups.” As for “political opinion,” while indeed it can theoretically be held by a sole individual or a few isolated persons, it is not likely to attract persecution unless it is prevalent among—or imputed to—a sizable section of the population of the country of origin.⁵

To assert that the refugee criteria in the Refugee Convention are “highly individualistic”⁶ is, therefore, an incorrect reading of the refugee definition. The plain language of Article 1A(2) supports the interpretation which, as early as in 1990, the US Asylum Regulations proposed, namely that a fear of persecution upon return can be considered reasonable where “the applicant can show a pattern or practice of persecution of a group of persons similarly situated and his or her own inclusion in, and identification with, such a group of persons.”⁷

In the following, I shall refer to such groups of similarly situated persons as “groups at risk.” I argue that this notion is intrinsic to the Convention refugee concept. Should this proposition be properly factored into RSD processes, the latter would gain in transparency, consistency, efficiency, and, ultimately, fairness.

Refugee Law and Groups at Risk

There is no escaping the fact that the law and practice of industrialized states has distanced itself considerably from the “group” approach to refugeehood, which was the norm under the League of Nations regime. Practically since the entry into force of the Refugee Convention, but more noticeably since the 1980s, a recurrent jurisprudential stream in Europe and North America has insisted that persecution necessarily implies a singling out of the individual, even where entire segments of the population of the country of origin are subjected to severe discrimination or targeted for ill-treatment.⁸ Some jurisdictions, notably the Dutch Council of State, have upheld this position relentlessly until this day. While others have ostensibly banned the “singling-out” requirement, they may still keep a cautious distance from group-based determination. To be sure, eligibility guidelines routinely stress that each asylum case has to be decided on its singular merits. An adjudicator may read into this commonsense instruction an encouragement to look for distinguishing features that are in a way unique to the claimant before him or her. Such a “highly individualistic” approach is misguided and should

be questioned as a matter of principle. For the time being, though, I will only argue that it is not antithetic to the “group at risk” approach, which I am propounding. Rather, it adds an “individualized” requirement *on top of* a group-based determination [“you, the individual claimant, must convince me that you are personally more at risk of persecution than all other members of a group, which is itself the target of persecution in your country”]—and this begs the obvious question of who is expected to establish that the group is being persecuted, or discriminated against, in the first place.

While admitting the lack of hard empirical data on this point, I contend that the way interviewers and adjudicators approach asylum claims is more often than not coloured by these officials’ outlooks on particular groups. In a similar vein, Towle and Stainsby warn that historical, cultural, political, and other biases for, or against, certain caseloads or nationalities of asylum seekers may lead to predetermined eligibility outcomes and cause disparities in recognition rates among national jurisdictions.⁹ This finding should not scare us, at least so far as *positive* inclinations are concerned. After all, the image of a refugee among the public at large, in any society in which the concept is current, is likely to take the form, not of an isolated individual, but of a “typical” refugee *population*: the boat people from Vietnam, the Bosniaks, the Afghans, the Iraqis, the people of Darfur ... The official who hears refugee status claims will inevitably be influenced by these public perceptions of particular situations (which, admittedly, are not always specific as to groups at risk within the larger population) as “refugee” situations. Unlike the man on the street, though, this official will normally have the benefit of detailed country-of-origin information, in addition to personal knowledge developed through previous interviews. Country-of-origin information is seldom neutral, and never perfectly objective. Nonetheless, it displaces the centre of subjective gravity from the individual interviewer or adjudicator to a more general level, from where it can influence a large number of decisions, hence increasing consistency of decision making on similarly situated claims.

For their own peculiar reasons, though, states tend to conceal even their positive biases towards particular groups of asylum seekers behind the smokescreen of a person-centered assessment, within which persecution is (in my view, wrongly) construed as an individual experience in both its effect and its causation. This is not to say that groups at risk are completely absent from the assessment, but rather that either their conceptual influence is implicit, rather than explicit; or they are explicitly removed from the ambit of the Refugee Convention and consigned to discretionary forms of protection.

Be that as it may, industrialized states have experimented with a wide variety of measures acknowledging, to varying

degrees, the relevance of group membership to a determination of a “need for international protection” writ large. States in the developing world, especially in Africa, have evolved their own group determination mechanisms, with an eye on mass influxes. A full inventory of all explicit and implicit acknowledgements of the “group at risk” dimension in state practice worldwide is clearly beyond the scope of this paper. I will rely instead on a few examples, in order to illustrate the following point: the group-at-risk methodology offers interesting evidentiary shortcuts in refugee status determination, thereby reducing the complexity and opacity of procedures and lightening the burden of proof for the applicant.

A preliminary observation is in order: a *lighter* burden on the asylum seeker is not the necessary consequence of all evidentiary shortcuts. Ironically, the only “legal” presumption affecting material RSD in the current law of industrialized states is a negative one—namely, the designation of “safe countries of origin.” On its face, the safe country of origin notion (as codified in the EC directive on asylum procedures¹⁰) does not trigger a presumption of substance. The automatic labelling of the claim as “manifestly unfounded” in view of the claimant’s nationality does not entail an equally automatic denial of the claim, but rather an acceleration of the qualification procedure.¹¹ In practice, though, accelerated procedures are so devoid of basic guarantees of fairness that their only possible outcome is a negative decision—unless, that is, the applicant is able to establish that there exist exceptional circumstances making the country of origin “unsafe” for him or her personally.

We can all agree—including, I am sure, the drafters of this clause—that this evidential burden is simply impossible to meet. I certainly do not know how to make the safe country notion work as a fair mechanism. However, I can find some comfort in a reading *ab absurdo* of this practically non-rebuttable presumption. Here is how it goes: where the country of origin is considered generally safe, the claimant must prove the existence of highly personal circumstances that make him or her, individually, a potential target of persecution. In good logic, where the country of origin is *not* regarded as generally safe, *i.e.*, where it is acknowledged that persecution may happen there, the claimant should *not* be required to relate his or her fear of persecution to individual circumstances or “special distinguishing features” over and above those of groups at risk of persecution. As I explained before, this is also what the plain language of the Convention definition suggests.

Two Basic Questions

We can now return to the mainstream of our discussion. Henrik Zahle has usefully observed¹² that determination of refugee status consists in answering two main questions:

- the question of “group-risk existence” (*e.g.*, are Ahmadi persecuted in Pakistan, and if so what risk does an Ahmadi living in Pakistan run of actually being persecuted?); and
- the question of “group-risk affiliation” (*e.g.*, is the person, or are the persons, in front of me [a] Pakistani national[s] and does she/ do they profess the Ahmadi faith?). To be complete, however, one should add to the question of group-risk affiliation that of *identification* with the risk group, as set out in the above mentioned 1990 US Asylum Regulations.

I propose that we examine these two concepts in turn.

The question of “risk-group existence” can be broken down into a set of interrogations: Who determines the existence of a group at risk? Through which process? In what terms is it defined?

Who Determines, and Through Which Process?

It is possible to identify seven levels at which the existence of a *prima facie* refugee group can be established:

A. *In a multilateral agreement.* This was standard procedure in Europe in the 1920s and 1930s, when under the auspices of the League of Nations a series of treaties and arrangements were concluded with regard to specific categories of refugees, usually defined by reference to their nationality, coupled with lack of protection from the state of origin.¹³ As noted above, the contemporary refugee regime has departed from this selective and highly predictable approach to refugee protection. Nonetheless, the notion that *ad hoc* multilateral arrangements may be an effective way of resolving specific refugee situations is not entirely absent from the regime: though not binding in the same way as their League of Nations precursors, multilateral arrangements concerning particular caseloads of asylum seekers have resurfaced in recent times, in the form of comprehensive plans of action [CPA].¹⁴ It must be noted, however, that such plans do not necessarily formulate blanket assumptions about the refugee character of individuals in the group: to be sure, the landmark CPA adopted by the second international conference on Indo-Chinese refugees in 1989 prescribed, as part of a comprehensive set of humanitarian undertakings, a systematic screening, against Refugee Convention criteria, of all asylum seekers having left Vietnam after a set cut-off date.¹⁵

B. *By UNHCR.* The UN refugee agency is often called upon to make broad-brush assessments of the eligibility, under its mandate from the UN General Assembly, of large groups of asylum seekers in need of immediate protection and assistance. Whether and to what extent such assessments translate into states’ obligations varies from one situation to another, as Jackson has thoroughly documented.¹⁶ It is worth recalling, however, that UNHCR is also deeply—though

often grudgingly—involved in individual refugee status determination, either as an add-on to, or more problematically as a substitute for, state-run processes. Furthermore, several industrialized states, while they run their own asylum procedures, attach much credit to UNHCR’s “reading” of particular refugee-producing situations, on the ground that UNHCR’s extensive field presence places its staff in a privileged position with regard to gathering and assessing first-hand information on events in source countries. While this is a correct assumption, it is also true that UNHCR faces serious limitations when it comes to releasing—as opposed to just compiling—information on groups at risk in countries of origin. More than any individual state, UNHCR must be wary of adverse reactions, including damaging accusations of bias, by states of origin and/or their political friends—or, conversely, their political enemies if UNHCR appears to be “soft” on certain source countries. Such accusations are all the likelier to be forthcoming, since the organization does not have the necessary resources to ensure a “universal” coverage of all refugee-producing situations, nor to update its information base with sufficient regularity. Due to those significant limitations, UNHCR’s eligibility guidance on groups at risk remains incomplete in two ways: (i) it deals with a small number of source countries, including many but certainly not all quantitatively major ones; (ii) it usually stops short of recommending a *prima facie* finding of refugeehood on the basis of risk-group affiliation/ identification alone. This at times leads to rather ambiguous formulations. Thus, UNHCR’s eligibility guidelines on Afghan asylum seekers, dated 31 December 2007, go into a detailed “profiling” of groups and categories of Afghan nationals facing a heightened risk of being persecuted—only to conclude that “UNHCR considers the above-mentioned categories to be linked to the grounds enumerated in the refugee definition, and where such claimants are able to establish a well-founded fear of persecution, international protection is merited.”¹⁷ It is not at all clear, be it from this sentence or from the rest of the guidelines, what—besides their belonging in a group designated as “at risk”—may make the fear of the profiled asylum seekers well-founded.

C. *By the EU Council.* This is a very specific feature of the European asylum regime, and arguably a rather theoretical scenario. Nonetheless, the mechanism instituted by the 2001 Temporary Protection directive,¹⁸ following almost a decade of experimentation with the “temporary protection” concept in Europe, is worth a mention in this discussion, both for what it does and for what it does not do. On the positive side, the directive contains a definition of “beneficiaries” that includes persons fleeing persecution *en masse*, *i.e.*, it recognizes that people fleeing areas of endemic violence or armed conflict may well fall within the scope of Article 1A of

the Refugee Convention.¹⁹ On the down side, the decision-making process itself is particularly cumbersome, considering that it is meant to respond to an emergency situation.²⁰ More critically still, the interim protection system that the directive envisages falls short of *prima facie* recognition of refugee status. Rather, it leaves the question of refugeehood, and also of eligibility for subsidiary protection, in suspense for the duration of the temporary protection “regime.” What happens (short of return) at the end of that road is rather confusing, since a bizarre hiatus persists between the 2001 definition of “beneficiaries of temporary protection” and that of persons eligible for international protection under the 2004 Qualification Directive.²¹

D. *Executive Designation Authorized by Law.* This is the most common modality of group determination, both within and outside a mass influx scenario. Here are three illustrations, out of a potentially large number of similar examples.²² Tanzania’s Refugees Act of 1998 provides that the Minister of Home Affairs may, by notice published in the *Gazette*, declare any group of persons to be refugees for the purpose of that Act. Ministerial declarations or orders, based on a similar provision in the now-repealed Refugees Control Act of 1966, have been issued in Tanzania on a regular basis.²³ Still within a context of large-scale influx, but without reference to “refugee” status as such, one can mention Austria’s Aliens Residence Act of 1993, which allowed the Federal Government to grant, by decree, a temporary residence status to people fleeing their country of origin “during times of heightened international tension, armed conflict or other circumstances that endanger the safety of entire population groups.”²⁴ Before the ink got dry on this new Act, a decree was issued to grant temporary residence to people from Bosnia and Herzegovina who had arrived before July 1993. The third example is found in the law of the Netherlands, one of very few European states in which the government has retained the power to designate, under the operation of its asylum law, groups and categories of persons as worthy of special humanitarian protection. Pursuant to Article 29 (1) (d) of the 2000 Aliens Act, an “asylum” residence permit may be granted to an alien whose return to the country of origin would, in the Minister’s judgment, constitute particular hardship in light of the general situation there. The Ministry of Justice’s explanatory notes make it very clear that this power is entirely discretionary and does not reflect or engage the international law obligations of the state. The reference to “an alien” notwithstanding, the operation of Article 29 (1) (d) is triggered by the executive designation of groups and categories of persons in need of protection. Regulations have been issued outlining the “indicators” that should guide the Minister in deciding whether or not a grant of “categorized protection”—as this mechanism is known in

the Netherlands—is warranted. These are: (i) the nature of violence in the country of origin, and specifically the extent of violations of human rights and humanitarian law, the degree of arbitrariness, and the intensity as well as geographical spread of the violence; (ii) the activities undertaken by international organizations, to the extent that these represent a benchmark for the position of the international community regarding the situation in the country of origin; and (iii) the policies of other EU Member States.²⁵ Though, as per standard Dutch practice, the designation of a new protected category is discussed in Parliament before it is enacted by the Minister of Justice, the latter has not been questioned so far about the respective weight she or he attaches to these three indicators.²⁶

E. Internal Instructions or Recommendations. I refer here to more or less binding guidance provided to first-instance adjudicators by the administrative authorities to whom they report, insofar as such guidance relates to groups at risk in specific source countries. By far the most elaborate practice in this regard is that of the UK Home Office, whose case workers can, and indeed must, rely on a wide array of country-specific Operational Guidance Notes (OGN). OGNs are issued from time to time, and regularly updated, by the Asylum Policy Unit of the Home Office, in respect of major source countries of asylum claims in the UK; fifty-two OGNs are currently available on the Home Office's website. An OGN typically covers issues of both fact and law, its objective being to facilitate and harmonize the application of refugee (or subsidiary protection) criteria to particular situations. OGNs follow a standard format, whereby an overall country assessment leads to a listing and analysis of "main categories" or "main types" of claims, each section being wrapped up with some conclusions as to eligibility for refugee or other protected status.

F. Authoritative Guidance from Reviewing Bodies. The designation of groups at risk, as part of general country of origin information, is usually considered a matter of fact, which is not subject to judicial review by higher courts.²⁷ On the other hand, where appeal tribunals or boards engage in a *de novo* assessment of all material elements of a claim, their findings on risk-group existence are bound to have an impact on the future jurisprudence of first-instance bodies. In the UK, the Asylum and Immigration Tribunal has developed its own country guidance system "in response to concerns over the inconsistency of appeal outcomes arising from differential assessments by tribunal members of the conditions in countries of origin producing asylum applicants."²⁸ In this modality, country guidance is not—as with the Home Office—a matter of issuing administrative instructions, but a distinctive form of tribunal litigation: it is issued through judicial decisions, typically made on a set of cases raising a sim-

ilar country issue. Robert Thomas describes three techniques used by the Tribunal in such cases, two of which are relevant to our discussion: namely, the identification of "risk categories" within specific source countries, such as Palestinians in Iraq; and the identification of "risk factors" which, alone or in combination, contribute to making return to the country of origin a more dangerous proposition for individual applicants, even though the group they belong to (*e.g.*, Sri Lankan Tamils) is not in itself a group at risk. Whether country guidance issued in this way should be regarded as binding, persuasive, or authoritative is discussed at some length in Thomas's paper.²⁹ For our purposes, it is enough to observe that the Home Office refers to the Tribunal's country guidance cases extensively in its own OGNs.

Albeit in a very different judicial setting, the brush of Dutch administrative tribunals with the notion of "group persecution" can also be mentioned here, in particular the position of the *Rechtseenheidskamer* (law harmonization chamber) which, between 1994 and 2001, performed the role of consistency monitor among administrative tribunals at a time when the Council of State had no competence in asylum cases. In a decision of July 2000, the tribunal acknowledged that group persecution may exist in some countries, and that in such cases the applicant who can establish membership in the group in question benefits from a presumption of refugeehood. However, it stopped short, in the case at issue, of designating the Reer Hamar clan of Somalia as such a "persecuted group."³⁰

G. In the Individual Case. The question of risk-group existence is seldom raised as such in asylum hearings, which tend to emphasize the personal circumstances of the claimant—themselves understood more as *events* having affected him or her personally than as *characteristics* which she or he may share with a larger group. The claimant is definitely not encouraged to stress the collective dimension of his or her fear of persecution—nor, for that matter, to present his or her own view of the general situation in the country of origin, which is supposed to be known to the adjudicator. On the one hand, it may be argued that to require the individual claimant to prove the existence of groups at risk is to place an unfair burden on him or her. On the other hand, I contend that assumptions about groups at risk—or not at risk—are almost always present in the mind of the interviewer and inevitably affect the course of the hearing. The problem for the claimant, obviously, is that such assumptions are implicit and therefore difficult to relate to (where they are positive) or to challenge (where they are not). The only way out of this catch would seem to be for both parties to share, as it were, their respective "maps of the world,"³¹ in other words, to disclose the group-based evidence that each of them is bringing into the assessment of the claim. Preferably, such disclosure should

take place before the hearing, so that the latter can focus exclusively on those material elements of the claim on which there has been no prior agreement. The UK Home Office has recently launched a pilot project that features such a pre-hearing conference. I cannot tell what weight is attached to group-based factors of risk in this process, which I have not (yet) been able to observe in person. However, the Home Office’s practice of country guidance through public domain OGNs, which I described above, suggests that a good part of the conference may actually be devoted to comparing notes about groups at risk. This methodology presents two main advantages: it is participatory, and it is transparent. There is no escaping its downside, though: there will always be a *first* claim made by a member of a *new* group at risk—and it can be argued that the more detailed existing country guidance is, the harder it will be for this “first new” claim to be recognized as valid. The objective of lightening the claimant’s burden of proof is clearly met where the group at risk, of which she or he is a member, appears on the adjudicator’s “map of the world.” If it does not, and the map in question is, in the words of Popovic, “unwavering,” the burden on the applicant may well become unbearable.

In What Terms Is the Group-at-Risk Defined?

At least two ingredients appear indispensable to the description of a group at risk in the RSD context: one is the *source country* (i.e., the nationality of members of the group, or, if they are stateless, the country of habitual residence); the other is a *time frame*, which can be expressed either (i) through a cut-off date of departure from the country of origin or arrival in the host country; or (ii) by reference to “dated” events in the country of origin.³² It is interesting to note, however, that eligibility guidance directed mainly at individual determination processes, such as OGNs, UNHCR guidelines, or “country guidance cases” are not always precise as to the temporal validity of their risk assessments. It must be assumed that they represent the issuing authority’s reading of the situation at the time of writing, but claims entering a refugee status determination procedure at that time may not be decided upon until months later. It seems logical to require, therefore, that any risk-group existence determination should be supported by time-specific country information, as well as regularly and systematically updated.

Beyond the (obvious) nationality element and the (not so obvious) time frame, the wide variety of processes through which groups at risk come to light in RSD is mirrored in very different levels of detail in the representation of such groups. Formulations will also vary according to the significance given to the risk-group notion in the overall assessment of the claim. Here, it is worth recalling that not all instruments referred to in the previous section identify groups at risk as

such—they may, e.g., refer to types of claims, which is an obviously more open as well as more neutral description. Save in situations of large-scale influx, membership in the group is rarely conclusive evidence of a need for international protection: more often, it is only indicative of the direction, which an inquiry into the personal circumstances of the claimant ought to take.

Thus, while an OGN designates former members of parties to the conflict in Colombia as a risk-group, it considers a grant of asylum appropriate only where the claimant establishes that he or she has been “kidnapped in the past and/or [has] encountered serious harassment or threats from either FARC, ELN or AUC, and such treatment has been for political reasons.”³³ This last requirement, in particular, appears dangerously circular: if it cannot even be assumed that the harassment of ex-members of armed groups is politically motivated, the very notion of risk group loses all relevance in this context. To be relevant, the notion must be susceptible of use as a “reading grid,” a lens through which the refugee definition is projected against the background of country-of-origin information. A straightforward illustration can be found in another OGN, in respect of the Democratic Republic of Congo, which concludes its analysis of the situation of Banyamulenge Tutsis in that country with the following statement: “If it is accepted that the claimant is of Banyamulenge origin, a grant of asylum is likely to be appropriate.”³⁴

Tutsis from the Democratic Republic of Congo also benefit, on account of their sole ethnicity, from “categorized protection” in the Netherlands. In contrast, the protected category of Sudanese from Darfur is defined by a mix of innate characteristics, place of origin, itinerary, and other elements of personal history: non-Arabs from North, West, or South Darfur are eligible unless they resided without difficulties for a period of six months or more in the north of the country. The notion of internal relocation alternative thus creeps into the definition of a group at risk, which, as noted by the International Centre for Migration Policy Development in a 2006 study, is a bit of a paradox.³⁵ I will briefly revert to this point further down.

I have already alluded to the way groups with a *prima facie* need for protection are identified where they arrive in large numbers over a short period of time. In most such cases, what states attempt to define through the adoption of special criteria is a *fait accompli*, in the sense that the emergency is in full swing already. One must acknowledge the peculiar difficulty of adopting precise definitions in the heat of an influx. The refugee-producing crisis may be too current to permit a detailed analysis of its causes, which are likely to be complex in any event. Neighbouring states may also be wary that their attitudes towards fleeing persons do not aggravate international tensions, or close the door to

quiet diplomacy for the resolution of the crisis. Receiving states and UNHCR may be tempted, therefore, to resort to broad-brush characterizations. The judgmental “massive violations of human rights” and the more neutral “events seriously disturbing public order” become handy catch-phrases, erasing important distinctions among groups at risk and among the types of risk they actually incur. Such distinctions are important, not only in order to calibrate the protection response, but also in order to identify the appropriate durable solutions.³⁶ Even where they are faced with large-scale influxes, therefore, states should aim at the most precise description possible of their causes, including time and space parameters. While this is not an easy task, it is not an impossible one: after all, the circumstances leading to involuntary displacement are usually well known and sufficiently documented before they manifest themselves through cross-border flows.

The next set of questions concerns *inclusion in*, and *identification with*, groups at risk.

What Is the Claimant's Burden of Proof?

Designation of a group at risk undoubtedly provides an “evidentiary shortcut” in the RSD process. Nevertheless, the individual member of the group is not relieved of all evidential burden: she or he must satisfy the authority that she or he belongs in, and/or is identified with, the group at risk. It is, simply put, the degree of precision in the definition of the group that will determine the evidential burden to be discharged by the individual claimant.

While in theory all persons belonging to the discriminated group are equally at risk, one must accept that the particular position of individuals within the group may be relevant, as it may determine the level of repression expected from the authority (*i.e.*, the threshold between discrimination and persecution). Whether the individual's position in the group may also affect the likelihood of persecution, *i.e.*, the well-foundedness of the fear, is more debatable. The UK Home Office's guidance in respect of, *e.g.*, Falun Gong members from China or Ahmadiis from Pakistan holds that members of these groups have no persecution to fear if they lie low; in other words, the likelihood of persecution depends on their membership in the group being “visible” to the potential persecutor. This further level of discrimination is in my opinion not required for a correct application of the refugee definition. To be sure, an assessment of “visibility” is highly problematic within a qualification process that is, in essence, an “essay in prediction”:³⁷ the “unexceptional Ahmadi”³⁸ may have been discreet so far, but this is no guarantee that she or he will be able, let alone willing, to remain “invisible” in the future.

To What Standard Must the Evidential Burden Be Discharged?

In attempting to distinguish between the *existence* of a group at risk and the *affiliation* to such a group, “the difference in focus and in the types of information asked for reasonably demand a distinction to be made when assessing the evidence.”³⁹

To say that a risk group exists is another way of stating that members of the group have a well-founded fear of being persecuted. This does not mean that it is more likely than not they will be: a reasonable likelihood is a more appropriate standard. On the other hand, where group affiliation is at issue, the standard can be raised: there must be a relatively high degree of certainty that the applicant is who he claims to be (in terms of affiliation with a designated group).⁴⁰ This point was not lost to the Dutch Ministry of Justice as it elucidated the rules of evidence applicable to claims to “categorized protection”: in order to arrive at a decision on this matter,

one must not in the first place consider whether the asylum seeker's statements regarding the substance of his or her claim are credible. What is primarily at issue is whether the asylum seeker belongs to a category that has been designated for a grant [of categorised protection]. *It goes without saying that identity and nationality must be established well beyond doubt.*⁴¹

These are facts, indeed, that are not subject to speculation, but from which significant inferences are about to be drawn. Is this to say that group-based RSD requires *more* certainty regarding identity and national origin than an individualized approach? If this is the case, what additional evidence is required, and in what form? And above all: what are the consequences if it is not adduced to the satisfaction of the adjudicator? These are questions worth exploring further, against the challenging backdrop of wilful destruction of identity documents; forging, swapping, and confiscating passports; and other practices, for which people-smuggling rings that control many of the asylum seekers' flight routes have become notorious.

Rules of evidence find their application within procedures, and issues of burden and standard of proof may, in the final analysis, be determined by the setting, within which evidence is being adduced by the asylum seeker, to the effect that he or she belongs in, and can be identified with, such risk group as has been defined. In mass or diffuse influx situations, the simple act of coming forward may constitute the beginning and the end of the qualification process. Thus, in Tanzania following the 1994 ministerial declaration in favour of refugees from Burundi,⁴² the eligibility procedure was actually dispensed with through a summary process of

registering family units upon admission into a refugee camp, which served assistance at least as much as protection purposes. In such situations, it appears that the main control of the integrity of the process is exercised by the refugee population itself, through an informal co-optation mechanism that does not necessarily reflect the criteria set by the host state.⁴³ While a stricter screening exercise can be envisaged at a later stage, it is likely to cause major disruption in the affected settlements if it results in deregistration of a substantial number of residents. The few studies that have been undertaken on this topic⁴⁴ paint a rather confused picture, suggesting that group determination procedures that are fair, credible, and efficient in refugee emergencies remain, by and large, to be invented. In this connection, an ongoing initiative in the Americas probably deserves attention. In the areas of Ecuador bordering on Colombia, the Ecuadorian government and UNHCR register asylum seekers originating from any of nine administrative departments of Colombia, on the understanding that they are more likely than not to meet the refugee definition criteria of the Ecuadorian law. UNHCR has proposed to the government to introduce an enhanced registration and profiling system, which would obviate the need for registered Colombian asylum seekers to go through the regular RSD procedure.⁴⁵

Rebuttable Presumption, or Not?

The evidentiary shortcut described in the preceding sections can be loosely described as the operation of a presumption: upon proof of a few facts, the law presumes another relevant fact—in essence, a well-founded fear of being persecuted. Some features of this evidentiary process make it difficult, however, to assimilate fully to a rebuttable presumption of law, the effect of which is to change the allocation of the risk of losing regarding a particular issue.⁴⁶

First, as we have seen, the “presumption” of refugeehood is not always established by law. Second, in RSD one can hardly speak of two parties with conflicting interests, both at risk of “losing the case”: the official representing the state does not have a case to lose; rather his or her job is to ensure the proper application of a common good, albeit that this may involve a refutation of the claimant’s evidence.

This observation leads us into a third conceptual obstacle: if refugeehood on a group basis stems from a presumption, this presumption is not *stricto sensu* rebuttable. Let us assume that the asylum seeker has made a *prima facie* case of refugeehood; in other words, has met the burden of proof to the satisfaction of the “law”—*i.e.* the criteria set by the “group determiner” are not in dispute. The *Handbook* states that this person must be regarded as a refugee in the absence of evidence to the contrary. But what can such evidence consist of?

Clearly, the state would be in contradiction with itself if it were to dispute, in an individual case doubtlessly belonging to a designated group, the existence or even the risk of persecution in the country of origin. Under the League of Nations, when refugees were primarily defined in relation to their membership in a group, the fact of not enjoying national protection was also part of the definition. The cursory screening of individual refugees would involve, therefore, some inquiry into this fact, notably as regards any evidence that the individual had effectively and voluntarily maintained ties with the state of origin. This evidence, if we assume that it was produced by the official as would normally be the case, was indeed “evidence to the contrary” because non-availment of national protection was an integral part of the definition. In contrast, when Hungarian refugees sought refuge in Germany following the 1956 revolution (and the Refugee Convention was deemed applicable), each applicant was automatically recognized and documented as a refugee unless she or he presented a security risk.⁴⁷ While it was the responsibility of the state to establish the existence of such a risk, this was clearly not tantamount to producing “evidence to the contrary”: what was at issue was not the refugee character of the individual in question, but whether, as a refugee, the individual could safely be granted asylum or any other facility in Germany.

Though African state practice is extremely poor with regard to screening “non-refugees” out of designated refugee groups, the attempts made by Zambia, Tanzania, and the DRC/Zaire all point to a similar concern for national security.⁴⁸ The tragic experience of the Rwandan exodus following the 1994 genocide brought to light the very real possibility that refugee flows might be “contaminated” by the presence of serious offenders, war criminals, or *genocidaires*. Without underestimating the practical difficulties involved, this is probably the clearest case, under Article 1 of the Convention, for “rebutting” the “presumption” of refugeehood in individual cases: that is, where an exclusion clause may be invoked. Even in this case, however, it may be incorrect to describe the “contrary move” of the receiving state as a rebuttal of the presumption. In all legal rigour, the assessment of exclusion grounds is a separate test, distinct from the assessment of inclusion (which is what the so-called presumption is about).⁴⁹

In contrast, a finding of “internal protection”—the availability within the country of origin of a safe relocation alternative to asylum seeking abroad—is normally regarded as part and parcel of the inclusion process. Can the state that has designated a group as “at risk” dispute the existence of the risk in an individual case by arguing that this particular claimant availed, or could/should have availed, himself or herself of an internal flight/relocation alternative inside

the country of origin? This would indeed be “evidence to the contrary,” capable of rebutting the group-based presumption of refugeehood. To introduce this parameter into the assessment seems, however, to defeat the purpose of procedural and evidential simplification. Designations of “protected categories” in the Netherlands have attempted to square this circle by “objectivizing” internal protection, notably in the cases of Somalia and Sudan: instead of probing the potential of an *hypothetical* relocation to a relatively safe and stable part of the country, the “categorized protection” assessment includes the *fact* of prior problem-free residence in such a part, which in turn is interpreted as evidence of the current and future availability of internal protection. This additional criterion injects several layers of complexity into the evidentiary process, and multiple shifts in the allocation of the burden of proof, that may well offset the positive effect of group-based RSD in terms of efficiency and consistency.

Tentative Conclusions

Undoubtedly, the main argument in favour of group-based RSD is its efficiency. It avoids the need for fresh decisions on the same material in situations of common application, with the associated resource implications. This consideration is clearly predominant in mass influx situations. As we have seen, though, there is in such situations a risk that efficiency may be achieved at the expense of certainty: because of an overly broad or vague definition of the groups at risk, and/or as a result of procedural faults, the receiving state is not entirely confident about the “refugee” character of all those admitted as refugees; such indeterminacy may also be detrimental to the asylum seekers themselves where—as in the case of EU-styled temporary protection—they find themselves in a legal limbo and with an inferior status. There is no reason, however, why efficiency and certainty cannot be reconciled, especially in those states where resources are available to be applied to the regular updating and distillation of country information, and to the monitoring and control of asylum decisions.

To admit group-based evidence in RSD is also advantageous in that it is bound to increase decisional consistency. It can be argued that it enhances consistency in two ways: at one level, it ensures that like cases are treated alike; on a more conceptual plane, it makes RSD more consistent with the refugee definition itself.

Consistency is an element of fairness, not least because it breeds predictability. Where groups at risk are clearly identified, the claimant knows what she or he is supposed to prove and is aware of the inferences that will be made from his or her statements. Admittedly, the above benefits can only be reaped if the process is sufficiently transparent: any group-based evidence must be squarely “above the table” and all

possible inferences must be explicit. I set out on this inquiry with a particular understanding of a “lighter” burden of proof, whereby the claimant is required either to prove fewer facts in issue, or to produce evidence to which the claimant has easier access. However, issues surrounding sufficiency of, and access to, evidence can hardly be resolved in the abstract: whereas risk-group affiliation may be easier to prove in some situations, this will not be the case in others. In the final analysis, therefore, I find that fairness will be better served by a transparent and precise definition of groups at risk than by a sheer reduction of definitional criteria.

There is, on the other hand, a distinct risk of artificiality in any attempt at classification or categorization, which is somehow inherent in group-based RSD. Thomas rightly warns: “Country guidance prioritizes certainty and consistency over individual justice. In particular, country guideline determinations, it has been argued, seek to impose artificial certainty on what are often uncertain and rapidly changing country situations.”⁵⁰ In a similar vein, Legomsky identifies complexity and dynamism as essential ingredients of the subject matter with which asylum adjudicators must contend.⁵¹ Not only is categorization somewhat artificial, it is also, inevitably, selective: as noted above, fairness will be trumped if the asylum seeker is faced with an unwavering “map of the world,” on which the group to which she or he belongs does not figure.

I am not recommending, in any case, that group-based RSD should be the exclusive, or even the preferred, approach to applying the refugee definition. It is neither feasible nor desirable to reduce RSD to a process of fitting individual applicants into neatly defined categories. While refugee definition criteria are not “highly individualistic,” they are not “highly collective” either. In particular, there will always be situations in which group-based discriminatory measures (and/or measures of general application) do not meet the threshold of persecution, *except for* those individuals who do actively resist them. The assessment required in such deserving cases cannot be exhausted by the two recommended steps of risk-group existence and risk-group affiliation. On the other hand, it does not make those steps redundant either. What is recommended, in short, is a balanced approach, one that avoids both the temptation of excessive emphasis on individual circumstances and the dangers of exclusive reliance on group characteristics.

Individual and group determination processes are rarely discussed together, or, if they are, it is mainly with a view to stressing their allegedly irreconcilable differences. In the global North, not only does the *Handbook's* mantra according to which refugee status “must normally be determined on an individual basis” hold its ground, it has actually been taken to such undesirable extremes as the “singling out” re-

quirement. It has also failed to produce consistent or credible outcomes.⁵² At the other extreme, there seems to be a consensus that large-scale influxes—to which some sort of group determination is the typical response—follow their own rules, which in turn are deemed to be less rigorous and somehow less worthy of legal analysis than individual RSD. Were it not for the formalization of temporary protection in Europe, which is a very recent phenomenon, one might even suspect that group determination is perceived in the industrialized world as a symptom of underdevelopment, an incomplete mechanism to which developing countries resort by default, for want of a better way.

Regrettably, neither UNHCR nor African states have made much effort to dispel this negative perception of their group determination practices. The recommendation of the 1979 Pan-African Conference on Refugees, calling for a thorough study of these practices, remains a dead letter, despite being reiterated on the occasion of the 30th anniversary of the 1969 OAU Convention.⁵³ The lack of systematic compilation and comparative analysis undoubtedly reinforces the feeling that not much can be learned from *ad hoc* mechanisms and disparate pieces of legislation, and relegates group determination to insignificance. True, there are serious conceptual and procedural weaknesses in African refugee law as it applies to groups of refugees. In my view, though, it would be a mistake to throw the baby away with the bathwater and to simply dismiss African practice of group-based RSD. There are two important reasons for this.

Firstly, there has been in recent years a steady push for African states that have not yet equipped themselves with “regular” (*i.e.*, individual) RSD procedures, or whose existing procedures have somehow gone out of use, to overcome those deficiencies. Some real progress has been achieved in this direction, including the accompanying development of legal counselling services for asylum seekers and the surge of capacity-building projects benefiting national RSD authorities.⁵⁴ While this trend is welcome, it is not exempt from risk: African states will no doubt be tempted to adopt the restrictive practices of their European partners, the export value of which has already been tested in Europe’s “near abroad” in a way that has not, by any yardstick, enhanced the protection available to genuine asylum seekers. As they engage in regulating and/or revamping individual RSD procedures, African states with a past or current practice of group determination should be encouraged not to discard this practice, but rather to factor it into a comprehensive approach to refugee protection on their territories. Such a “comprehensive” approach—this is my second and final point—does not only mean *co-existence* of individual and group determination processes within domestic jurisdictions, though this would in any event be useful, particularly in states likely to face large-scale

influxes from time to time due to their geostrategic location. It also means the *interpenetration* of critical elements of both individual and group-based processes. As I hope this article has made clear, the value of such an exercise would extend far beyond the confines of Africa.

NOTES

1. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (re-edited 1992)
2. Jennifer Hyndman and Bo Victor Nylund, “UNHCR and the Status of *Prima Facie* Refugees in Kenya,” *International Journal of Refugee Law* 10 (1998): 21; Eduardo Arboleda, “Refugee Definition in Africa and Latin America: The Lessons of Pragmatism,” *International Journal of Refugee Law* 3 (1991): 185, 189.
3. Jean-François Durieux and Jane McAdam, “Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies,” *International Journal of Refugee Law* 16 (2004): 4.
4. Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969), Article I (2).
5. In some cases, however, “political opinion” may be hard to reconcile with membership in a group, *e.g.*, where “a person is aware of contending political forces and affirmatively chooses not to join any faction;” *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984).
6. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), 529, but *contra*: 129; also *contra*, Thomas Spijkerboer, “Subsidiarity in Asylum Law. The Personal Scope of International Protection,” in *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* ed. Daphne Bouteillet-Paquet (Brussels: Bruylant, 2002), 20–28.
7. 8 CFR para.208.13 (b) (2) (iii); para. 208.16(b) (92).
8. See J. Crawford and P. Hyndman, “Three Heresies in the Application of the Refugee Convention,” *International Journal of Refugee Law* 1 (1989): 152; Kazimierz Bem, *Defining the Refugee: American and Dutch Asylum Case-law, 1975–2005* (Amsterdam: Vrije Universiteit, 2007), 29–35, 129–141.
9. Richard Towle and Richard Stainsby, “Strengthening Protection Capacity and Consistency in Refugee Status Determination: A Global Perspective” (paper presented to the conference Best Practices for Refugee Status Determination, Monash University Prato Centre, 29–30 May 2008).
10. Council of the European Union, *Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (1 December 2005), Articles 29 [NB: quashed by the Court of Justice of the European Communities in 2008], 30 and 31.

11. *Ibid.*, Articles 23 and 28. Compare with the assignation of “simple claims” to a fast-track hearing or expedited process in the Canadian procedure: Immigration and Refugee Board of Canada, *Policy no. 2005-01: Fast Track Policy: Hearings Process* (14 March 2005), 2.
12. Henrik Zahle, “Competing Patterns for Evidentiary Assessments,” in *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, ed. Gregor Noll (Leiden and Boston: Martinus Nijhoff, 2005), 21.
13. For a description of these arrangements, see e.g. Goodwin-Gill and McAdam, 16–20; James Hathaway, “The Evolution of Refugee Status in International Law,” *International and Comparative Law Quarterly* 33 (1984) 348–380.
14. See e.g., Alexander Betts, *Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA* (New Issues in Refugee Research, Working Paper No. 120, UNHCR, Geneva, January 2006).
15. See Sten A. Bronee, “The History of the Comprehensive Plan of Action,” *International Journal of Refugee Law* 5 (1993): 534; Shamsul Bari, “Refugee Status Determination under the Comprehensive Plan of Action,” *International Journal of Refugee Law* 4 (1992): 487; UN Doc. A/CONF.148/2 (26 April 1989).
16. Ivor C. Jackson, *The Refugee Concept in Group Situations* (Cambridge: Cambridge University Press, 1999).
17. UNHCR, *UNHCR’s Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers* (Geneva: UNHCR, 2007), <<http://www.unhcr.org/cgi-bin/textis/vtx/refworld>> (emphasis added).
18. Council of the European Union, *Directive 2001/55/EC on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof* (20 July 2001).
19. *Ibid.*, Article 2.
20. See Article 5.1: “The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.”
21. On this point, see e.g. Jean-François Durieux and Agnes Hurwitz, “How Many Is Too Many: African and European Legal Responses to Mass Influxes of Refugees,” *German Yearbook of International Law* 47 (2004): 105.
22. For an overview of the law and practice of African states, in particular, see Bonaventure Rutinwa, *Prima Facie Status and Refugee Protection* (New Issues in Refugee Research, Working Paper No. 69, UNHCR, Geneva, October 2002).
23. *Ibid.*, 8–9.
24. *Bundesgesetz mit dem der Aufenthalt von Fremden in Osterreich geregelt wird (Aufenthaltsgesetz)* (1 July 1993), section 12, as cited by Joanne Van Selm, *Refugee Protection in Europe: Lessons of the Yugoslav Crisis* (Leiden and Boston: Martinus Nijhoff, 1998), 190.
25. These are unofficial translations. For full text of the 2000 Aliens Act, Aliens Decree and Aliens Circular C2/5, see <<http://www.wetten.overheid.nl>>.
26. Interview with officials of the Ministry of Justice, The Hague, 19 May 2008.
27. Nonetheless, “failure to take account of a country guidance case, even though it is a decision on fact only, will entail an error of law in that a material consideration will have been ignored”: UK Court of Appeal [2007] EWCA Civ 297 (4 April 2007); also [2005] EWCA Civ 982222 [27].
28. Robert Thomas, “Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom,” *International Journal of Refugee Law* (2008) 20 (advance access: 2). Note that the Court of Appeal remains critical of the country guidance mechanism instituted by the AIT: see, e.g., [2007] EWCA Civ 297 (4 April 2007).
29. *Ibid.*, 28–32.
30. RV 2000, 12; see Bem, note 8 above, 127–128.
31. I am borrowing this term from Aleksandra Popovic, “Evidentiary Assessment and Non-Refoulement: Insights from Criminal Procedure,” in Noll, *Proof, Evidentiary Assessment, and Credibility in Asylum Procedures*, note 11 above, 41.
32. Pursuant to Article 5 of the 2001 Temporary Protection directive (note 20, above), the Commission’s proposal to the Council should include, at a minimum, a description of the specific groups to whom temporary protection will apply; the date of temporary protection taking effect; and an estimation of the scale of the flow.
33. Home Office, *Operational Guidance Note: Colombia* (4 May 2007), <<http://www.unhcr.org/cgi-bin/textis/vtx/refworld/rwmain?docid=422c832e4>>.
34. Home Office, *Operational Guidance Note: DRC v 8.0* (20 August 2007), <<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/drcongoogn?view=Binary>>. Compare this with the designation, in the Netherlands, of the same Banyamulenge Tutsis from DRC as beneficiaries of “categorized protection” under Art. 29 (1) (d) of the Aliens Act, which in practice rules out the recognition of those claimants as Convention refugees.
35. International Centre for Migration Policy Development (ICMPD), *Comparative Study on the Existence and Application of Categorized Protection in Selected European Countries* (Vienna, January 2006), 15, 22.
36. One further consideration is that the application of a cessation clause based on change of circumstances (as per Art. 1 C 5 of the Refugee Convention) in effect requires that the original circumstances—including of time and space—justifying a grant of international protection be clearly spelled out at the time of the influx.
37. Goodwin-Gill and McAdam, note 6 above, 542.
38. [2005] UKIAT 00033 KK, cited in Home Office, *Operational Guidance Note: Pakistan* (15 March 2007), 5.
39. Henrik Zahle (2005), note 12 above, 22.

40. *Ibid.*
41. Circulaire, 5.4 (free translation; emphasis added).
42. Cited and discussed in Rutinwa, note 22 above, 9.
43. *Ibid.*, 14—observing that when Lukole camp was established in 1997 for Burundian refugees, “some 12,275 Rwandese managed to be admitted into the camp by claiming themselves to be Burundians” because “they were not sure whether they would successfully undergo the individualised refugee status procedure which was mandatorily applied to asylum seekers from Rwanda.”
44. See notes 2, 23, and 24, above.
45. UNHCR, *Application of the broader refugee definition in Ecuador* (Geneva, Bureau for the Americas, October 2007); on file with the author. “Profiling” of asylum seekers is also being piloted by UNHCR within the context of “mixed migratory flows,” notably across the Mediterranean: see UNHCR, The Ten-Point Plan of Action (1 January 2007), <<http://www.unhcr.org/protect/483df0fb04.html>>.
46. Steve Uglow, *Evidence: Text and Materials* (London: Sweet and Maxwell, 1997), 760.
47. Ivor C. Jackson, note 16 above, 117–119.
48. Rutinwa, note 24 above, 13, 14.
49. On the related but distinct issue of “combatants” and armed elements infiltrated among designated refugee caseloads, see Stephane Jaquemet, *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or Non-International Armed Conflict Become an Asylum Seeker* (Geneva: UNHCR, Legal and Protection Policy Series No.6, 2004), 35; Durieux and Hurwitz, note 21 above; George Okoth-Obbo, “Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,” *Refugee Survey Quarterly* 20 (2001): 79.
50. Robert Thomas, note 28 above, 36.
51. Stephen H. Legomsky, “Learning to Live with Unequal Justice: Asylum and the Limits to Consistency,” *Stanford Law Review* 60 (2007), 441.
52. See, e.g., Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag, “Refugee Roulette: Disparities in Asylum Adjudication,” *Stanford Law Review* 60 (2007): 295; and for a critical analysis, Stephen H. Legomsky, “Learning to Live with Unequal Justice: Asylum and the Limits to Consistency,” *Stanford Law Review* 60 (2007): 413.
53. *Recommendations from the Arusha Conference on the African Refugee Problem* (1979), Recommendations 2.4 and 2.5, reprinted by Scandinavian Institute of African Studies, Uppsala; Special OAU/UNHCR Meeting of Government and Non-Government Technical Experts on the 30th Anniversary of the 1969 OAU Convention, *Comprehensive Implementation Plan* (Conakry, 29 March 2000), Action Five (ii), reproduced in *Refugee Survey Quarterly* 20 (2001): 36.
54. See Barbara Harrell-Bond, “Starting a Movement of Refugee Legal Aid Organizations in the South,” *International Journal of Refugee Law* 19 (2007): 729; on UNHCR’s Strengthening Protection Capacity project, see <<http://www.unhcr.org/protect/43d644142.html>>.

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