



## Submission by the Office of the United Nations High Commissioner for Refugees in the case of *S.M. v. Spain* (Appl. No 29659/16) before the European Court of Human Rights

### 1. Introduction\*

1.1 UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for the problem of refugees.<sup>1</sup> Moreover, UNHCR is responsible for supervising the application of international conventions for the protection of refugees.<sup>2</sup> UNHCR welcomes the opportunity to intervene in this case granted by the European Court of Human Rights ('the Court') by its letter received on 9 December 2016.

1.2. In this submission, UNHCR addresses the international protection needs of asylum-seekers from El Salvador (part 2) to provide the context in which the decision of the authorities in Spain must be situated. This is followed by a brief review of the relevant domestic legislative framework and practice (Part 3). It then provides UNHCR's interpretation of the relevant principles of international refugee and human rights law governing the determination of asylum claims involving persecution by non-State actors and the application of an 'internal flight alternative' (Part. 4).

### 2. UNHCR's position on the international protection needs of gang-related victims in El Salvador

2.1. UNHCR provides a detailed overview of the international protection needs of asylum-seekers from El Salvador in its *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* dated 15 March 2016 ('El Salvador Guidelines'),<sup>3</sup> including specific considerations on persons fleeing persecution from gang-related violence. These Guidelines reflect the current situation prevailing on the ground and remain valid.

2.2. The El Salvador Guidelines highlight that 'despite being the smallest country in Central America, El Salvador is the nation reported to be the most affected by the violence of street gangs (*pandillas*) and reportedly has the highest concentration of gang members of any country in the region',<sup>4</sup> giving El Salvador the ignominious distinction of having of 'the highest rates of homicides of any country in the world'.<sup>5</sup> UNHCR further highlights that 'the increasing exodus of Salvadorians in search of international protection is rooted in the human rights, social, political and economic impact of the increasing reach, power and violence of organized criminal groups in El Salvador', and that 'most of the[se] gangs are affiliated to one of the two main gang structures (...), the *Mara Salvatrucha* (MS) and its rival *Barrio-18* (B-18) (...)'.<sup>6</sup>

2.3. The El Salvador Guidelines note that 'considering the small territorial size of El Salvador, and given the ability of the gangs and other organized criminal groups to operate country-wide, and indeed internationally – both independently and as part of international criminal networks – a viable IFA/IRA [internal flight alternative/internal

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\* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

<sup>1</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>2</sup> *Ibid.* para. 8(a).

<sup>3</sup> UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, ('El Salvador Guidelines') 15 March 2016, HCR/EG/SLV/16/01, <http://www.refworld.org/docid/56e706e94.html>.

<sup>4</sup> *Ibid.*, p. 10; See more generally Section II.B of the El Salvador Guidelines, entitled 'Structures and Patterns of Organized Violence'.

<sup>5</sup> *Ibid.*, p. 4. In 2015, El Salvador had an annual rate of approximately 103 homicides per 100,000 inhabitants. In comparison, homicide rates in North America over the last decade have averaged around 1.5 per 100,000 inhabitants in Canada and 5 per 100,000 inhabitants in the USA. UN Office on Drugs and Crime (UNODC), *Global Study on Homicide 2013: Trends, Contexts, Data*, 10 April 2014, [https://www.unodc.org/documents/gsh/pdfs/2014\\_GLOBAL\\_HOMICIDE\\_BOOK\\_web.pdf](https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf).

<sup>6</sup> *Ibid.*, pages 5 and 13-17. See also, Amnesty International, "Home Sweet Home? Honduras, Guatemala and El Salvador's Role in a Deepening Refugee Crisis", October 2016, <https://www.amnesty.org/fr/documents/amr01/4865/2016/en/>.

relocation alternative] is unlikely to be available to individuals at risk of being pursued by such actors.<sup>7</sup> UNHCR further underlines that ‘the Salvadorian B-18 and MS gangs are also reported to maintain ties with their counterparts in other countries of Central America and Mexico, via social networks and other media, who are used to arrange for the safe passage of drugs and weapons (...). Gang members are also sometimes “lent” between affiliated gangs from neighbouring countries to carry out assassinations and other criminal activities.’<sup>8</sup>

2.4. Regarding the State’s ability and willingness to provide protection,<sup>9</sup> UNHCR further notes that despite the existence of laws directed at combatting gangs and criminal organizations, ‘weaknesses and corruption in the Salvadorian security forces and the judiciary reportedly contribute to creating a high level of impunity for crimes in El Salvador.’<sup>10</sup> UNHCR observed that, ‘the judicial system is reported to be particularly inefficient and subject to corruption, a practice that in turn contributes to high levels of impunity for crimes in El Salvador, where the criminal conviction rate reportedly is less than 5 per cent.’<sup>11</sup>

2.5. In the El Salvador Guidelines, UNHCR provides detailed information on a number of potential risk profiles for asylum-seekers from El Salvador. UNHCR considers asylum-seekers from El Salvador who fall within one or more of these risk profiles may be in need of international refugee protection under Article 1(A) of the 1951 Convention.<sup>12</sup> Such risk profiles include, among others, 1) persons perceived by a gang as contravening its rules or resisting its authority including in refusing a request by a gang member or refusing to participate in gang activities or to join the gang<sup>13</sup> and 2) ‘informants’ cooperating with the authorities.<sup>14</sup>

### **3. The practice in Spain regarding the treatment of claims involving non-state actors of persecution and internal flight alternative**

#### **3.1. Relevant legislative framework**

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<sup>7</sup> El Salvador Guidelines, p. 45. See also *Canada: Immigration and Refugee Board of Canada, El Salvador: Information Gathering Mission Report - Part 1. Gangs in El Salvador and the Situation of Witnesses of Crime and Corruption*, September 2016, <http://www.refworld.org/docid/57f7ab794.html> which was a joint fact-finding mission carried out in April 2016 by the Immigration and Refugee Board (IRB) of Canada, representatives from the United States Citizenship and Immigration Services (USCIS), the Mexican government’s Commission for Refugee Aid (Comisión Mexicana de Ayuda a Refugiados, COMAR), and the Mexican Ministry of Foreign Affairs (Secretaría de Relaciones Exteriores, SRE) of Mexico, under the auspices of UNHCR. It found that ‘[g]angs exert their influence all over the country’ and that ‘several sources pointed out that gangs are seen as the de facto authorities in many communities.’ (See section 4.1. of the Mission Report).

<sup>8</sup> El Salvador Guidelines, p. 16.

<sup>9</sup> ‘As the above account of independent information shows, State authorities have been unable to contain the activities of El Salvador’s gangs despite concerted efforts to do so. The problem is described as intractable and one former President said it would take around 25 years to get under control. [...] Despite law enforcement and other social policy initiatives on the part of the El Salvador government and police, the police are not able to provide to citizens a reasonable level of protection against being harmed by gang members.’ *RT Case No. 0906782, [2009] RRTA 1063*, Australia: Refugee Review Tribunal, 24 November 2009, available at: <http://www.refworld.org/docid/4b5708f42.html>, at para. 90. The tribunal further stated that ‘the applicant has said that people do not call for police help when they are being robbed by gangs. There seemed to me to be two reasons for this: the police would have difficulty responding before the crime would have been completed and the culprits left the scene; and because of a fear that gang members would take revenge on people who reported their activities to the police. Seeking police help would thus generally be futile and possibly even give rise to additional danger. I am not satisfied that an adequate level of state protection exists in El Salvador to protect a person in the applicant’s particular circumstances [an extorted bus driver] from coming to harm at the hands of gang members.’ Paras. 91-92.

<sup>10</sup> El Salvador Guidelines, p. 23. See more generally Section II.C of the El Salvador Guidelines, ‘Ability and Willingness of the State to Provide Protection’. See also, UN Human Rights Council, *Report of the Working Group on Arbitrary Detention, Addendum: Mission to El Salvador*, UN Doc. A/HRC/22/44/Add.2, 11 January 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/101/63/PDF/G1310163.pdf?OpenElement>. Also, Amnesty International, ‘*Home Sweet Home? Honduras, Guatemala and El Salvador's Role in a Deepening Refugee Crisis*’: ‘The inability [...] to halt the gangs’ rapid growth and control of territory, coupled with the complicity and abuses of frequently corrupt law enforcement and security forces, has left people unprotected and at risk of violence’. Page 11, October 2016, <https://www.amnesty.org/fr/documents/amr01/4865/2016/en/>.

<sup>11</sup> El Salvador Guidelines, p. 24. ‘Even specialized anti-mafia judges have reportedly been arrested on charges of receiving bribes from organized criminal groups’. See also, Nicolás Rodríguez Serna, ‘Fleeing Cartels and *Maras*: International Protection Considerations and Profiles from the Northern Triangle’, which states that ‘[t]hese criminal groups’ success is largely due to the lack of a strong state presence and control. They are able to operate with a large degree of freedom because of threats against officials and “endemic corruption, insufficient funding for law enforcement and inadequate training for judicial officers”. As law enforcement is weak and criminal groups can easily corrupt or intimidate officials, their victims’ odds of obtaining effective state protection are slim’. *International Journal of Refugee Law* (2016) 28 (1): 25-54 at p.29, <https://doi.org/10.1093/ijrl/eev061>.

<sup>12</sup> *Ibid.*, See further, section III.A, ‘Refugee Protection under the 1951 Convention’.

<sup>13</sup> *Ibid.*, p. 29.

<sup>14</sup> *Ibid.*, p. 32. See also two resolutions of the Inter-American Commission on Human Rights ordering precautionary measures against deportation from the United States in favour of Salvadorian citizens: Resolution 21/2016, PM 152-16 of 9 April 2016, <http://www.oas.org/en/iachr/decisions/pdf/2016/MC152-16-EN.pdf>; Resolution 30-2016, PM 297-16 of 11 May 2016 <http://www.oas.org/es/cidh/decisiones/pdf/2016/MC297-16-Es.pdf>.

3.1.1. Articles 2,<sup>15</sup> 3<sup>16</sup> and 4<sup>17</sup> of Law no. 12/2009 of 30 October 2009 on the Right to Asylum and Subsidiary Protection (hereafter ‘the Spanish Asylum Law’), regulates who is entitled to refugee status and to subsidiary protection. Article 6 on acts of persecution,<sup>18</sup> Article 7 on reasons for persecution<sup>19</sup> and Article 10<sup>20</sup> on serious harm transpose the definitions included in the Qualification Directive.<sup>21</sup>

3.1.2. Article 13 defines the actors of persecution or serious harm as follows:

- The State;
- Parties or organisations controlling the State or a substantial part of the territory of the State;
- *Non-state actors*, when the actors mentioned in the above, including international organizations are unable or unwilling to provide effective protection against persecution or serious harm.

However, while Article 13 of the Spanish Asylum Law should have been implemented through the adoption of a decree, the Spanish authorities have not yet issued such measures.<sup>22</sup> Furthermore, the notion of internal flight alternative is not included in the Spanish Asylum Law as the corresponding provision of the Qualification Directive has not been transposed by Spain.

3.1.3. The accelerated asylum procedure at the border (also applied to asylum claims filed at a detention centre for migrants ‘Aliens Internment Centre’) is governed by Articles 21 (in relation with Article 20.1 and 25.c, d, f) and 22.<sup>23</sup>

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<sup>15</sup> Article 2: The right of asylum.

<sup>16</sup> Article 3. Refugee status: Refugee status is recognized to any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, membership of a particular social group, gender or sexual orientation, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; [...] and is not engaged in any of the reasons for exclusion of Article 8 or the causes of denial or revocation of Article 9.

<sup>17</sup> Article 4. Subsidiary protection: The right to subsidiary protection is afforded to nationals of other countries and stateless persons who, without fulfilling the requirements for obtaining asylum or to be recognized as refugees, but for which substantial grounds exist for believing that if they returned to their country of origin in the case of nationals or their previous habitual residence in the case of stateless persons, they would face a real risk of suffering any of the serious damage referred to in Article 10 of this Law, and those who are unable or, because of that risk, do not want to benefit from the protection of the country concerned, provided that they do not incur in any of the circumstances referred to in Articles 11 and 12 of this Law.

<sup>18</sup> 1. Acts on which a well-founded fear of persecution is based within the meaning provided in Article 3 of this Law shall:

a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or  
b) be an accumulation of various measures, including violations of human rights, which are sufficiently severe as to affect an individual in a similar manner as mentioned in letter a). 2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

a) acts of physical or mental violence, including acts of sexual violence;

b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

c) prosecution or punishment, which is disproportionate or discriminatory;

d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in the second paragraph of Article 8 of this Law;

f) acts of a sexual nature involving adults or children.

3. Acts of persecution as defined in this Article should be related to the reasons mentioned in the Article below.

<sup>19</sup> 1. Member States shall take the following elements into account when assessing the reasons for persecution:

the concept of race shall in particular include considerations [...]; the concept of religion shall in particular include [...]; the concept of nationality shall [...]; **the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential agents of persecution and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant**; [emphasis added]; a group shall be considered to form a particular social group where in particular: Members of that group share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce to it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society or by the persecuting actor/s.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

<sup>20</sup> Serious harm leading to subsidiary protection under Article 4 of this Law consists of: a) Death penalty or risk of its material execution; b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; c) Serious threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal conflict.

<sup>21</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>.

<sup>22</sup> This norm should have been issued 6 months after the adoption of the law, thus May 2010 according to the asylum law Final Provision No. 3.

<sup>23</sup> Article 21 and 22 regulate the procedure that governs applications lodged at border points.

Articles 34<sup>24</sup> and 35 provide UNHCR with a direct advisory role as ‘a guarantee of the fair functioning of the system’.<sup>25</sup> Each asylum application processed through the accelerated admissibility procedure is systematically communicated to UNHCR, which issues a non-binding recommendation on each case.<sup>26</sup> This recommendation is limited to addressing whether the case should be transferred to the regular asylum procedure for its determination. It does not involve an assessment of the merits of the case at this stage of the procedure.

3.1.4. The procedure consists of three distinct steps:

- 1) A determination is made as to whether the case is admissible to be determined in depth in the ordinary procedure. If not, the claim is rejected;<sup>27</sup>
- 2) If rejected, a re-examination of the claim by the same authority can take place upon the applicant’s request;
- 3) If the re-examination is rejected, the applicant has the right to file an appeal before the National High Court (Audiencia Nacional).

3.1.5. While the procedure includes some guarantees, such as the provision of compulsory free legal aid, access to an interpreter if needed and UNHCR’s advisory role, the admissibility accelerated procedure in Spain also has gaps, which may lead to the *refoulement* of persons in need of international protection.

3.1.6. Firstly, the time frame for the consideration of asylum applications is excessively short. A decision on the admissibility of the initial asylum claim must be issued within four days. In case of rejection, the submission by the applicant of a re-examination request must be lodged within two days and the authorities have two additional days to examine such request.

3.1.7. Secondly, in case of judicial appeal, the National High Court must dispose of the request to suspend the removal as an interim measure within two days, and must then confirm or overturn the interim suspension of removal after a hearing within the next three working days.<sup>28</sup> Moreover, the examination of the asylum application is limited to assessing the admissibility of the claim but does not involve any consideration of the merits of the case, as this is meant to take place within the regular asylum procedure only if the case is declared admissible. Lastly, the appeal before the National High Court does not have automatic suspensive effect. The suspension of the removal pending the review by the National High Court of the decision to reject the claim can be considered by that court only upon the applicant’s request and is not automatically granted.<sup>29</sup>

3.1.8. This Court has held that the speed of remedies should not be at the expense of the effectiveness of the guarantees intended to protect against arbitrary deportation to a real risk of ill-treatment.<sup>30</sup> Moreover, the Court found in *A.C. and Others v. Spain*, that the lack of an automatic suspensive effect of the administrative appeal before the National High Court constitutes a violation of the right to an effective remedy within the meaning of Article 13 in conjunction with Article 3 ECHR.<sup>31</sup>

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<sup>24</sup> Article 34: The submission of applications for international protection shall be communicated to UNHCR, which may request information about the situation of the case files, to be present at the hearings to the applicant and to submit reports for inclusion in the case files. To this purpose, it shall have access to the applicants, including those located at the border point premises, or alien internment centers or prisons.

<sup>25</sup> Preamble to the 12/2009 Asylum Law.

<sup>26</sup> Article 35(2): The UNHCR representative in Spain, shall ‘be immediately informed of the submission of the applications at the borders and may interview, if so desired, the applicants. UNHCR shall be heard prior to the issuance of the decisions set forth in paragraphs first, second and third of Article 21 of this Law.’

<sup>27</sup> Cases can be rejected based on both formal and substantive grounds. See Article 21 in relation with Article 20.1 and 25.c), d) and f).

<sup>28</sup> If the Court does not grant a suspension of removal, the person is expelled from the territory. The case will still be reviewed by the Court but the appellant will have to pursue their appeal from outside of Spain.

<sup>29</sup> Article 135 of the Law no 29/1998 of 13 July 1998 on the Administrative Jurisdiction and Procedure (Ley de la Jurisdiccion contencioso-administrativa). 1. When the parties allege the existence of especially urgent circumstances, the single or multi-judge bench, within two days, may resolve as follows, without hearing the opposing party. a) The judicial authority may perceive the existence of especially urgent circumstances and adopt or deny the measure, pursuant to Section 130. No appeal may be entered against this ruling. In the same decision, the single or multi-judge bench shall grant the opposing party a hearing with-in three days of adoption of the measure. Once the allegations have been received, the deadline therefore has lapsed or the hearing has been held, the single or multi-judge bench shall decide to lift, maintain or modify the measure adopted. The decision may be appealed in keeping with the general rules. The provisions contained in section 63 shall be applicable to the recording and documentation of the hearing. b) The judicial authority may perceive no especially urgent circumstances and rule that the request for precautionary measures shall be processed as laid down in section 131, during which the parties concerned may request no new measure via application of the present section. 2. In cases relating to actions performed by the administration regarding migration or asylum legislation entailing the return of minors to their country of origin, the judicial authority shall hear the public prosecutor prior to delivering a ruling referring to the first paragraph of this section.

<sup>30</sup> ECtHR, *I.M. c. France*, Application No. 9152/09, 2 February 2012, para. 145, <http://www.refworld.org/docid/4f2932442.html>.

<sup>31</sup> ECtHR, *A.C. and Others v. Spain*, Application No. 6528/11, 22 April 2014, para. 105, <http://www.refworld.org/docid/5357733b4.html>

### 3.2. *Relevant practice*<sup>32</sup>

3.2.1. The asylum claims of victims of gang-related violence are routinely rejected in Spain, with the authorities holding that persecution by criminal gangs (including in cases from Central America) is not connected to the grounds of the 1951 Convention refugee definition or subsidiary protection, as it is believed to relate to ordinary criminal activities and general insecurity.<sup>33</sup>

3.2.2. Spanish authorities further argue that legislative measures adopted by El Salvador to tackle gang-related violence demonstrate their ongoing efforts to address the problem and that the authorities cannot be regarded as promoting or authorizing such acts. This approach does not assess the effectiveness of those measures or the capacity of the State authorities in the country of origin to effectively protect the persons concerned, believing rather that asylum-seekers could have sought state protection through the available remedies in their country of origin.<sup>34</sup>

3.2.3. In some cases, Spanish authorities have relied on the internal flight alternative to reject the asylum claims in question, and concluded that the alleged persecution or serious harm is limited to a specific area and could have been avoided by moving to a different location in the country of origin.

3.2.4. The above arguments are therefore used to dismiss all asylum claims from El Salvador, Honduras and Guatemala. The protection needs of concerned asylum-seekers are rarely examined on an individual basis, nor is there a general assessment of the scale and seriousness of the violence by these gangs and the impact of their activities on the security and human rights situation in the countries where they operate. Spanish authorities have not determined the ability of the country of origin authorities to effectively protect the persons in question. Where the internal flight alternative is invoked, it does not involve substantial and individual assessment of the relevance and reasonableness of this concept<sup>35</sup> nor the consideration of other forms of protection or other humanitarian reasons for preventing the expulsion of the person concerned to their country of origin.<sup>36</sup> This approach has been upheld by the judicial authorities of the National High Court (Audiencia Nacional) in first instance and on appeal as well as the Supreme Court, which, usually adopts the same reasoning of the competent asylum authority.

3.2.5. This practice is of particular concern, especially where such asylum claims are assessed through the accelerated border procedure, in which excessively short timeframes and lower procedural safeguards apply, thereby preventing a proper examination of the claim.

## 4. Principles of international refugee and human rights law regarding the determination of asylum claims involving persecution by non-state agents

### 4.1. *International refugee and human rights law*

4.1.1. The 1951 Refugee Convention and its 1967 Protocol, to which Spain is a State party, is grounded in Article 14(1) of the Universal Declaration of Human Rights 1948, which recognizes the right to seek and enjoy asylum from

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<sup>32</sup> Based on UNHCR Spain's experience and knowledge gained through its supervisory role in the Spanish RSD procedure whereby it assesses and issues a recommendation on the protection needs of every asylum application lodged in Spain.

<sup>33</sup> In contrast see the Federal Court of Canada's decision in *Vaquerano Lovato v. Canada (Citizenship and Immigration)*, 2012 FC 143 (CanLII), <http://canlii.ca/t/fq1fn>, which held that '[i]f any risk created by "criminal activity" is always considered a general risk, it is hard to fathom a scenario in which the requirements of section 97 would ever be met. Instead of focusing on whether the risk is created by criminal activity, the Board must direct its attention to the question before it: whether the claimant would face a personal risk to his or her life or a risk of cruel and unusual treatment or punishment, and whether that risk is one not faced generally by other individuals in or from the country'. Section 97 of the *Immigration and Refugee Protection Act*, 2001, c. 27, is similar to article 3 ECHR, it reads as follows: s. 97: A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally; (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail them self of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

<sup>34</sup> See for example, Supreme Court decision of 15 February 2016 (cassation appeal 2821/2015), Supreme Court decision of 10 April 2014 (cassation appeal 1874/2013) and Supreme Court decision of 6 February 2014 (cassation appeal 602/2013). Regarding decisions of the National High Court, see for example, decision of 5 May 2014 (appeal 494/2012), decision of 14 March 2014 (appeal 317/2012), decision of 3 March 2014 (appeal 189/2012) and decision 12 December 2013 (appeal 65/2013). All available at: [http://www.poderjudicial.es/search\\_old/indexg.jsp](http://www.poderjudicial.es/search_old/indexg.jsp). See also, Comisión Española de Ayuda al Refugiado (CEAR), *Informe 2015: Las personas refugiadas en España y Europa*, pages 85 and 94, <https://www.cear.es/wp-content/uploads/2015/06/Informe-2015-de-CEAR3.pdf>.

<sup>35</sup> On this issue, see European Council on Refugees and Exiles: *Actors of protection and the application of the internal protection alternative. National report-Spain*, 2014, available at: <http://www.refworld.org/pdfid/543bbdba12.pdf>.

<sup>36</sup> On humanitarian reasons, see Articles 37.b) and 46.3 of the Spanish Asylum Law.

persecution.<sup>37</sup> Central to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened. *Non-refoulement* is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as a norm of customary international law.<sup>38</sup> *Non-refoulement* is also an obligation under international and European human rights law.<sup>39</sup>

4.1.2. UNHCR recalls that the consequences of an erroneous assessment of an asylum claim are potentially dramatic for the person concerned. The Court underlined the importance of Article 3 of the European Convention on Human Rights (ECHR), and, ‘the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises’.<sup>40</sup> In the same vein, the Court of Justice of the European Union (CJEU) has highlighted that such assessment ‘must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union’.<sup>41</sup>

4.1.3. Article 1 A (2) of the 1951 Convention states that the term ‘refugee’ shall apply to any person fleeing a ‘well-founded fear of being persecuted’, but nowhere is the term persecution defined, nor is it limited to actions of governments. However, ‘the on-going development of international human rights law subsequent to the adoption of the 1951 Convention has helped to advance the understanding, expressed in the UNHCR Handbook, that persecution comprises human rights abuses or other serious harm.’<sup>42</sup>

4.1.4. Based on the wording and the ordinary meaning given to the term ‘persecution’, as well as the purpose and object of the 1951 Convention, UNHCR has long maintained that the 1951 Convention does not limit persecution to acts perpetrated by State agents.<sup>43</sup> Rather, persecutory acts committed by non-State agents against whom the State is unwilling or unable to offer effective protection similarly give rise to refugee status under the 1951 Convention, provided the other criteria of the refugee definition are met.<sup>44</sup>

4.1.5. UNHCR takes the view that ‘serious violations of human rights and threats to life, liberty and security of person that constitute persecution are not perpetrated solely by agents of the State. Persecution that does not involve State complicity is still, nonetheless, persecution. Non-governmental groups have persecuted individuals for reasons of race, religion, nationality, membership of a particular social group or political opinion. Under these circumstances, where their own State of origin proves unable to protect them, victims or potential victims of such forms of persecution are, equally, the intended beneficiaries of the 1951 Convention and 1967 Protocol relating to the Status of Refugees’.<sup>45</sup>

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<sup>37</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III),

<http://www.refworld.org/docid/3ae6b3712c.html>

<sup>38</sup> See, in particular, UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para. 4, <http://www.unhcr.org/refworld/docid/3d60f5557.html>; ExCom Conclusions No. 15(XXX) – 1979, (b); 17 (XXXI) – 1980, (b); 25 (XXXIII) – 1982, (b); 68 (XLIII) – 1992, (f). See also, Concurring Opinion of Judge Pinto de Albuquerque in ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, p. 67,

<http://www.unhcr.org/refworld/docid/4f4507942.html>; UNHCR *Note on the Principle of Non-Refoulement*, November 1997,

<http://www.unhcr.org/refworld/docid/438c6d972.html>; and UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection], 20 June 2001, paras. 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>.

<sup>39</sup> More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment. See also the jurisprudence of this Court, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court’s judgment in *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 114, <http://www.refworld.org/docid/4f4507942.html>.

<sup>40</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 293,

<http://www.refworld.org/docid/4d39bc7f2.html>.

<sup>41</sup> CJEU, *Salahadin Abdulla and others v. Bundesrepublik Deutschland*, 2 March 2010, Joined cases C-175/08, C-176/08, C-178/08 and C-179/08, para. 90, <http://www.refworld.org/docid/4b8e6ea22.html>.

<sup>42</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para. 17,

<http://www.refworld.org/docid/3b20a3914.html>. See also, UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (‘UNHCR Handbook’) December 2011, HCR/IP/4/ENG/REV. 3, paragraphs 51-53, <http://www.refworld.org/docid/4f33c8d92.html>.

<sup>43</sup> UNHCR Handbook, para. 65, <http://www.refworld.org/docid/4f33c8d92.html>.

<sup>44</sup> UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, pp. 16-17, <http://www.refworld.org/docid/4200d8354.html>.

<sup>45</sup> UNHCR, *Agents of Persecution - UNHCR Position*, 14 March 1995, para. 5, <http://www.refworld.org/docid/3ae6b31da3.html>. See also, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, which held that ‘persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens.’ <http://www.refworld.org/docid/3ae6b673c.html>, under the heading state complicity.

4.1.6. This is further reflected in international human rights law, where the prohibition on torture and ill-treatment enshrined in Article 7 of the ICCPR<sup>46</sup> applies regardless of whether the acts were committed by ‘public officials’ or ‘other persons acting on behalf of the State’, or ‘private persons’ and ‘whether by encouraging, ordering, tolerating or perpetrating prohibited acts.’<sup>47</sup>

4.1.7. Furthermore, specific considerations apply in the application of an internal flight alternative<sup>48</sup> to persecution by a non-State agent. As part of the relevance assessment,<sup>49</sup> in addition to determining whether the area of relocation is practically, safely, and legally accessible to the individual, the authorities should assess the motivation of the persecutor, the ability of the persecutor to pursue the claimant in the proposed area, and the protection available to the claimant in that area from State authorities. The latter involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to provide protection. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State’s willingness to do so, but, unless these are given effect in practice, they are not of themselves indicative of the availability of protection. Evidence of the State’s inability or unwillingness to protect the claimant in the original persecution area will be relevant.<sup>50</sup>

4.1.8. In its *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (‘UNHCR Gangs Guidance Note’), UNHCR provided guidance on the assessment of asylum claims caused by, or associated with, organized gangs, including on the specific issues of the availability of State protection and IFA/IRA.<sup>51</sup> It has also recently published *Guidelines on Claims for Refugee Status related to Situations of Armed Conflict and Violence* which states that ‘[a]gents of persecution also include non-state actors such as paramilitary groups, militias, insurgents, bandits, pirates, criminal gangs or organizations, terrorist organizations, private military or security companies, or other groups or individuals engaging in situations of armed conflict and violence’.<sup>52</sup>

4.1.9. The UNHCR Gangs Guidance Note finds that forcible recruitment attempts, including under death threat, by violent groups would normally amount to persecution.<sup>53</sup> It is thus ‘necessary to review the extent to which the state is able and/or willing to provide protection against persecution’.<sup>54</sup> The UNHCR Gangs Guidance Note also indicates that authorities may be *unwilling* to protect a particular individual, for instance, because of their own financial interest in the gang activities or because they consider the person associated with or targeted by the gangs unworthy of protection. The State could also prove *unable* to provide effective protection, especially when gangs wield considerable power and capacity to evade law enforcement or when the corruption is pervasive. In certain circumstances the State may be considered the agent of persecution in gang-related claims.<sup>55</sup>

4.1.10. In UNHCR’s view, the assessment of the availability of State protection will require detailed and reliable country of origin information, including information about existing programmes, to address the gang phenomenon and their effectiveness. Factors that may be indicative of available State protection and may help adjudicators analyse claims include: efforts to reform and expand the criminal justice system; attempts to end the practice of social

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<sup>46</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>47</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 13, <http://www.refworld.org/docid/453883fb0.html>.

<sup>48</sup> The concept of an internal flight or relocation alternative is not explicitly referred to in the 1951 Convention. The 1951 Convention does not require or even suggest that the fear of being persecuted need always extend to the whole territory of the refugee’s country of origin. The concept of an internal flight or relocation alternative therefore refers to a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him/herself and live a normal life.

<sup>49</sup> UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para. 9-21, <http://www.refworld.org/pdfid/3f2791a44.pdf,%20para.%2033-35> (‘*Guidelines on IFA/IRA*’).

<sup>50</sup> UNHCR, *Guidelines on IFA/IRA*, para. 15.

<sup>51</sup> UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, <http://www.refworld.org/docid/4bb21fa02.html>.

<sup>52</sup> UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, (‘UNHCR Armed Conflict and Violence Guidelines’) 2 December 2016, HCR/GIP/16/12, para. 28, <http://www.refworld.org/docid/583595ff4.html>.

<sup>53</sup> UNHCR Gangs Guidance Note, para. 22.

<sup>54</sup> *Ibid.*, para. 30.

<sup>55</sup> For example, the El Salvador Guidelines state that ‘gangs reportedly have their own infiltrators in the police and the military, including certain elite units and the General Staff, who warn them about anti-gang operations and with access to intelligence, weapons and uniforms’, p. 23.

cleansing<sup>56</sup>; and the establishment of witness protection programmes<sup>57</sup>. Conversely, the following factors are indicative of a lack of effective State protection: lack of measures to ensure security to individuals at risk of harm by gangs; a general unwillingness on the part of the public to seek police or governmental assistance because doing so may be perceived as futile or likely to increase risk of harm by gangs<sup>58</sup>; a prevalence of corruption, impunity and serious crimes, such as extrajudicial killings, drugs and human trafficking, implicating government officials, police and security forces.<sup>59</sup>

4.1.11. With regard to the IFA option in the specific context of gang-related violence, UNHCR recalled that it is normally not considered relevant where the feared persecution emanates from, or whether it is condoned or tolerated by, State agents, as State agents are presumed to exercise authority in all parts of the country. This, therefore, generally precludes relocation where State agents are complicit with the gang activities or in cases involving a fear of arbitrary and unlawful State measures. Where the applicant fears persecution by a gang, the first analysis includes an assessment of the ability of the gang (or other similar group) to pursue the applicant in the proposed alternative location and the protection that would be available there from State authorities. It is important to distinguish the reach of gangs which operate in relatively small countries, from gangs active in larger countries.<sup>60</sup> Given that many Central American gangs have country- or even region-wide reach and organization, there may be no realistic internal flight alternative in such instances.<sup>61</sup> Experiences of individuals fleeing gang violence often reveal that the victim may have sought protection internally within his/her country or relocated in the region, in order to escape the gangs. Such attempts have often been unsuccessful as gangs can locate the individual in urban as well as in rural areas, appearing at the applicant's home and place of work as well as near the homes of family members.<sup>62</sup>

## 4.2. Relevant EU standards

4.2.1. EU asylum law recognizes that refugee status or subsidiary protection should be granted to persons fleeing due to respectively a well-founded fear of persecution or a real risk of serious harm emanating from non-state actors. On 4 March 1996, the European Union Member States adopted a Joint Position on the harmonized application of the definition of the term 'refugee' outlining that 'persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A, is individual in nature and is

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<sup>56</sup> UNHCR notes in the El Salvador Guidelines that 'reports have begun to emerge of death squads and vigilante groups with possible connections to the security forces engaging in the extrajudicial killing of suspected gang members in El Salvador. In 2015 this pattern became more evident with reports of death squads dressed like policemen killing suspected MS gang members and other, mostly young, residents of MS gang-controlled neighbourhoods in different parts of the country. The police, prosecutors and other institutions of the Salvadorian State have reportedly not made any efforts to investigate these killings. Extrajudicial executions by the PNC of gang members and persons supposed to be affiliated with the gangs have also been reported.' p. 22.

<sup>57</sup> On the issue of witness protection, 'there are well documented examples of these witnesses, especially the protected witnesses, being tracked down and killed by gangs and other organized criminal groups, including after trial judges allowed or ordered their identities to be revealed during trial proceedings.' El Salvador Guidelines, p. 25.

<sup>58</sup> UNHCR notes that '[w]itnesses and victims of crimes committed by gangs and other organized criminal groups in El Salvador have reportedly been killed by the perpetrators to ensure their silence, even when they have not sought to formally denounce those crimes to the authorities. Those who do denounce the crimes, or who otherwise cooperate with the authorities against gangs or other organized crime groups as "informants", are reportedly pursued for their "betrayal", often along with their family members, even when placed in a witness protection programme. Persons giving evidence against corrupt members of the security forces have also reportedly been targeted and killed, even as protected witnesses.' El Salvador Guidelines, p. 32. Moreover, 'intimidation and violence against complainants reportedly continues to contribute to a climate of impunity from criminal investigation and prosecution. Victims are particularly averse to reporting crimes perpetrated by gangs for fear of reprisals.' at p. 24. See also, D.J. Cantor, 'The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico', *Refugee Survey Quarterly*, Vol. 33, 2014, <http://rsq.oxfordjournals.org/content/33/3/34.full.pdf+html>, p. 45.

<sup>59</sup> UNHCR, *Gangs Guidance Note*, paras. 25-28. See also, El Salvador Guidelines, Section II.C of the El Salvador Guidelines, 'Ability and Willingness of the State to Provide Protection' and Amnesty International "*Home Sweet Home? Honduras, Guatemala and El Salvador's Role in a Deepening Refugee Crisis*" which highlights that '[b]eyond perceptions of neglect or ineptitude, people in the Northern Triangle have also reason to fear that the same authorities who are supposed to protect them are complicit in organized crime or are the perpetrators of abuses themselves.' at p. 22, October 2016, <https://www.amnesty.org/fr/documents/amr01/4865/2016/en/>.

<sup>60</sup> See, *Henriquez de Umana v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 326, Canada: Federal Court, 20 March 2012, <http://www.refworld.org/docid/4f8fea312.html>: 'The applicant stated that the MS is well organized, has infiltrated various offices, and would be able to locate him anywhere in the small country. The Board summarizes this evidence and concluded that notwithstanding that evidence, it finds there is an IFA. The Board's decision cannot be upheld on the basis of its IFA finding.' at para. 25.

<sup>61</sup> The El Salvador Guidelines specifically highlight that '[w]here the agents of persecution are non-State agents, consideration must be given to whether the persecutor is likely to pursue the claimant in the proposed area of relocation. Considering the small territorial size of El Salvador, and given the ability of the gangs and other organized criminal groups to operate country-wide, and indeed internationally – both independently and as part of international criminal networks – a viable IFA/IRA is unlikely to be available to individuals at risk of being pursued by such actors. It is particularly important to note the operational capacity of certain organized structures, particularly the MS and B-18 and the larger smuggling structures, to carry out attacks in any part of El Salvador, irrespective of territorial control of the specific zone.' p. 45.

<sup>62</sup> UNHCR, *Gangs Guidance Note*, paras. 52-54.

encouraged or permitted by the authorities'.<sup>63</sup> This was further codified in Article 6(c) of the Qualification Directive stating that 'actors of persecution or serious harm include non-state actors'.<sup>64</sup> This provision remains unchanged in the Qualification Directive (recast).<sup>65</sup>

4.2.2. Article 8 of the Qualification Directive (recast) governing the application of the 'internal protection' sets out strict safeguards in this regard and expressly provides that:

'Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:

- (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
- (b) has access to protection against persecution or serious harm as defined in Article 7; and *he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.* [emphasis added]

4.2.3. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.<sup>66</sup>

4.2.4. Finally, the use of accelerated procedures for the determination of an internal flight alternative has been explicitly excluded from the very inception of the EU asylum harmonisation process.<sup>67</sup>

### 4.3. Relevant ECHR standards

4.3.1. Before highlighting relevant standards relating to the assessment of risk under Article 3 ECHR pertaining to the notions of non-state actors of ill-treatment and internal flight alternative, UNHCR recalls that, according to the Court, such standards should be interpreted 'in harmony with other rules of international law of which it forms part',<sup>68</sup> particularly where such other rules are found in human rights treaties (such as the 1951 Convention, the ICCPR and the UN Convention against Torture).

4.3.2. First, it is well established in the Court's jurisprudence that the source of the treatment prohibited by Article 3 ECHR, whether a State authority or a non-state actor, is irrelevant. In the *H.L.R.* judgment involving a Colombian national who alleged that his expulsion from France to Colombia would breach Article 3 ECHR on account of a risk of retaliation by the drug cartels (resulting from the applicant's cooperation with the French authorities), the Court confirmed that given its absolute character, the Court 'does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials'.<sup>69</sup> The Court has repeatedly confirmed this position in subsequent judgments,<sup>70</sup> and has further highlighted that 'it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing

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<sup>63</sup> Joint Position defined by the Council of the European Union on the basis of article K.3 of the Treaty on European Union on the Harmonised Application of the Definition of the Term "Refugee" in Article 1 of the 1951 Geneva Convention relating to the Status of Refugees, OJ L 63, 13.3.1996, point 5.2, p. 2-7, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996F0196&qid=1483522212197&from=en>.

<sup>64</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>.

<sup>65</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF>.

<sup>66</sup> European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>.

<sup>67</sup> EU Commission, *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 20 September 2000, COM(2000) 578 final 2000/0238 (CNS), Article 28(2)(a), <http://www.statewatch.org/semDOC/assets/files/commission/COM-2000-578.pdf>.

<sup>68</sup> ECtHR, *Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, Application No. 35763/97, para. 55, <http://www.refworld.org/docid/3fe6c7b54.html>; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(3)(c), <http://www.refworld.org/docid/3ae6b3a10.html>; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 53, <http://www.refworld.org/docid/3ae6b3b04.html>.

<sup>69</sup> ECtHR, *H.L.R. v. France*, Judgment of 29 April 1997, Application No. 24573/94, para. 40, <http://www.refworld.org/docid/5034e6ec2.html>

<sup>70</sup> ECtHR, *J.K. and Others v Sweden*, Judgment of 23 August 2016, Application No. 59166/12, para 80, <http://www.refworld.org/docid/57bc18e34.html>. See also ECtHR, *T.I. v U.K.*, Admissibility Decision of 7 March 2000, Application No. 43844/98, p. 14.

appropriate protection.<sup>71</sup>

4.3.3. Secondly, the Court introduced specific guarantees regarding internal flight alternatives in the context of the assessment of Article 3 ECHR claims, namely, ‘the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there’.<sup>72</sup> Such conditions were incorporated in the Qualification Directive (recast) as highlighted above (in para. 4.2.2.).

4.3.4. In addition, the fact that persecution is perpetrated by non-state agents, as well as the application of an internal flight alternative, should not lead to a heightened burden of proof on the applicant. Although the Court stated that, in principle, it is for the applicant to adduce evidence capable of proving that he or she would be exposed to a real risk of being subject to treatment contrary to Article 3 ECHR, it acknowledged the hardship that refugees may experience in adducing evidence.<sup>73</sup> Therefore, the Court noted that, ‘as far as the evaluation of the general situation in a specific country is concerned, a different approach should be taken’<sup>74</sup> and, it emphasized that ‘the general situation in another country, including the ability of its public authorities to provide protection, has to be established *proprio motu* by the competent domestic immigration authorities’.<sup>75</sup>

4.3.5. Finally, the Court repeatedly stated that any arguable claim under Article 3 shall be subject to an effective remedy within the meaning of Article 13 ECHR. This entails a close and rigorous scrutiny of the substance of the claim, automatic suspensive effect of the remedy,<sup>76</sup> as well as reasonable timeframes to prepare and adjudicate the claim.<sup>77</sup> Against this backdrop, the Court accepted in principle that the re-examination of an asylum claim in an accelerated procedure did not necessarily raise an issue under Article 13 ECHR, provided that the claim has already been assessed fully on the merits in the regular asylum procedure.<sup>78</sup>

4.3.6. Due to their often complex nature, refugee claims from persons fleeing persecution by non-state actors and involving the examination of an internal flight or relocation alternative are generally unsuited to accelerated processing, as they raise particular challenges for adjudicators, as well as for asylum-seekers.<sup>79</sup> In principle, UNHCR takes the position that national procedures for determination of refugee status may provide for accelerated procedures for dealing with manifestly unfounded applications which are those that are clearly fraudulent or abusive or not related to the granting of refugee status.<sup>80</sup> However, the case before the Court, like those of all asylum-seekers fleeing persecution from gangs in El Salvador, do not fall within that category and thus are ill suited for accelerated procedures.

## 5. Conclusion

In light of all of the above, UNHCR is of the view that Article 2 and 3 ECHR violations can be perpetrated by non-state actors and the lack of procedural safeguards in accelerated procedures can give rise to a violation of Article 13 ECHR.

UNHCR  
30 January 2017

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<sup>71</sup> ECtHR, *H.L.R. v. France*, Judgment of 29 April 1997, Application No. 24573/94, para. 40, <http://www.refworld.org/docid/5034e6ec2.html>.

<sup>72</sup> ECtHR, *Salah Sheekh v. The Netherlands*, Judgment of 11 January 2007, Application No. 1948/04, para. 141, <http://www.refworld.org/docid/45cb3dfd2.html>. See also ECtHR, *JK and Others v Sweden*, Judgment of 23 August 2016, Application No. 59166/12, para. 82.

<sup>73</sup> ECtHR, *JK and Others v Sweden*, Judgment of 23 August 2016, Application No. 59166/12, paras. 91-93 and 97.

<sup>74</sup> *Ibid.*, para. 98.

<sup>75</sup> *Ibid.*

<sup>76</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, Application No. 30696/09, para. 293, <http://www.refworld.org/docid/4d39bc7f2.html>.

<sup>77</sup> ECtHR, *I.M. c. France*, Judgment of 2 February 2012, Application No. 9152/09, paras 144 and 150, <http://www.refworld.org/docid/4f2932442.html>.

<sup>78</sup> ECtHR, *Sultani v. France*, Judgment of 20 September 2007, Application No. 45223/05, paras 64-65, <http://www.refworld.org/docid/470cf3432.html>; ECtHR, *I.M. c. France, Ibid.*, para. 142, <http://www.refworld.org/docid/4f2932442.html>.

<sup>79</sup> UNHCR, Guidelines on IFA/IRA, para. 36.

<sup>80</sup> UNHCR, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 1 December 1992, 3 European Series 2, p. 397, <http://www.refworld.org/docid/3ae6b31d83.html>.