Treaty Interpretation and English Law: Some Progress to Date and Some Challenges to Come[1]

Notes for a talk to the International Law Association
University College, London, 10 March 2010

Guy S. Goodwin-Gill
Senior Research Fellow, All Souls College, Oxford
Barrister, Blackstone Chambers, Temple, London

Introduction

Together with the European Convention on Human Rights, the 1951 Convention relating to the Status of Refugees is probably the most 'interpreted' treaty in modern UK case law. This is all the more surprising, perhaps, in that, unlike the European Convention, the 1951 Convention has neither been incorporated, nor made the subject of reference legislation, except now by way of the 2004 EU Qualification Directive.

In fact, UK courts have focused principally on just one provision only of the 1951 Convention – Article 1 – which sets out the refugee definition, the circumstances when refugee status comes to an end, and a variety of categories to whom the Convention shall not apply.

The 1951 Convention and the 1967 Protocol now have 147 States parties, and consistent interpretation across multiple jurisdictions is clearly something to be hoped for. The task of application, however, falls almost exclusively on national courts, for the most part in States having the infrastructure capable of engaging with individual claims to protection.

Absent an international review body, each State must therefore determine the scope of its own obligations. With many States engaged on an identical purpose, then, as Leo Gross remarked back in 1962,

> '[W]e may never know, or, in some cases, we may not know for a time, which autointepretation was correct... This is, for better or worse, the situation resulting from the organizational insufficiency of international law.' Gross, L., 'States as Organs of International Law and the Problem of Autointerpretation' in Lipsky, G. A., ed., *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law*, 1953, 59, 76-7.

Not surprisingly, therefore, 'harmonization' in the sense of a common asylum policy and common approaches to the refugee definition are very much on the agenda of the European

---

[1] This talk draws on Chapter 11, 'The search for the one, true meaning...', in Guy S. Goodwin-Gill & Hélène Lambert, eds., *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*, Cambridge: Cambridge University Press, 2010, 204-41.

Union. The 2004 Qualification Directive is thus part of the policy of ironing out differences in law and practice, both in the application of the 1951 Convention and in the provision of 'subsidiary or 'complementary protection'.

The jurisprudence is already beginning to emerge; see the judgments of the ECJ in *Elgafaji* last year, in *five joined cases against Germany* on 2 March 2010 (on cessation of refugee status), and Advocate General Sharpston's opinion of 4 March on the *Bolboli* reference from Hungary in a case involving Palestinian refugees and Article 1D.

Treaty concepts, of course, are essentially evolutionary. As the International Court of Justice has noted in another context:

> 'Interpretation cannot remain unaffected by the subsequent development of the law... [A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.' *Namibia*, Advisory Opinion, [1971] ICJ Reports, 16, 31.

Back in 1958, Hersch Lauterpacht argued that the established canons of construction,

> '... must be supplemented by the principle that when the intention of the parties is not clear it must be assumed that they intended a result which is in conformity with general international law...' Lauterpacht, H., *The Development of International Law by the International Court*, London: Stevens, 1958, 27-8.

It is not clear that this approach – which, I would argue, also reflects the general principle that a State must exercise its rights consistently with its international obligations – has been appreciated at the national level; or that the opportunities for constructive development have been fully grasped.

Despite formal acknowledgement of interpretation in context and by reference to object and purpose, more often than not it is the primacy of the text that seems to prevail, irrespective of developments generally in related areas of international law.

My focus this evening is mostly on UK jurisprudence, and the methodology of UK courts in interpreting the 1951 Convention. I am particularly interested in the courts' ready acceptance and use of the 1969 Vienna Convention on the Law of Treaties and the rule of interpretation set forth in Article 31, in the courts' approach to the *travaux préparatoires*, and particularly in their response to the views of the Office of the United Nations High Commissioner for Refugees and the different forms that it may take.

But I also have reservations. There is little clear evidence of a consistent approach, rather too much variation in the weight given to the views of the UNHCR, and often purely rhetorical endorsement of the Convention as a 'living instrument'.

The 1951 Convention is not like other treaties for the protection of human rights. It is written, for example, mostly in the language of inter-State obligation, rather than that of individual rights. It also lacks a treaty supervisory body as we have come to understand

such institutions, for example, through the practice of the European Court of Human Rights, the Human Rights Committee, the Committee against Torture, and the Committee on the Rights of the Child.

According to Article 35 of the Convention, and consistently with its own Statute, UNHCR *is* recognized as having the 'duty of supervising the application of the provisions of the Convention', and States undertake to cooperate with it in the exercise of its functions.

However, UNHCR is not accepted by States as the final authority on interpretation and the meaning of terms; nor does it claim such a role. It may seek to speak authoritatively, of course, and it promotes the consistent interpretation of the law, for example, by participating in national refugee decision-making procedures, sometimes substantively and sometimes as an observer. It also publishes guidelines on the application of the Convention and makes substantive interventions on questions of law in appellate proceedings in different jurisdictions. How, then, are these to be viewed?

Approaches to interpretation in the United Kingdom

The United Kingdom, of course, is also not like every other jurisdiction. Besides accepting the authority of the Vienna Convention on the Law of Treaties, the courts remain remarkably open to the citation of foreign case law, which they have long recognised as relevant to the interpretation of international treaties, they are generally familiar with the use of supplementary means of interpretation, such as *travaux préparatoires*, and they have traditionally referred to UNHCR materials and accepted UNHCR as an 'intervener' in appeal proceedings, even if there is some inconsistency in approaching its submissions and published views.

The general approach of UK courts to treaty interpretation can be illustrated by the case of *King v. Bristow Helicopters Ltd. (Scotland)* [2002] 2 AC 628, [2002] UKHL 7, where the House of Lords emphasised the importance of 'international uniformity...', and ideally the same meaning among all who are party to the particular convention.

In the case of the 1951 Convention, however, the higher courts have been conscious of the 'formidable difficulties' in the way of finding 'international meaning'. In the Court of Appeal in *Adan (Hassan Hussein) v. Secretary of State for the Home Department* [1997] 1WLR 1107, 1114, Thorpe LJ referred to Nehemiah Robinson's reference to the 'obscurities' of Article 1 in his 1953 publication, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation*, adding, 'If that was the contemporary view of the obscurity of the text it is not surprising that its interpretation 46 years later continues to perplex even specialist and skilled interpreters...' Now, of course, it is nearly 60 years later, and we may be little wiser...

Nevertheless, the ideal remains, that through interpretation by reference to object and purpose, there can be found the 'autonomous meaning', the 'international meaning', the 'one true meaning', to which Lord Steyn referred in *Adan (Lul Omar) v Secretary of State for the Home Department* [2001] 2 AC 477, 516-7.

The UNHCR *Handbook*

One would certainly expect, then, a certain weight to be given to UNHCR, in light of its role within the Convention regime.

In 1979, it published a *Handbook* on procedures and criteria for determining refugee status. How is the *Handbook* to be evaluated, particularly from the perspective of the Vienna Convention? Does it count as 'subsequent practice' in the sense of Article 31(3)(b) of the Vienna Convention? And if it is a reflection of practice, is that practice common to and/or accepted by all the parties, and therefore good evidence of agreement on interpretation?

Back in 1977, States members of UNHCR's Executive Committee did indeed express a wish for guidance, and approved the idea of something 'simple but authoritative...' The Preface to the *Handbook* two years later declares that it is based on the High Commissioner's accumulated knowledge over 25 years, and that this includes the practice of States.

The international provenance of the *Handbook* is certainly respectable, and the circumstances of its preparation and the fact that States might have expressed dissent or qualification in an international forum – the UNHCR Executive Committee – are additional good grounds for accepting the 'subsequent practice' argument, at least in relation to practice in the period 1954-1979.

The world moves on, and much the same could be said for UNHCR's later *Guidelines* as likewise mediating practice and judicial decisions through the prism of international interpretation and UNHCR's particular responsibility to supervise the application of the Convention. And, if the methodology is solid, specific interventions in particular cases might carry similar weight.

However, the practice of UK courts and tribunals (particularly the old Asylum and Immigration Tribunal) reveals a degree of uncertainty and inconsistency, which may be due to opportunism, or to a lack of clarity on the part of all concerned, including UNHCR, regarding the exact nature of UNHCR's role.

At one level, certainly, the superior courts have been generally supportive. For example, Lord Woolf MR recognized the provenance and context of the UNHCR *Handbook* in *ex parte Robinson*; he thought it, 'particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice.' *R v Secretary of State for the Home Department, ex parte Robinson* [1998] QB 929, at 938.

And in *Adan (Lul Omar) v Secretary of State for the Home Department*, Lord Steyn noted specifically that the *Handbook*, 'although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals...' Ibid., 519.

But this does not necessarily mean that the law will be interpreted and applied in the manner argued for by UNHCR.

Express words and the limits to interpretation

There is always the problem of what to do with express words. This is well illustrated by *R (Hoxha) v Special Adjudicator, R (B) v Immigration Appeal Tribunal*.([2003] 1 WLR 241, [2002] EWCA Civ 1403). Here, the Court of Appeal was faced with the application of Article 1(C)(5) of the Convention, which provides that it shall cease to apply to refugees who, because the circumstances in connection with which they have been recognized have ceased to exist, can no longer continue to refuse to avail themselves of the protection of their country of nationality. An exception is provided, however, and 'this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality...'

The Court was asked to accept that the limitation by reference to Article 1(A)(1) – that is, primarily to 'statutory refugees', including those recognized under earlier international instruments – should be 'read up' so as now to include *all* Convention refugees. In support of this position, it was argued *inter alia* that the provision reflected a general humanitarian principle, which had been adopted in the laws of some and in the practice of other States. The Court of Appeal, however, rejected this argument. It rested the first premise of its judgment in fact on the *Handbook* and the cautious language of paragraph 136, which speaks only of what 'could' and 'should' be done. Having reviewed the evidence, it found that there was no sufficient widespread and general practice establishing a legal obligation, and it rejected UNHCR's argument from principle.

The case of *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, [2006] UKHL 5 illustrates a related problem, namely, the extent to which words or meaning can be *implied* into a particular treaty provision. Here, the House of Lords was faced with the issue, not specifically addressed in the refugee definition, of whether and when a putative refugee should in fact be expected and required to make use of an 'internal flight alternative', that is, to seek protection from persecution elsewhere in his or her country of origin; and if so, whether he or she might nevertheless still secure recognition as a refugee if the alternative failed to ensure 'basic norms of civil, political and socio-economic human rights'. Said Lord Bingham:

> 'As a human rights instrument the Convention should not be given a narrow or restricted interpretation. None the less, the starting point of the construction exercise must be the text of the Convention itself... because it expresses what the parties to it have agreed. The parties to an international convention are not to be treated as having agreed something they did not agree, unless it is clear by necessary implication from the text or from uniform acceptance by states that they would have agreed or have subsequently done so.'§4.

Quoting paragraph 91 of the UNHCR *Handbook*, he nevertheless noted that the 'relocation alternative' had long been accepted as a reason for denying protection, subject only to the requirement that it should be reasonable and not entail undue harshness. Lord Bingham rejected the further argument for a certain level of human rights protection, however, finding that such a rule could not be implied into the Convention and that it was not currently supported by the necessary uniformity of international practice and consensus of opinion to establish a rule of customary international law: Ibid., §§16, 18. He nevertheless found 'valuable guidance' on the reasonableness standard in UNHCR's 2003 *Guidelines* on international protection.

Interpretation in the face of ambiguity or obscurity

Ambiguity or obscurity, on the other hand, might provide greater scope for influence.

Article 32 of the Vienna Convention permits recourse to 'supplementary means of interpretation', including the *travaux préparatoires*, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31, '(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable'. UK courts have accepted that the *travaux* can be helpful, but have generally advised caution, so far as the material may not indicate a view held in common. As Fitzmaurice noted long ago, the *travaux* can be 'extremely confused and confusing', 'actively misleading', and 'reference to the records will be, at best, futile, and quite possibly mischievous'.

In practice, the *travaux* may indicate the origins of the ambiguity, such as lack of drafting time, but not necessarily provide a clear indication of exactly what was intended. States participating in the drafting process may not have anticipated a future problem, and resolving the ambiguity or obscurity will then depend on later practice and related developments. The case of *El Ali v Secretary of State for the Home Department* [2003] 1 WLR 95, in which UNHCR intervened and I acted as Counsel, concerned the interpretation and application of Article 1D of the Convention, and specifically the question whether the Convention should apply 'automatically' to Palestinians outside the area of operations of the UN Relief and Works Agency (UNRWA), whose situation remained unresolved.

One question was whether the benefit of Article 1D extended only to Palestinians who were refugees on some anterior date, such as 26 July 1951, when the Convention was opened for signature; or whether it should extend also to the descendants of such refugees. The *travaux préparatoires* made no mention of any critical date governing the Convention entitlements of Palestinians, but they clearly confirmed, among other matters, that Palestinians were considered to be refugees by the United Nations, by reason of the political and military events attending the emergence of the State of Israel; and that a political solution to their plight was anticipated relatively quickly. The history of subsequent developments also provided ample evidence of Palestinian refugees' continuing need for protection, whether within or outside UNRWA's area of operations.

Faced with an admitted lack of clarity in the text, the Court of Appeal opted out of the 'living instrument' approach which Laws LJ, the leading judge in the case, had unhesitatingly endorsed – with House of Lords approval – in *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, 500. Article 1D was thus interpreted without reference to context or object and purpose, and the court avoided extending protection to certain Palestinian refugees by relying on an essentially intentions approach to the problem of ambiguity:

> 'What matters is what the parties to the Convention in fact agreed in 1951, not what they might have agreed had they envisaged a state of affairs which they did not foresee at the time.'

However, there was no clear evidence of intention at all, and notwithstanding the scope left to it by the absence of express words, the Court gave no weight to the significant body of international practice which UNHCR adduced in support of its interpretation (and considered not all whether it might be 'supplementary means' within Article 32 of the Vienna Convention). It took little or no account of the fact that UNHCR, in exercising its own statutory competence, had determined that Palestinians outside UNRWA's region of operations do fall within its mandate, and that in doing so, it had based itself on, among other materials, relevant resolutions of the UN General Assembly dealing with the definition and description of 'Palestinian refugees'. Despite UNHCR's complementary role in relation to the application of the 1951 Convention, the Court did not explain why it should not follow the protection lead given by UNHCR.

The 'living instrument' approach

Then there is the 'living instrument' approach, which would seem to be fertile ground indeed for international refugee law to be developed progressively through the medium of the 1951 Convention.

From one perspective, however, there is a certain tension or contradiction in the reasoning which leads the courts, both to uphold the notion that the terms of the 1951 Convention possess a 'single autonomous meaning', and yet to claim that they are also responsive to changing times and circumstances.

In *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856, for example, Lord Bingham agreed that the Court must respect articles 31 and 32 of the Vienna Convention. He was of the view that the Convention had 'a single autonomous meaning', but also that it must be seen as a living instrument; in Sedley LJ's memorable words in *R v Immigration Appeal Tribunal, ex p Shah* [1997] Imm AR 145, 152: 'constant in motive but mutable in form...'

The facts raised the question, among others, whether a conscientious objector to military service with a well-founded fear of persecution might come within the Convention refugee definition. This in turn invited consideration of a number of familiar issues, including the *reasons* for any such fear (social group, political opinion, and so forth), whether prosecution and punishment under a law of general application or the availability of alternative service had a bearing on the issue, and whether the treatment in fact accorded to conscientious objectors amounted to persecution. The judgment in *Sepet*, however, neglected the opportunities for aligning protection with the times, to which the 'living instrument' approach might otherwise seem to have opened the way.

Although the House of Lords was prepared to recognise that 'the reach of an international human rights convention is not forever determined by the intentions of those who originally framed it', and notwithstanding the fact that the UNHCR *Handbook* paragraphs dealing with conscientious objection to military service dated from 1979, Lord Bingham and the Court were not prepared to give such weight to developments since then as would bring the conscientious objector within the protective scope of Article 1A(2) of the 1951 Convention.

Having determined, in the absence of express words to this effect, that 'persecution' requires the violation of a 'fundamental human right', and having further found that 'conscientious objection to military service' is not recognized in customary international law as a fundamental human right, the Court effectively ruled itself out of adopting a living instrument approach to protection. For there is certainly nothing in the Convention which stands in the way of such an interpretation and, while the *Handbook* in 1979 may have fallen short of a clear statement of obligation, it was open to the Court to adopt an interpretation more consistent with the object and purpose of the treaty and with the evolving understanding of the individual's freedom of conscience in his or her relationship with the State.

In this context, where no revision to the express words of the treaty is called for, the Court has no need to find the existence of some new rule of customary international law,

or to identify a body of concordant practice among the State parties in applying a treaty sufficient to indicate agreement as to how the terms of that treaty should be interpreted. Rather, it needs to look for the interpretation most consistent with the object and purpose of the Convention and its underlying values.

Such an approach can be seen to work effectively when the court reasons *within* the bounds of the words themselves, as it did in the more recent cases of *K and Fornah* [2007] 1 AC 412, [2006] UKHL 46, and *Asfaw* [2008] 2 WLR 1178, [2008] UKHL 3. In the joined appeals of *K and Fornah*, the House of Lords faced questions arising in regard to the interpretation of 'membership of a particular social group', including, first, whether a family may be a social group, and secondly, whether a fear of female genital mutilation (FGM) would be for reasons of the appellant's membership of a particular social group. The Court began by recalling that, 'the starting point of the construction exercise must be the text of the Refugee Convention itself, because it expresses what the parties to it have agreed...'

Thereafter, on the question of the family as social group, Lord Bingham cited both domestic authority and a number of Australian, Canadian and US cases, but paid particular attention to UNHCR's convening of an expert meeting on the question of social group and to its subsequent issue of *Guidelines*. He noted expressly that UNHCR's position indicated acceptance of views advanced in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. and in *R v Immigration Appeal Tribunal, Ex parte Shah* [1999] 2 AC 629 and concluded that the *Guidelines*, 'clearly based on a careful reading of the international authorities, provide a very accurate and helpful distillation of their effect.'

On the second point, Lord Bingham noted that claims based on FGM had been recognised or upheld 'all around the world'; in addition to domestic decisions, he cited authorities from the United States, Australia, Austria and Canada, which he noted were consistent with the clearly expressed opinions of UNHCR, with the view of the European Parliament, with guidelines issued by national authorities, and with the humanitarian objectives of the Convention.

In *Asfaw*, the Court was faced with the interpretation and application of Article 31 of the 1951 Convention, substantially incorporated into UK law by section 31 of the Immigration and Asylum Act 1999. Article 31 itself provides that Contracting States shall not impose penalties on refugees who, coming directly from a country in which they fear persecution and showing good cause, illegally enter or are present. In this case, the refugee having illegally entered the United Kingdom, then sought to leave it illegally using another false passport, and for this act of attempted exit she was prosecuted. By a 3-2 majority, the House of Lords held that the immunity accorded to a refugee by reason of his or her 'illegal entry or presence' should not be limited to offences of entering or remaining illegally in an

intermediate country, but should include offences committed when leaving it to seek asylum elsewhere.

The express terms of Article 31 do not appear to cover the 'onwards' movement of refugees in search of asylum, but the fact that they frequently do have to keep moving was recognised from the start. The majority of the House of Lords held that the Convention was to be given a 'purposive construction' consistent with its humanitarian aims, and that immunity from criminal penalties should also cover infractions of the law reasonably or necessarily committed in the course of flight from persecution, including a refugee's attempt to leave a country following a short stopover in transit.

As he had done so often in previous cases, Lord Bingham emphasised that the starting point must be 'the literal meaning of the words used', but he then underlined that 'the words must be construed in context, and an instrument such as the Refugee Convention must be given a purposive construction consistent with its humanitarian aims.' Unusually, perhaps, the *travaux préparatoires* were considered helpful, particularly because of their focus on the crossing of *land* borders, 'and there was accordingly no consideration of the position of refugees changing planes in the course of escape to a country of intended asylum.'

In an approach reminiscent of that adopted by the European Court of Human Rights in *Golder v United Kingdom*, (Application no. 4451/70), 21 February 1975. Lord Bingham concluded:

> '54. ... the best guide is to be found in the *evolutionary* approach that ought to be taken to international humanitarian agreements. It has long been recognised that human rights treaties have a special character... Their object is to protect the rights and freedoms of individual human beings generally or falling within a particular description...

Conclusions

Cases requiring interpretation will be coming up with some regularity in the immediate future, if for no other reason than that the courts of EU Member States must now work out exactly what the Qualification Directive means, including whether that instrument itself is consistent with international refugee law.

Among others, there is still uncertainty regarding the scope of political opinion and of serious non-political crime, the meaning of persecution, the compatibility of protection by non-State actors with the Convention, the circumstances permitting exclusion, and whether the House of Lords got it right, as a matter of international refugee law, in its reading of the social group provisions of Article 10 of the Qualification Directive in *K and Fornah*.

Although much of the available national case law derives from jurisdictions which were involved in or otherwise associated with drafting the original text, there are good reasons to approach interpretative judgments based on original intent with a measure, if not of scepticism, then of openness of mind.

The fact is that today some 120 States party to the Convention did *not* participate in the drafting, and therefore cannot be presumed to share in drafters' intent; on the contrary, though they came to a common text, they necessarily brought their own understanding of its terms, itself likely modelled on or influenced by senses of meaning shaped by international law as it had by then developed. More than half the States party to the 1951 Convention ratified that instrument 25 years or more after it was opened for signature; and since 1976, 74 States have become party to the Convention, and 82 to the 1967 Protocol.

The challenge, where the text allows, is to find that interpretation which is firstly consistent with the object and purpose of the Convention; secondly, responsive to emerging protection needs; and thirdly, rationally related to the underlying values of the refugee regime.

At first glance, the guidance provided by the Vienna Convention on the Law of Treaties might appear to place greater emphasis on the ordinary meaning of words, to the exclusion of a more dynamic approach.

In this regard, UK cases present a somewhat mixed picture of inconsistency and opportunity. Thus, the decisions in *Hoxha* and *Roma Rights* (*R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004]2 AC 1, [2004] UKHL 55) clearly involved arguments for changes in or disregard of the actual words of the treaty; in the absence of agreement or subsequent practice, it was beyond the competence of the court to effect the necessary change by way of interpretation.

El Ali, on the other hand, was a case of ambiguity or obscurity in a provision which the Court could have rendered more effective in the sense of protection, but which it chose to resolve in favour the interests of the State. The case of *Sepet*, too, was clearly open to a human rights approach more precisely aligned with the individual dimensions to freedom of conscience, where the fundamental goal of protection did not need to wait on the development of an internationally recognized right of conscientious objection to military service. The House of Lords judgments in *K and Fornah*, and *Asfaw* stand in contrast to the restrictive approach, and reveal the protection possibilities of working within the terms of the treaty as a living instrument.

For its part, whether in the formulation of guidelines or in the structuring of its interventions, UNHCR needs to be clearly focused if its views are to be accorded weight, and it is to ensure the continuing effectiveness of the 1951 Convention/1967 Protocol. It must distinguish carefully between positions which deal with matters of interpretation – that is, those which can be adopted, consistently with the meaning of words in context and

in the light of the object and purpose of the Convention, and which a court therefore can accommodate within the process of reasoning and deciding; and those which are more in the form of recommendations for amendment – that is, which go beyond the meaning of words, beyond the Convention and which are better addressed to States in their executive and legislative capacity, seeking to influence States to adopt that 'subsequent practice' which, over time, may come to mark their acceptance of changed interpretation. The search for the one, true meaning, like the pursuit of democracy, is not necessarily one with an end in sight.

The practice of UK courts to date is certainly of relevance across jurisdictions. Their approach is generally open, and reflects an awareness of the applicable international law. Yet the methodology is not without holes. In my view and in particular, the courts have not

- worked through the 'living instrument' approach; or
- developed a coherent appreciation of State practice in the context of customary international law, and therefore also in relation to that practice which is relevant to treaty interpretation; or
- properly understood the significance of UNHCR's role as the medium for the translation of practice into progressive development of the law.

Sometimes, UNHCR itself may pitch the interpretative ball too high, particularly when seeking to adjust the meaning of express words to conform with present humanitarian needs. But when it advances a considered view on the law, on the basis of experience and practice (for example, when issuing 'Guidelines' on specific issues), then its position should be accorded due weight. As I have indicated briefly already, such Guidelines do not emerge *ad hoc*, but on the basis of a methodology involving the review and analysis of State practice, including national jurisprudence, and often also subject-specific meetings open to States and others. What UNHCR does and what it produces is also open to review by States members of the UNHCR Executive Committee, namely, an international forum in which 'protection' issues are aired and where States can express their views. In light of this provenance and the standing which it enjoys under the 1951 Convention, UNHCR Guidelines ought therefore in general to be accepted by national courts.

The years ahead are likely to offer plenty of opportunities to test these premises.