



Application No. 43844/98  
IN THE EUROPEAN COURT OF HUMAN RIGHTS  
BETWEEN:

**T.I. AND THE UNITED KINGDOM**

**SUBMISSION BY THE  
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

*1. INTRODUCTION*

1. By letter of 6 December 1999, the European Court of Human Rights invited the United Nations High Commissioner for Refugees (“UNHCR”) to submit a written intervention in the case of *T.I. v. the United Kingdom*. The Court specifically requested that UNHCR’s submission should deal with the aspects of the case relevant to refugee protection, including the operation of the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community (“Dublin Convention”).

2. General human rights principles and the various bodies established to monitor and ensure their implementation, in particular the European Court of Human Rights, are of increasing relevance to UNHCR’s own work to protect refugees and other people of concern to the Office. UNHCR therefore welcomes the opportunity to make a submission in respect to the present case before the European Court of Human Rights in an area where it has been charged with responsibilities by the General Assembly of the United Nations and by States Parties to the 1951 Convention relating to the Status of Refugees (“1951 Convention”) and the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).

3. Established by the General Assembly of the United Nations as a subsidiary organ under Article 22 of the Charter of the United Nations, UNHCR has a unique mandate: to provide international protection to refugees and, together with Governments, to seek permanent solutions to their problems. The Statute of the Office of UNHCR specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, *inter alia*, “promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto...” This supervisory responsibility of UNHCR is formally recognized in Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

4. In this statement, UNHCR focuses on a number of fundamental principles concerning mainly the 1951 Convention in the context of international refugee law. In doing so,

UNHCR is not directly addressing the relationship between the 1951 Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR”). However, some of the legal principles outlined in regard to the 1951 Convention may have relevance to comparable protection issues under the ECHR. UNHCR’s submission will first deal with fundamental principles of refugee protection, with particular emphasis on the principle of *non-refoulement*. It will then address the issue of persecution emanating from agents other than the State. Finally, the submission will deal with the provisions and operation of the Dublin Convention.

## 2. REFUGEE PROTECTION AND NON-REFOULEMENT

5. The principle of *non-refoulement* is the cornerstone of asylum and of international refugee protection. The essence of the principle is the prohibition against the return of a person to a country where that person may be exposed to persecution or other serious harm to life or freedom. Implicit in the right to seek and to enjoy in other countries asylum from persecution proclaimed in the Universal Declaration of Human Rights, this principle reflects the concern and commitment of the international community to ensure to those in need of protection the enjoyment of fundamental human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of the person. These and other rights are threatened when refugees are forcibly returned, directly or indirectly, to countries in which they face persecution or similar dangers.

6. The principle of *non-refoulement* has found expression in a number of international instruments, both at the universal and regional levels. At the universal level, the 1951 Convention in its Article 33 obliges States not to “expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” The principle has also been incorporated in other international treaties to which a very large number of States have now become parties. It has, moreover, been reaffirmed in the 1967 United Nations Declaration on Territorial Asylum, as well as in numerous conclusions of the UNHCR Executive Committee and in resolutions adopted by the United Nations General Assembly. Finally, the centrality of *non-refoulement* to refugee protection has been repeatedly acknowledged in a series of resolutions and recommendations adopted by the Committee of Ministers of the Council of Europe starting with Resolution No 67(14) of 29 June 1967.

7. In view of its general widespread acceptance at both the international and regional levels, and based on a consistent practice of States with the recognition that the principle has normative character, UNHCR considers that *non-refoulement*, as part of the international system for refugee protection, constitutes a rule of international customary law which is progressively acquiring the character of a peremptory rule of international law.

8. As far as the principle of *non-refoulement* and other fundamental standards of treatment are concerned, it is generally accepted that international human rights law adds

another important dimension to the protection of refugees. Therefore, the treatment of refugees and asylum-seekers within State territory is governed not only by those instruments that address this category of persons specifically, but also by the broader human rights treaties.

9. The 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains in the form of Article 3 another *non-refoulement* provision. The essential characteristics of *non-refoulement* are also present in Article 3 of the ECHR. This is clearly borne out by the case law of the European Court of Human Rights in its interpretation of Article 3, which imposes upon the Contracting States an absolute requirement to protect persons within their jurisdiction from return to a country where they would face a serious risk of being subjected to torture or to inhuman or degrading treatment or punishment.

10. The principle of *non-refoulement*, as set out in Article 33 of the 1951 Convention, applies to all persons coming within the refugee definition of Article 1 of the Convention. Respect for the principle of *non-refoulement* therefore requires that asylum-seekers (persons who claim to be refugees pursuant to the definition of Article 1 of the 1951 Convention) be protected against return to a place where their life or freedom would be threatened until their status as refugees<sup>4</sup> has been finally determined. Recognition of refugee status under international law is essentially declaratory in nature -- formal recognition of a person's refugee status does not make the person a refugee but only declares him or her to be one. The duty to observe the principle of *non-refoulement* therefore arises as soon as the individual concerned fulfils the criteria set out in Article 1 of the 1951 Convention, and this would necessarily occur prior to the time at which the person's refugee status is formally determined.

11. The fundamental importance of the observance of the principle of *non-refoulement* -- both at the border and within the territory of a State -- has been repeatedly confirmed by the international community. In essence, subject to the exception of Article 33 (2) of the 1951 Convention, the requirement to examine *non-refoulement* is applicable whenever a State considers to return a person "in any manner whatsoever" to territories where the life or freedom of that person would be threatened on account of one of the Convention grounds.

12. It follows from the above that direct removal of a refugee or an asylum-seeker to a country where he or she fears persecution is not the only form of *refoulement*. States are responsible for the application of this principle so as to do everything in their power to avoid asylum-seekers being returned to their countries without an exhaustive examination of their claims. Indirect removal of a refugee from one country to a third country which subsequently will send the refugee onward to the place of feared persecution constitutes *refoulement*, for which both countries would bear joint responsibility.

13. The prohibition of indirect or "chain *refoulement*" has been recognized in State jurisprudence, notably by the German Constitutional Court in its decision of 14 May 1996 (2 BvR 1938/93 and 2 BvR 2315/93). In that decision, the Court reiterated the view

that the principle of *non-refoulement* prohibits not only direct return to a country of persecution, but also return to other countries where the risk of *refoulement* exists. The Court therefore confirmed that the responsibility of a State under Article 33 of the 1951 Convention can include indirect *refoulement* via an alleged “safe third country”.

14. In UNHCR’s view, a reliable assessment as to the risk of “chain *refoulement*” must be undertaken in each individual case, prior to removal to a third country. No asylum-seeker should be returned to a third country for determination of the claim without sufficient guarantees, in each individual case. These guarantees include: that the person will be readmitted to that country; will enjoy effective protection against *refoulement*; will have the possibility to seek and enjoy asylum; and will be treated in accordance with accepted international standards.

### 3. NON-STATE AGENTS OF PERSECUTION

15. The concept of persecution, although central to the determination of refugee status and hence to the international regime for the protection of refugees established under the 1951 Convention, is not strictly defined in the Convention. Despite the ongoing efforts of harmonization undertaken by the European Union, significant differences persist in the practice of the Member States regarding asylum and refugee status determination, in particular concerning the interpretation of Article 1 of the 1951 Convention. The “Joint Position” on the harmonized application of the definition of the term ‘refugee’ in Article 1 of the 1951 Convention, adopted by the Council of the European Union on 4 March 1996, had only a very limited impact on harmonizing administrative and judicial practice in the different Member States of the European Union.

16. In Germany, according to both doctrine and constant practice, the refugee definition of the 1951 Convention has been held to cover only acts of persecution which either directly emanate from the State or which are attributable to the State by reason of the State encouraging or voluntarily tolerating such acts. While this jurisprudence was initially developed in relation to Articles 1 and 33 of the 1951 Convention, the German Federal Administrative Court has later applied essentially the same criteria in regard to Article 3 of the ECHR. In other words, persecution under the 1951 Convention or treatment contrary to Article 3 of the ECHR emanating from non-State actors would, according to German law, usually fall outside the purview of these instruments, unless such persecution or treatment could be attributed to the State.

17. It is UNHCR’s position that recognition of refugee status is also required where persecution is perpetrated by non-State actors on account of one of the grounds enumerated in the 1951 Convention, under circumstances indicating that protection against the threatened persecution by such actors was not available. This position is clearly set out in paragraph 65 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979), which was prepared at the request of the UNHCR Executive Committee for the guidance of governments. Paragraph 65 of the Handbook notes that persecution may emanate not only from the authorities of a country, but also from “sections of the population.” This would include any non-governmental group, such

as a guerrilla organization, “death squads,” paramilitary groups, etc. It also includes, *a fortiori*, non-recognized entities exercising *de facto* authority over a part of the national territory.

18. The fact must be acknowledged that in today’s world, serious violations of human rights and threats to life, liberty and security of the person are not perpetrated solely by agents of the State. Victims or potential victims of such violations are still the intended beneficiaries of the 1951 Convention and other international human rights instruments. Clearly, the spirit and purpose of the 1951 Convention would be defeated and the system for the international protection of refugees seriously weakened if it were to be held that a person in need of protection from persecution or other harm should be denied that protection unless a State could be held accountable for the violation of his or her fundamental human rights.

19. UNHCR’s position regarding the interpretation of persecution in the sense of the 1951 Convention is shared by the great majority of European States, Australia, Canada and the United States of America. Hence, in most countries of Western Europe (Belgium, Denmark, Finland, Greece, Ireland, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom), refugee status is normally granted also in circumstances where it is evident that protection against persecution by non-State agents is not available. It is only in a small number of Western European countries (France, Germany Italy and Switzerland) that by official doctrine refugee status (and protection from non-refoulement under Article 33 of the 1951 Convention) is formally denied in situations in which the government is unable to provide protection, although the practice is often more flexible.

#### 4. THE DUBLIN CONVENTION

20. The Dublin Convention was adopted on 16 June 1990 with a view to determining the responsibility for the examination of an asylum request between the States Parties to the Convention. According to Article 1 (b) of the Dublin Convention, an application for asylum is defined as “a request whereby an alien seeks from a Member State protection under the Geneva Convention by claiming refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol.” The Dublin Convention makes no mention of claims to protection under the ECHR or other instruments. However, in a number of States Parties to the Dublin Convention, including Germany and the United Kingdom, the decision whether a person may qualify for protection under Article 3 of the ECHR is usually taken within the procedure established for determining refugee status under the 1951 Convention. In such instances, therefore, the decision to transfer an asylum-seeker to another Dublin State for the purpose of examining the claim under the 1951 Convention will implicitly also result in a “re-allocation” of the claim under the ECHR.

21. UNHCR has welcomed the Dublin Convention because it established a mechanism among the States Parties to the Convention whereby an asylum claim would be adjudicated by one of them, thus remedying the situation of so called “orbit cases” in which no State would consider itself responsible for the determination of an asylum

claim. The provisions of the Dublin Convention offer a number of advantages and guarantees which make transfers of asylum-seekers to countries within the Dublin area most likely to conform to some of the necessary safeguards mentioned in paragraph 14 above.

22. The Dublin Convention contains the assurance that States Parties to the Convention undertake to examine the application of any person who requests asylum at the border or in their territory (Article 3, para. 1), subject to the right, pursuant to national laws, to send an applicant to a third State outside the territory of Dublin States (Article 3, para. 5). The Convention sets out a number of criteria for determining the responsible State (Articles 4 to 8). These criteria include, in order of priority, family reunion (Article 4), issuance of visa (Article 5), illegal border-crossing (Article 6), first entry into the common territory (Article 7, para. 1) and transit situations (Article 7, para. 3). In addition, the State responsible for examining an application for asylum also undertakes to take back, under certain conditions, a person whose application it has rejected and who is illegally in another Dublin State (Article 10, para. 1e).

23. UNHCR generally considers that the criteria set out in the Dublin Convention for determining the State responsible for the examination of an asylum application to be both reasonable and effective. It is, however, critically important that the implementation of the Dublin Convention should be based on fair and expeditious asylum procedures and a consistent application of the criteria for granting refugee status, in full conformity with the principles of international refugee law. Otherwise, implementation of these provisions could be at variance with the obligations of Contracting Parties under the 1951 Convention.

24. The effective application of the Dublin Convention is seriously hampered by States' diverging interpretations of the refugee definition of the 1951 Convention, especially in regard to the issue of "agents of persecution". UNHCR is aware that there are currently a substantial number of Dublin cases pending in the United Kingdom, in which the applicants objected to their transfer to Germany on the ground that Germany could not be considered a "safe country of asylum" in their particular case due to its restrictive interpretation of the refugee definition in regard to non-State agents of persecution. Similar cases have also been brought forward in other States Parties to the Dublin Convention.

25. Clearly, in the absence of a commonly accepted interpretation among Dublin States of the 1951 Convention refugee definition and Article 3 of the ECHR, the strict assignment of responsibilities to deal with an application for protection can lead to a rejection of the application by one State, whereas if processed in another State, the same application might have been accepted.

26. The problem of divergent interpretations among States Parties to the Dublin Convention is particularly pertinent in circumstances where transfer to another Dublin State takes place under the conditions laid down in Article 10 para. 1 (e) of the Dublin Convention, i.e. when it concerns a person whose application has already been rejected

by the State to which the person is supposed to be transferred (the receiving State). A person who finds himself or herself in such a situation can normally no longer hope to be recognized as a refugee or to obtain alternative forms of protection in the receiving State. In addition, the receiving State will generally have issued an enforceable deportation order, against which an effective legal remedy – including an appeal with a suspensive effect – is, in all likelihood, no longer available.

## 5. CONCLUSION

27. The essential position of UNHCR is that in view of the above considerations relating to significant differences between States Parties to the Dublin Convention in the interpretation of the refugee definition of the 1951 Convention, there may be cases of asylum-seekers whose claims have been rejected by one State, but who other States and UNHCR may nonetheless consider to be in need of protection. An applicant whose valid claim had been earlier rejected by a Dublin State on the basis of that State's determination criteria which are clearly at variance with standards applied by the majority of Dublin States may succeed in demonstrating to the authorities of another Dublin State a continued risk in terms of the 1951 Convention or Article 3 of the ECHR. The indirect removal of such an applicant from Dublin territory to the country of origin, under circumstances involving the application of Article 10 para. 1 (e) of the Dublin Convention, could well constitute a violation of the *non-refoulement* principle. For such persons, the protection available under the ECHR may offer the last opportunity to safeguard the integrity of the *non-refoulement* principle.

UNHCR Geneva  
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