

A Proposal for the Establishment of an International Judicial Commission on Refugees

Justice Tony North

Ladies and Gentlemen, I welcome the opportunity to address you on a proposal for the establishment of an International Commission on Refugees.

The presentation is based on a paper delivered at the World Conference of the International Association of Refugee Law Judges (IARLJ) in Stockholm in April this year. There is not time today to go into the detail contained in the paper. You may read it for yourselves. Rather, I will explain the essence of the argument put forward.

I shall deal with six aspects:

1. The reasons for the proposal.
2. Some current models of treaty supervision.
3. Some pitfalls to be avoided.
4. Elements of the Proposal.
5. Critiques and responses.
6. Conclusion.

The Reasons for the Proposal

It is fundamental to the rule of law that like cases be treated alike. The Refugees Convention provides the basic legal provisions for the protection of refugees under international law for the signatory countries.

At this very moment there are hundreds of judges in tens of countries applying the law established in the Convention. And yet there is considerable divergence in the way this universal law is applied. The immediate past President of IARLJ, Allan Mackey, said in Stockholm earlier this year:

“UNHCR figures set out recognition rates for claimants, from seven major refugee producing countries, in some 16-20 receiving countries, and UNHCR’s own refugee status determination (RSD) results as well, where they do the assessments. The percentages are virtually a set of random numbers, or a lottery. For example: Afghanistan; rates vary from 90% in one receiving country to 1% in two other major jurisdictions (with UNHCR rate 65%), Iran; 67% and 48% in two major countries through to 4% and 11% at the other end (UNHCR rate 84%), Iraq: 80% and 50% at one end and 1% and 0% at the other. Sudan, Turkey and China show similar range fluctuations. The figures do show subsidiary protection, plus appeals, in some of the low approval rate countries, do add between 5% to 20% for some countries. However, clearly the huge variations are very concerning, and there may be serious cause for concern in the high recognition rates as well as the low ones. Also we should never forget these are all the applications of individuals and their families we are considering in the “lottery”, not just statistics!”

The UNHCR's most recent set of published statistics covering 2004 indicates that disparities of this magnitude between the acceptance rates in different refugee-receiving countries continue.

In recent times there have been major issues of divergence in the construction of the Convention. Four examples immediately come to mind.

In the UK it has been accepted that non-state actors could be the agents of persecution, whilst in Germany and France this position has been denied.

In Australia, Chinese people fleeing from the consequences of the one child policy were held not to constitute a particular social group while in the Netherlands they do. And in Canada, courts are divided on this issue.

There have been fundamental differences in the application of the exclusion provisions in article 1F. For instance, the practice in the refugee-receiving countries of Western Europe is generally to balance the seriousness of the alleged crime against the seriousness of the feared persecution, whereas this is generally not the case in the common law jurisdictions. There are also conflicting approaches between countries as to the standard of evidence required to meet the threshold in the Convention of "serious reasons for considering" that the applicant has committed one of the enumerated offences.

And finally, there have been quite different approaches to the application of the internal flight alternative. Jurisdictions have taken discordant views on the nature of the relevant evidentiary burden, and on the factors that are relevant in considering whether it is "reasonable" to expect an asylum-seeker to avail him or herself of that alternative.

Some current methods for promoting convergence in interpretation

The UNHCR has done considerable work in order to promote a convergence in the interpretation of the Convention. The Handbook is a fundamental tool at least for field officers in the application of the Convention. The UNHCR publishes Guidelines on major issues of interpretation and also publishes the conclusions of its Executive Committee. To mark the 50th Anniversary of the Convention, it convened the Global Consultations which brought together eminent thinkers who sought to rationalise some of the current outstanding issues in refugee law.

Whilst acknowledging the important role which these initiatives represent, our paper draws attention some of the limitations of this material in the context of refugee determination processes. There is no uniform approach by courts to the acceptance of this material. Certainly in Australia there has been a marked disinclination to accord such material significant authority. Further, these publications tend to be brief and limited in scope.

The moves towards the European Union Common Asylum Policy might be seen as one of the boldest attempts at harmonisation. In many EU Countries the directives will have direct legal effect. However, the formulation of the directives was as a result of political negotiations — not judicial interpretation. In an the unprecedented

action the European Council on Refugees and Exiles called for the withdrawal of the Procedures Directive on the ground that it breached international law.

The paper also refers to other regional initiatives, for instance in Africa and Latin America.

Then it considers the contributions of NGOs (such as ECRE), academic groups (such as the University of Michigan initiatives) and associations such as IARLJ which have published papers on important matters of refugee law jurisprudence. However, in each case these efforts lack institutional authority and wide dissemination.

Some Pitfalls to be Avoided

The paper analyses some current models for treaty supervision. From this analysis we draw a number of conclusions relevant to the model proposed. Today I will summarise a few of the important conclusions.

A common form of treaty supervision is by a committee established by the treaty itself. The result is that the composition of the committee is under the control of the member States. Experience has shown that the nominees of States are not always the best persons for the position. This has been recognised in recent moves toward major reform of many United Nations institutions. Further, there is a pattern of States' failure to comply with reporting requirements, and a general lack of efficiency borne mainly of lack of proper resourcing of the administrative mechanisms.

Against this background it is not surprising that there has been this criticism of the quality of committee decisions.

On the other hand, the European Court of Human Rights, the largest human rights court in the world, which rules on violations of the European Convention on Human Rights, has proved extremely successful in developing a human rights jurisprudence respected throughout the world. There is little problem of defiance by States of its decisions. High profile cases such as the *McLibel* case have received extensive publicity and raised the profile of the proceedings of the court. Applications to the court are brought by individual applicants against the forty-five contracting parties to the Convention. Herein lies the major problem of the court, namely, its large backlog of cases. The same problem arises with the European Court of Justice.

It is too early to say whether the International Criminal Court will prove to be a successful international judicial organ. However, the process of creating the court was marked by a very lengthy and complex process of negotiation and compromise.

Some of the conclusions which we drew from this review of existing treaty supervision models were:

- The Commission should be established by a non-political process.
- It was necessary to provide a mechanism to ensure that the best people are appointed to the Commission.
- The Commission should utilise accepted judicial techniques in rendering its opinions.

- The Commission should be so structured that the quality of its opinions is not compromised by lack of resources.
- The Commission must not be overwhelmed by a too large a quantity of cases.

The proposal

In order to address the issue of divergence in the interpretation of the Convention, we propose that an International Judicial Commission on Refugees be established.

The Commission would be established by the UNHCR under its power to supervise the application of the Convention: paragraph 8 of the UNHCR Statute. It should be created informally by the UNHCR, and parties to the Convention would be obliged to cooperate with the UNHCR in this respect: articles 35 and 36 of the Convention. Creation of the Commission by the UNHCR would provide the institutional authority for the body.

However it is a key feature of the proposal that the Commission be independent of the UNHCR. This reflects something like a separation of powers principle. The executive function of the UNCHR should, in principle, be separate from an interpretative function. Otherwise, there is a danger that the interpretative function might be influenced by the practical pressures exerted by contributing states, rather than by a process of legal reasoning.

You will notice that the Commission is called a Judicial Commission. This is because it will be an independent body providing legal opinions using established legal reasoning. It is not a policy or political body. Erika Feller, the Director of the Department of International Protection of the UNHCR captured this facet in relation to domestic judicial asylum decision making in a speech at the Stockholm World Conference of the IARLJ as follows:

“The value of the judiciary in the asylum system is rooted in its independence – not only as an entity independent of the initial decision-maker, but as an institution which is independent per se. This is what sets judicial decision-making apart, and makes it so indispensable in a democracy. Judges decide cases according to the law as applied in the individual case and not subject to pressures of outside influences.”

The Commission would have nine members. The members would include eminent jurists, scholars, and international bureaucrats expert in refugee law.

The quality of the members is critical to the success of the body. Thus, it is proposed that the selection of members be by an Appointments Commission, which will be composed of representatives of relevant, specified organisations (such as the IARLJ), a number of recognised refugee law experts, a sitting judge expert in refugee law, a representative of nominated NGO’s involved in refugee law and, possibly, a number, although not a majority, of States’ representatives.

The Commission would consider questions pertaining to the interpretation of the Refugees Convention selected and formulated by its members. They would be questions of high importance in refugee law jurisprudence. The Commission would not receive applications from individual asylum-seekers. In this way it will avoid the

pitfall of being overwhelmed by work, and will also avoid the need for a high level of resourcing. There would however be a special power for the UNHCR to seek opinions from the Commission.

It would not be necessary in most cases for the Commission to conduct hearings. Rather it would call for submissions from interested parties and consider issues on the papers.

One of the challenges in designing the model is to take account of the fact that some members of the Commission would come from a civil law background and some from a common law background. The Commission is an ideal place in which to seek to integrate the best of both systems. In relation to the question whether there should be a single opinion or multiple opinions, a civil law approach would be favoured. Thus, the Commission would be expected to produce one unified opinion on each question. Whilst it would be expected that this would be the norm, the procedures of the Commission would provide for dissenting opinions in extraordinary circumstances.

The model is designed to require the minimum of funding. The members will be serving judges or scholars or others who are in the main supported by their own organisations. The Commission would require research support in the preparation of arguments and ultimately of the opinions. This would be provided by formal arrangements with an interested university faculty. Minimal funding would then be required for perhaps several staff members, and this would be sourced from private foundations or law firms or other non-governmental sources.

A most critical element is that the work of the Commission and the high quality of its opinions and integrity of its members is brought to the attention of the judicial systems of member states. The Commission would gain its authority from the quality of its opinions alone in the first instance. Its existence and the quality of its opinions would be disseminated by the appointment of a rapporteur along the lines of the UN rapporteur system presently existing. A well-respected retired Chief Justice would be an appropriate person. That person would engage with judges the world over to explain the role of the Commission and in due course promote the acceptance of the opinions of the Commission.

Critiques and responses

The purpose of the paper is to generate discussion. It puts forward a proposal. It is not meant to be writ in stone, but rather a work in progress. In almost every case I hear I observe the impact of contending views. So I welcome comment and criticism, and hope I will hear some from you today. Many people have already talked or written to me of their reactions. I will share some of these with you now. They may reflect your own reactions. This exercise gives me a chance to explain some of the more puzzling parts of the idea.

It is said by some that the idea is a bit dreamy, quite impractical, and could never be realised. Such a response is very generalised and does not grapple with the careful structure of the proposal. I will return in a moment to some of the more hard-edged critiques. But this one contains a sliver of insight which should be recognised. The idea is built on a foundation of idealism if you like, but it is not a particularly high flown or esoteric ideal – it is the ideal on which all legal systems are built, namely, a

striving towards the ideal of justice through the rule of law. The international rule of law, although often derided and doubted, has had some very notable institutional advances in recent decades – witness the International Criminal Tribunal for the former Yugoslavia, the Rwanda Tribunal, the Sierra Leone Tribunal, and most ambitiously of all, the International Criminal Court. The present proposal is intended to contribute to a further advance in the institutionalisation of the international Rule of Law. I plead guilty to having some remnant of idealism. But the idea has been formed against my professional background as a judge and as President of the IARLJ which brings me in contact with judges from all over the world. Working in these circles and dealing with practical legal problems daily is apt to ensure that one does not become too dreamy.

Then it is suggested that the idea rests on the UNHCR utilising its power to create the Commission, and yet the UNHCR not only has a limited role thereafter, but risks, at worst, the Commission flatly disagreeing with some of its interpretations of the UNHCR. In my view the proposal enhances the supervisory role of the UNHCR. The voice of the UNHCR will undoubtedly be received with great respect in recognition of its pre-eminent experience in the area and the excellence of some of its officers. It will have a special place in the procedures of the Commission. So, it will have the right to seek the Commission's opinion, and a right of audience. No other body will have those rights. It will also have a part to play in the appointments process. If the UNHCR gains confidence in the Commission, the workload of the UNHCR will be reduced in relation to its interpretative role concerning the Convention. But perhaps more than anything else, the Commission enhances the role of the UNHCR by allowing the UNHCR to point to an independent body as the source of authoritative interpretations. It thereby deflects from itself any disfavour flowing from unwelcome, but correct, interpretations. In the event that the Commission gives an interpretation at odds with the view of the UNHCR, then the UNHCR is naturally free to disseminate that view and the international community can freely judge the contending opinions. No participant in the debate should fear an open argument.

Next, one critic has suggested that states would not agree to the establishment of the Commission because there is no advantage to them. This approach, I think, fails to grasp the mechanics of the proposal. It is specifically designed so that states will not have a say in the creation of the Commission. We expressly avoided a model which requires negotiating a Protocol because of the complexity of the process which led to the creation of the International Criminal Court. In the end, we think that the Commission will sell itself to states. This model is intended to make the Commission operational so that it can demonstrate its value by the excellence of its opinions and the contributions towards convergence which would be derived from them. The real constituency of the Commission is the judiciary of signatory states. Thus, the idea of a rapporteur. The rapporteur would liaise with the domestic judiciaries to explain the value of the Commission as a source of expert opinion on Refugee Law.

Finally, some have questioned whether the aim of consistency is really desirable. The development of the law often results from conflicting opinions which are then resolved by a synthesis. Without differences in interpretation, the meaning of the Convention might stagnate. At worst, it might stagnate in an undesirable construction. It seems to me that this reasoning involves an assumption that it is intended that the opinions of the Commission would very soon determine the meaning

of the Convention across the world. However, it is fanciful to anticipate such a development. The opinions of the Commission will contribute to the debate. Hopefully, it will become a force for convergence in the interpretation of the Convention. Thus, whilst it would advance the cause of convergence, it will not achieve complete consistency and would have no power to impose it in any event.

Conclusion

The creation of an International Judicial Commission on Refugees is thus designed to advance the harmonisation of the interpretation of the Convention. The model proposed has considered the obstacles evidenced in existing supervisory structures and is designed to avoid them.

I emphasise that this is a work in progress. It is a proposal put forward stimulate discussion. It will be, and has already been reshaped by the reaction of interested people. It is an exciting challenge because it involves the advancement of the idea of an international rule of law by the design of a new concept.

Finally, there are some encouraging signs of interest in the idea. The Council of the IARLJ decided at its meeting in Stockholm in April to form a working party to further refine the proposal. It seems likely that this working party will comprise some leading judges in refugee law. Further, faculties in two leading universities have indicated an interest in creating a linkage between their universities and the proposed Commission.

Thank you for your attention.