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**Opinion of UNHCR regarding the question of Non-State persecution as
discussed with the Committee on Human Rights and Humanitarian Aid
of the German Parliament (Lower House)
on 29 November 1999**

Key issues

- (1) The crucial factor in any interpretation of the term 'refugee' based on constructive criteria of international law is not the originator of the persecution but the ability of the person concerned to avail himself of the protection of the State. It can be concluded from the origins, wording and purpose of the 1951 Convention relating to the Status of Refugees and from its relationship to the international protection of human rights that the Convention affords protection irrespective of whether the persecution is by State or non-State agents.
- (2) Most of the contracting States and UNHCR grant refugee status also in cases of non-State persecution provided that all the other requirements set out in article 1 A (2) of the 1951 Convention are met.
- (3) With its ever greater exclusion of non-State persecution from the scope of protection afforded by the 1951 Convention, Germany is increasingly isolating itself from the practice adopted by the majority of the contracting States.
- (4) UNHCR is of the view that serious gender-specific violations of human rights arising from one of the five reasons listed in the 1951 Convention constitute persecution within the meaning of article 1 A (2) of the Convention. Gender-specific persecution can relate to any of those five reasons, i.e., race, religion, nationality, membership of a particular social group or political opinion. For purposes of determining refugee status in such instances, it is immaterial whether the persecution is by State or non-State agents.
- (5) UNHCR considers it necessary for the Federal Republic of Germany to take appropriate measures in order to bring its practice for determining refugee status in cases of non-State persecution into line with international norms. One possible measure would be to include an appropriate clarification in its Law on Asylum Procedure.

Question 5.1: Does the 1951 Convention also afford protection in cases of non-State persecution and, if so, to what extent? How is this related to gender-specific persecution?

I. Introduction

1. Under article 33, paragraph 1, of the 1951 Convention relating to the Status of Refugees, the contracting States undertook 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.

2. In accordance with article 1 A (2) of the 1951 Convention, a refugee is any person who:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, 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 ...

3. The Federal Administrative Court has in recent years established the practice of largely denying victims of non-State persecution the international protection afforded under the above provisions of the 1951 Convention, especially if such persons have fled from war zones or crisis situations.

4. The legal viewpoint held by UNHCR, however, is that international protection should be based on the affected persons' need for protection, irrespective of the origin of the persecution. This position is being restated to the Committee on Human Rights and Humanitarian Aid in the present opinion.¹

5. The question whether non-State persecution comes within the definition of refugee, as set out in the 1951 Convention, can be answered only by means of an interpretation of the Convention which goes beyond purely national considerations and is based on international law. In addition to the origins, wording, composition and purpose of the Convention, it is necessary to take into account the developments that the law has undergone since that instrument was concluded and also the current decision-making practice adopted by the other contracting States. Only by such an ongoing interpretation can the Convention properly fulfil its role as the magna carta of refugee law.

II. Origins, wording and purpose of the 1951 Convention

6. It is clear from the **origins** of the 1951 Convention that persecution and mass exodus from civil wars and disintegrating States are not recent phenomena but had already given rise to international agreements prior to the adoption of the Convention. Mention may be made, for example, of the agreements for specific groups of refugees following the collapse of the Ottoman empire and the Tsarist empire, and of the agreement for the refugees from the Spanish Civil War. These refugee groups, to which the drafters of the Convention made explicit reference in the course of the *travaux préparatoires*, did not consist solely of persons who had fled from persecution by the State. The fact that they were included within the scope of application of the Convention, under its article 1 A (1), without any specific discussion during the preliminary work on the Convention of the question of the originators of the persecution thus indicates that the drafters did not attach any particular importance to that issue.

7. During the *travaux préparatoires*, extensive deliberations took place concerning the need to limit the obligations under the 1951 Convention. It was agreed to include a dateline clause and an optional Europe-based restriction. This too shows that no restrictive meaning was attached to the term 'refugee'. On the contrary, the drafters of the Convention were in favour of a broad interpretation of this term that would cover all targeted attacks on individuals.

8. The **wording** of article 1 A (2) and of article 33 of the 1951 Convention does not restrict the related measures of persecution to acts of persecution by the State. Article 33 of the Convention prohibits the expulsion of a refugee if his life or freedom is threatened for the reasons listed above. There is no qualification of the threat or restriction to a specific originator. Nor can any such limitation be inferred from the meaning of the verb 'threaten'.

9. According to the customary meaning of 'persecution' as used in article 1 A (2) of the 1951 Convention, this term denotes, both in the German translation and also in the original English and French versions, treatment that is targeted but does not necessarily stem from authorities of a State. Moreover, the

¹The present opinion is based on a study which has been conducted by UNHCR on this subject and which exists in draft form. The statements made in this opinion are supported by references to the literature and case-law.

terms *persecution* and *threat* do not have any generally accepted legal meaning which would restrict the customary wording and relate the threat or persecution solely to acts of State authorities. Indeed, the fact that the Convention does not define more precisely or qualify the terms *persecution* and *threat* shows that the definition of refugee was not being intentionally limited to a specific type of persecution.

10. This conclusion is also supported by the fact that article 33, paragraph 1, of the 1951 Convention speaks of *territories* where a refugee is threatened and not of *states* which threaten refugees. Furthermore, in article 1 A of the Convention, it is not the term *State* (of origin) that is used, but rather the word *Country*. A country will continue to exist as a subject of international law even if, owing to the absence of governmental structures, it no longer has capacity to act.

11. According to the wording of article 1 A of the 1951 Convention, the granting of refugee status depends essentially on two requirements: in addition to the establishment of well-founded fear of persecution by reference to specific persecution criteria, it is necessary to ascertain whether the person persecuted is able to avail himself of the protection of the State.

12. In cases where measures of persecution threatening an individual's life or freedom emanate directly from the State, it is generally clear that the person concerned cannot obtain the protection due to him from his State of origin. Any reference to his being unable to obtain protection from the State is in such cases superfluous. Reference to a person's inability to obtain protection from his State of origin is, however, meaningful in situations where the persecution stems from third parties. In accordance with the principle of subsidiarity of international protection, the absence of national protection against measures of persecution by third parties has to be established in such circumstances.

13. As shown by the preamble to the 1951 Convention, the **purpose** of the Convention is closely connected with the human rights treaties. By prohibiting the *refoulement* of persecuted persons, the Convention contributes to the prevention of human rights violations to which refugees would be subjected if expelled to their country of origin. Moreover, the Convention guarantees that refugees are accorded rights of an agreed standard in their country of residence. The Convention could thus be regarded as an earlier international treaty for the protection of the human rights of a specific group of persons who were particularly at risk. A purpose-based interpretation has to take account of that connection. As regards the interpretation of the term *refugee* this means that within the confines of the wording preference has to be given to the interpretation which best achieves the protection of fundamental human rights of the persecuted person. However, the perpetrators of serious breaches of international human rights norms are not only States. Particularly if the power of the State authorities is weakened, in situations of national conflicts or, when States disintegrate, there is an increased risk of large-scale violations of fundamental individual rights by groups which are independent of the (former) official government and against which the State's protection cannot be obtained. An interpretation of the term *refugee* based on the protection of human rights thus necessitates the inclusion of non-State persecution within the definition of the term *refugee*.

III. Developments in the protection of human rights and international criminal law

14. Since the adoption of the 1951 Convention, the **protection of human rights** has continued to develop. The preparation of numerous international and regional treaties and their recognition by a large majority of States have created a legal basis for the protection of human rights that has now become firmly established to a wide extent through international customary law. Human rights are not purely the domestic affair of individual States; their observance is in the international interest. All States are called upon to contribute to the implementation of the agreed standards.

15. *Non-refoulement* provisions similar to article 33 of the 1951 Convention have also been developed under the human rights treaties. Mention can be made, for example, of article 3 of the European Convention on Human Rights, article 7 of the International Covenant on Civil and Political Rights and article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The rulings of the European Court of Human Rights clearly show that the *refoulement* prohibition provided for in article 3 of the European Convention on Human Rights is binding on the contracting States irrespective of whether the treatment in breach of that article is attributable to the State of origin. The European Court refers in this regard to the unconditional nature of the protection afforded under article 3, which expresses one of the fundamental values of a democratic society and is thus unconditionally applicable, including in cases involving foreign countries. The Court further makes it clear that the criterion for determining a breach of the treaty is not the treatment by the State of origin and that the only factor to be considered is that of the violation of the treaty by the extraditing or deporting State. The Court's observations concerning the European Convention on Human Rights are applicable also to the 1951 Convention. The 1951 Convention establishes only the responsibility of the State of residence, not that of the State of origin. This is already clear from the fact that the rights arising under the Convention are conferred upon a refugee irrespective of whether his country of origin is a State party to the Convention.

16. In proceedings concerning a Somali who sought protection in Australia, the Committee against Torture ruled, in May 1999, that the term *torture* as appearing in article 1 of the United Nations Convention against Torture, also included torture by one of the Somali clans. The Committee based its ruling on the ground that the clans exercise governmental authority in Somalia. The Committee thus reaffirmed the applicability of the expulsion prohibition under the Convention against Torture to entities below the State level.

17. Despite the inclusion of such *non-refoulement* provisions in the human rights treaties, the 1951 Convention has not become an unnecessary instrument. The spheres of protection provided for in article 33, paragraph 1, of the Convention and in the prohibition of expulsion under human rights law are only identical in part. Moreover, the 1951 Convention and the *non-refoulement* clauses in the human rights treaties also differ in regard to their legal consequences.

18. Reference should also be made to one development in the law which had its beginnings with the Nürnberg war crimes trials after the end of the Second World War and which is directed towards making individuals liable for certain serious violations of international law directly on the basis of the international norms of **criminal law** and rendering them subject to international jurisdiction. The statute of the International Criminal Court, which was adopted in Rome in 1998, defines persecution of an identifiable group or collectivity on political, racial, national, ethnic, cultural or religious grounds or on grounds of gender as a crime against humanity (article 7 (h)). This means that the States involved in the drafting of the statute (including Germany) were in agreement that the criminal offence of *persecution* within the meaning of a crime against humanity could be committed by both State and non-State agents. It would be contradictory if the international community were to qualify such offences as persecution under criminal law and punish their perpetrators but were to refuse to acknowledge an offence of persecution under refugee law and deny the victims reasonable international protection.

IV. Accountability for persecution under international law

19. In **international law jurisprudence**, essentially two theories or views (and several hybrids of them) are held which are of relevance to the question of non-State persecution: the *Accountability view* which considers that persecution within the meaning of the 1951 Convention has to be attributable to a State or

another subject of international law, and the protection view which regards inability to obtain State protection as the decisive criterion.

20. A strict accountability view is at present still held only by a minority consisting mainly of a few German authors. However, a number of scholars maintain that persecution within the meaning of the 1951 Convention has to be attributable to the State but that such accountability may be assumed in cases where the State is not in a position to prevent measures of persecution by third parties.

21. A growing number of international law experts now adopt the protection view, according to which it is not necessary for a State to be accountable for persecution. In fact, at the expert meeting organized by UNHCR in Athens in December 1998, the specialists present (human rights practitioners, jurists and representatives of governmental and non-governmental organizations) came to the conclusion that the protection view should be given priority over the State accountability view.

22. The requirement that acts of persecution be attributable under international law to a State unduly restricts the protection afforded by the 1951 Convention. Accountability under international law is difficult to substantiate in countries without governmental or de facto governmental structures. The purpose of the 1951 Convention is not to establish liabilities under international law. Indeed, that would be inconsistent with its humanitarian and non-political nature. The granting of asylum should not be understood either as an unfriendly act against the country of origin or necessarily as a criticism. The Convention seeks rather to give refuge to persons whose fundamental rights have been violated in their countries of origin. There is accordingly neither any justification nor any need for protection to be restricted by the requirement of accountability under international law. Moreover, that requirement makes the determining of refugee status dependent on the evaluation of complex and often very controversial questions of international law and sociology, such as the nature of the State, the definition of de facto authority, the prerequisites for effective territorial authority, and accountability under international law for acts of persecution.

23. If, contrary to the view put forward here, accountability under international law is considered necessary for acts of persecution, such accountability has to be determined on the basis of the relevant international law provisions.

24. According to international law, States are liable for human rights violations under international law if they fail to exercise due diligence in taking effective preventive or repressive measures to avoid acts that are contrary to international law. A State's failure to provide safety will furnish under international law the necessary link to render that State liable for private acts of violence. In the recent discourse on international human rights, this argument is being used to justify, *inter alia*, the State's liability for acts of violence by individuals against women. Furthermore, partial or particular subjects of international law, such as de facto regimes, can also be held liable for breaches of international law.

V. Interpretation of the term 'refugee' by UNHCR

25. UNHCR's interpretation of the term 'refugee' as appearing in the 1951 Convention, whether in opinions issued by the Office or in summary proceedings conducted by UNHCR to determine refugee status, does not differentiate according to the originator of the persecution. UNHCR has over the years repeatedly made it clear that solely the absence of State protection owing to the reasons set forth in the Convention is the determining factor for granting refugee status.

26. The *Handbook on Procedures and Criteria for Determining Refugee Status*, which was published by UNHCR pursuant to a decision of the Executive Committee of the High Commissioner's Programme and drawn up on the basis of the Executive Committee's guidelines and UNHCR's experience of States' practice

acquired over the years, indicates that persecution does not necessarily have to be the act of the authorities of a country but that violations of rights committed by the local populace may also be regarded as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection. The Executive Committee has also pointed out that persons who leave their country on account of (internal) conflicts may have a well-founded fear of persecution within the meaning of the Convention.

27. UNHCR's interpretation of the 1951 Convention is not binding on States in law. States nevertheless entrusted UNHCR, under article 35 of the Convention, with the task of supervising the application of the provisions of the Convention. At the same time, they undertook to cooperate with UNHCR. Therefore, they should not, without sufficient grounds, formulate practices for the determination of refugee status which conflict with UNHCR's position.

28. The question of the relevance of non-State persecution arises in particular in connection with **gender-specific persecution**, i.e. in cases of persecution which, by their nature or origin, have a gender-based connection.

29. In UNHCR's view, persecution can take the form of gender-specific violence. UNHCR is of the opinion that serious gender-specific violations of human rights arising from one of the five reasons listed in the 1951 Convention constitute persecution within the meaning of article 1 A (2) of the Convention. In its conclusion No. 73 (XLIV) on refugee protection and sexual violence, adopted in 1993, the Executive Committee supported the recognition, as refugees, of persons whose claim to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion.

30. Gender-specific violence is often not committed directly by the State authorities. As shown above, this fact is immaterial as regards the definition of refugee. If a State is unwilling or unable to offer protection from sexual violence by third parties, such violation may be qualified as persecution within the meaning of the 1951 Convention if the other requirements laid down in the Convention are met.

31. Persecution based on a person's sex or sexual orientation is not expressly mentioned in the Convention as a possible reason for persecution. However, gender-specific persecution may be established on any of the five grounds indicated in the Convention, namely race, religion, nationality, membership of a particular social group or political opinion.

32. In its conclusion No. 39 (XXXVI), of 1985, on the subject of refugee women and international protection, the Executive Committee recognized that States, in the exercise of their sovereignty, were free to adopt the interpretation that women asylum-seekers who faced harsh or inhuman treatment due to their having transgressed the social mores of the society in which they lived could be regarded as a particular social group within the meaning of article 1 A (2) of the 1951 Convention.

33. Recent developments in international refugee law show that increasing consideration is being given by the international community to gender-specific persecution (see the attached opinion of UNHCR, dated 25 May 1999, regarding the consideration of grounds for gender-specific persecution in Western countries of asylum).

VI. Harmonization of the application of the definition of refugee within the European Union

34. In the 1990s, the States members of the **European Union** sought to develop a common interpretation of the concept of refugee through the Joint position, of 4 March 1996, defined by the Council on the basis of

article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees

35. According to the interpretation agreed in the joint position, persecution is generally the act of the State. Furthermore, persecution by third parties is relevant if it is encouraged or permitted by the State. Persecution may also stem from de facto authorities. The joint position does not, however, contain any specific statements regarding fundamental problems of non-State persecution. Still unresolved, for example, are the questions of whether a State's inability to offer protection can give rise to the recognition of refugee status, whether persecution is possible in countries where neither governmental nor de facto governmental structures exist, and how the term "de facto authority" should be defined.

36. The joint position is understood as being a guideline for determining refugee status with no binding force. In addition, Denmark and Sweden have, with regard to the observations concerning the origins of persecution, submitted a reservation, pointing out that the persecution definition criteria in the Convention are fulfilled even in cases of States' inability to provide protection. Attempts to achieve the harmonized application of the definition of refugee within the European Union in regard to non-State persecution have not been successful to date. States have not been able to agree on a legally binding definition and the joint position has not had any decisive influence on States' practice.

37. The States members of the European Union are expected in the coming years to make a further attempt, on the basis of article 63 (1) (c) of the Treaty of Amsterdam, to agree upon a harmonized interpretation of the term "refugee". The extent to which the guidelines of the joint position will have an effect on the issue of non-State persecution is still totally uncertain. It should be noted in this connection that the European Council, at its meeting on 15 and 16 October 1999, undertook to "work towards establishing a common European asylum system based on the full and inclusive application of the Geneva Convention ..."

VII. Practice of States

38. An **analysis of States' practice** shows that the controversy surrounding the relevance of non-State persecution is essentially a problem that is confined to a few Western European States. In Africa, for example, under the refugee convention adopted by the Organization of African Unity, a definition of the term "refugee" has been developed which is wider than that contained in the 1951 Convention and which additionally applies to all persons "who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order" have left their country of origin.

39. A broader definition of refugee has also been developed in South and Central America. According to the definition of this term in the Cartagena Declaration on Refugees, the following persons are regarded as refugees, in addition to those specified in the 1951 Convention: persons who have had to leave their country "because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order". For the purposes of this definition of refugee, the originator of the persecution is totally immaterial.

40. According to the established practice of the United States and Canadian courts regarding the interpretation of the definition of "persecution" the originator of the persecution is immaterial. The countries of Central and Eastern Europe have to date not developed any settled practice as regards non-State persecution.

41. The following observations may be made concerning the practice of the Western European countries. It is acknowledged in all the countries that persecution, within the meaning of the 1951 Convention, does not necessarily have to stem directly from the State. Differing opinions exist, however, as regards the question whether a State's inability in practice to offer protection can alone be sufficient for the recognition of refugee status. This view is supported by the vast majority of the countries (Austria, Belgium, Denmark, Finland, Greece, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom). Leaving aside Germany, the possibility of granting refugee status solely in the event of a State's inability to provide protection is ruled out according to the official doctrine in France, Italy and Switzerland. However, this doctrine is not rigorously upheld in the practice for determining refugee status either in France or in Italy. In these two countries, a State's inability in practice to provide protection has in individual cases, particularly those involving Algerians seeking protection, led to the granting of refugee status. Nevertheless, in these four countries and also in Portugal, recognition of refugee status is not deemed possible if neither governmental nor quasi-governmental authorities exist.

42. All the countries further consider that persecution may also stem from de facto authorities. There is no uniform definition of the term *de facto authority*. For example, the existence of certain structures of statehood is regarded in the Netherlands as sufficient. In Switzerland, a certain permanence and effectiveness of de facto rule are also required. However, no other country advocates such a narrow interpretation as Germany. The Federal Administrative Court of Germany qualifies entities in a civil war situation as de facto authorities only if their regime is consolidated to such an extent that they will probably be long-lived and are the forerunners of new or renewed structures of government. While these criteria of the Federal Administrative Court mean that no partial or particular subjects of international law are acknowledged as de facto authorities in German practice, all other countries in whose asylum practice the concept of de facto authority is a factor have recognized at least certain entities (e.g. the Taliban in Afghanistan) as de facto authorities.

43. All the countries consider persecution, within the meaning of the 1951 Convention, to be possible in principle also within a civil war context. Even though the proportion of cases of recognition of refugee status is usually low on account of the difficulty involved in proving individual instances of persecution, only the German interpretation of the State persecution view, in combination with the narrow interpretation of de facto authority, leads in practice to the denial of refugee protection in general for persecuted persons from civil war zones and disintegrating States.

44. This means that, as regards non-State persecution, only four Western European countries (France, Germany, Italy and Switzerland) hold a view which thus differs from UNHCR's interpretation of article 1 A of the 1951 Convention and consider it necessary for persecution to be attributable to a State or de facto authority. In this regard, France and Italy are showing a tendency to include non-State persecution in the definition of *refugee* in cases where States are unable to offer protection. Also, in France, Italy and Switzerland, additional aspects of non-State persecution are being included in the definition of *refugee* through the concept of de facto authority.

VIII. Practice for determining refugee status in Germany

45. In contrast with the foregoing, an increasing tendency to exclude non-State persecution from the definition of the term *refugee* is discernable in Germany. According to German case-law and practice regarding the recognition of refugee status, persecution within the meaning of domestic asylum law and also article 51 (1) of the Aliens Act (AuslG), which incorporates article 33, paragraph 1, of the 1951 Convention into the national legislation, has to be the act of the State or to be attributable to the State. Until the late 1980s, such State accountability could be assumed even if the State was unwilling or unable to protect the person persecuted. At present, in cases purely involving a State's failure to provide protection, applications

are for the most part rejected, although there are no recent higher-court precedents regarding accountability for persecution in cases where there is effective territorial authority but the State is unable in practice to offer protection.

46. With regard to the persecution of persons from civil war zones, the Federal Administrative Court has since the 1970s, and, in particular, through a series of rulings from the 1990s, established judicial precedents according to which persons seeking protection from civil war zones are denied protection under refugee law and under the European Convention on Human Rights on the ground that their case does not involve persecution by the State, which would be relevant to the asylum question. The argumentCquestionable in international lawCthat the interpretation of an international treaty by national courts relates to the treaty in its form as domestic law at the time of accession means that the interpretation of the term Arefugee@is at variance with the prevailing international rules of interpretation set out in the Vienna Convention on the Law of Treaties and with major international developments in the law.

47. German case-law thus departs from the way in which the 1951 Convention is interpreted by the vast majority of States parties to the Convention and by UNHCR. The extent of deviation of German case-law from international norms has now reached such a level that the German interpretation is no longer comprehensible to courts in other countries. Indeed, the Court of Appeal in London ruled, in July 1999, that Germany was not a Asafe third country@since the exclusion of non-State persecution from the definition of the term Arefugee@was unjustifiable. The court accordingly refused to allow the transfer of asylum-seekers back to Germany under the Dublin Convention determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities. In Great Britain, some 200 further cases involving the same problem are currently pending before the courts.

48. In Germany, persons who flee from non-State persecution cannot receive adequate protection under the national disallowance of expulsion clause contained in article 53 (6) of the Aliens Act. That clause is in fact applicable in the event of threats from non-State persecutors, but the requirements of this provision are so restrictive that it is not applied in many cases of non-State persecution. AProtection@exists for victims of non-State persecution often only where their expulsion is impossible in practice. Even if protection from expulsion is granted pursuant to article 53 (6) of the Aliens Act, the persons seeking protection are initially afforded not a legal entitlement to reside but merely a temporary stay of deportation, and they are denied many fundamental rights which refugees can claim under the 1951 Convention, such as the right to employment, freedom of movement, and the right to education and to social welfare.

49. According to the German interpretation of the 1951 Convention, the individual fate of persons persecuted by non-State agents is immaterial as far as the determination of their status as refugees is concerned. Asylum applications are rejected on the blanket ground that the persecution does not stem from State agents. A differentiating assessment of individual cases does not take place even when the person seeking protection has been the victim of very large-scale measures of persecution.

IX. Effects of a modified practice for determining refugee status

50. In UNHCR's view, a proper interpretation of the definition of the term Arefugee@ including in cases involving refugees from civil war situations, should allow for the necessary differentiation between persons who ought to receive the protection of refugee law and persons who require other forms of international protection. Indeed, even with the inclusion of non-State persecution in the definition of Arefugee@ the recognition of a person as a refugee under the 1951 Convention presupposes targeted individual persecution.

51. From the data available to UNHCR, no statistical connection can be demonstrated between the recognition of non-State persecution and the admittance figures for asylum-seekers.

Question 5.2: What recommendations would UNHCR make to States regarding the application of the 1951 Convention to refugees who flee from non-State persecution?

52. UNHCR would see it as a welcome development if all States parties based their practice for determining refugee status in cases of non-State persecution on the international norms described above.

53. UNHCR considers it necessary for the Federal Republic of Germany to take appropriate measures in order to bring its practice for determining refugee status into line with the international norm. Although it ultimately rests with the Federal Republic of Germany to decide upon the initiatives to be adopted in this respect, UNHCR would like to put forward a few possible amendment proposals:

- (1) Given the settled practice of Germany's courts regarding non-State persecution, it is recommended that the scope of application of the 1951 Convention be clarified in the legislation. It is accordingly suggested that an appropriate provision be included in articles 26 ff of the Law on Asylum Procedure that would establish a statutory interpretation of article 51 (1) of the Aliens Act in line with the international norm, incorporating into domestic law the *refoulement* prohibition laid down in article 33 of the Convention. That provision might possibly be worded as follows:

Article 28a. Non-State persecution

The requirements set out in article 51 (1) of the Aliens Act may be satisfied also in cases of non-State persecution. In such cases, it shall be ascertained whether the applicant is able to obtain in his State of origin (or the country of his habitual residence in the case of stateless persons) protection from the threat of persecution. In that respect, it shall be immaterial whether such persecution is attributable to the State of origin.

- (2) For purposes of clarification, the word *politisch* [political] should be deleted from the heading of article 51 (1) of the Aliens Act. That would make it clear that the term *politisch Verfolgten* [person persecuted on political grounds] appearing in article 16a of the Constitutional Law is not necessarily identical to the term *refugee* as defined in the 1951 Convention.
- (3) Even though, as indicated above, cases of flight solely on account of armed conflicts do not give rise to the granting of refugee status, persecution within the meaning of the 1951 Convention can nevertheless arise in situations of armed conflict. Therefore, an application for asylum may clearly not be unfounded because the asylum-seeker has fled from a (civil) war zone. The phrase *oder einer kriegerischen Auseinandersetzung zu entgehen* [or to escape from an armed conflict] should accordingly be deleted from article 30 (2) of the Law on Asylum Procedure.
- (4) As regards non-State persecution and gender-specific persecution, Germany should support a harmonized European application of the definition of *refugee* that conforms to the international norms referred to above.

UNHCR Berlin

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