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NON-STATE AGENTS OF PERSECUTION AND THE INABILITY OF THE STATE TO PROTECT

– THE GERMAN INTERPRETATION

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1. THE RELEVANT LEGAL FRAMEWORK[1]

a) The Legal Basis

- The Geneva Convention of 1951 and the New York Protocol of 1967;
- The German Constitution (*Grundgesetz*, Basic Law), Section 16 a (1) which states that "[p]ersons persecuted on political grounds enjoy the right of asylum". In 1993 the Constitution was amended to the effect that the concepts of "safe third countries" and "safe country of origin" were incorporated;
- The Asylum Procedure Act of 16 July 1982, as amended by law of 29 October 1997, providing for a detailed regulation on the right of asylum;
- The Act Concerning the Entry and Residence of Aliens in the Territory of the Federal Republic of Germany of 9 July 1990 (Aliens Act). Section 51 (1) states that an alien may not be removed to a state "in which his life or freedom is threatened by virtue of his race, religion, nationality, membership of a particular social group, or political opinion";
- The Schengen Agreement and the Dublin Convention.
- European Convention on Human Rights (ECHR)

b) The Procedure

The Federal Office for the Recognition of Foreign Refugees considers claims for asylum or whether there are obstacles to the deportation of aliens. Negative decisions may be appealed to an administrative court (VG – *Verwaltungsgericht*). A further appeal is possible to the High Administrative Court (OVG – *Oberverwaltungsgericht* or VGH (*Verwaltungsgerichtshof*) in some *Länder)*, if the latter considers the case to be of special importance. OVG-decisions may be finally reviewed by the Federal Administrative Court (*Bundesverwaltungsgericht*) in cases where there is a question of principle involved. If the asylum seeker believes that a violation of a provision of the Constitution may be reasonably alleged, the case may be appealed to the Federal Constitutional Court *(Bundesverfassungsgerich*t).

c) Forms of protection

In Germany, an asylum seeker may be granted

1. Political asylum by virtue of a constitutionally granted right (Art 16 a of the Constitution),[2]
2. Protection from *refoulement* (in accordance with Art 33 of the Refugee Convention) by virtue of Section 51 (1) of the Aliens Act (so-called "small asylum");[3]
3. Suspension of deportation in conformity with Art 3 of the European Convention on Human Rights (ECHR) (prohibition of torture or inhuman or

[1] See also Fabrice Liebaut, Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries, Danish Refugee Council, 4th edition, May 2000 (available at www.ecre.org).

[2] Persons entitled to political asylum enjoy legal status in accordance with the Refugee Convention and are issued with an unlimited residence permit (section 68 of the Asylum Procedure Act).

[3] Section 51 (1) of the Aliens Act prohibits the deportation of aliens to a State where they would face political persecution. Aliens granted protection against deportation under this provision, enjoy legal status under the Geneva Convention, but are issued with limited residence for exceptional purposes.

degrading treatment) by virtue of Section 53 (4) of the Aliens Act (*Duldung* or tolerated residence).[4]

The above three forms of protection are only granted when the persecution

a) emanates from the state, or
b) is attributable to the state, or
c) emanates from a quasi/state-like organisation (under certain circumstances)

4. Discretionary protection may be granted by virtue of Section 53 (6) of the Aliens Act against deportation in case of a substantial danger to life, personal integrity or liberty of an alien ("humanitarian cases"). No state or state-like criterion is necessary and it is also applied in a civil war/war situation.[5]

5. Temporary deportation waiver under Section 54 of the Aliens Act. The Ministry of each *Land* may order a temporary deportation waiver for groups of people staying within the *Land*, either based on a point of international law or on humanitarian grounds. This procedure only applies to groups, not to individual refugees. The Ministries of the Interior of the *Länder* decided that no *Land* would order a temporary deportation waiver on its own without the agreement of the majority of the other *Länder*. The last group who benefited from section 54 of the Aliens Act were Bosnians.

In 1999, 3.04% of the applicants for political asylum in Germany received protection pursuant to the constitutional granted right (Art. 16 a of the German Constitution). 4.54% were granted Convention status by virtue of Section 51 (1) of the Aliens Act. Only 1.55% were granted the temporary suspension of deportation pursuant to Section 53 of the Aliens Act.[6] These statistics only relate to decisions by the Federal Office for the Recognition of Foreign Refugees.

[4] In the case of Section 53 (4) in conjunction with Art. 3 ECHR, the Federal Administrative Court declined to follow the interpretation of Article 3 of the ECHR adopted by the European Court of Human Rights (ECtHR) in *Ahmed v. Austria* (judgment of 15 April 1997), see e.g. BVerwGE 104, 265 Section 53 (4) only applies to persecutory acts of state agents.

[5] The provision applies to concrete individual danger resulting from either State or private action. It does not require an intentional act, intervention or State measure and covers risks to life resulting from adverse living conditions, lack of necessary medical treatment, etc. Persons afforded protection under this provision are granted temporary permission to remain for periods of three months, renewable by the authorities.

[6] See ECRE Country Report 1999, p. 100. See also ECtHR judgment in *T.I. v United Kingdom* where the ECtHR noted that: "In the first six months of 1999, section 53(6) was applied to 24 Sri Lankan nationals in respect of serious individual risks of ill treatment which could not be attributed to the Sri Lankan State. This included the case of a Tamil whose scars placed him a real danger of being apprehended by the security forces and submitted to renewed torture as a person suspected of LTTE involvement."

2. JURISPRUDENCE[7]

a) Introduction

The landmark decision of the Federal Constitutional Court on 10 July 1989, BVerfGE[8] 80, 315, has been constantly affirmed.[9] The decision sets out that, in principle, political persecution in the sense of Art. 16 a (1) of the German Constitution is persecution emanating from the state or attributable to the state. According to the Federal Constitutional Court, the term 'political' is understood to refer to those State measures, which are directed at the individual's political belief, or religious beliefs or against other inalienable characteristics.

According to the Federal Constitutional Court, the right of asylum as enshrined in Art. 16 a of the German Constitution is based on a conviction determined by the respect and inviolability of the human dignity, i.e. that no *state* is entitled to endanger or violate the life, limb or personal freedom of an individual for reasons of political conviction, religious belief or other inalienable characteristics which single him/her out from others and mark him/her as different ("*welche sein Anderssein prägen*"). It is the view that, historically, fundamental rights and freedoms were granted to protect against governmental interferences into certain spheres of freedom. The Federal Constitutional Court held that for persecution to become political, it has to have a public connection, that is to say it has to be situated in the context of a public discussion about the organisation and the specifics of a general order for people or groups living together. Thus, as opposed to private persecution, political persecution, according to the Federal Constitutional Court, emanates from a representative of superior, generally, sovereign power (vested with the monopoly of force).

This application of Art 16 a of the German Constitution is, according to the Federal Constitutional Court, in conformity with the drafting history and the objective of the constitutional right of asylum. In the Court's opinion, the drafting history of the German Constitution illustrates that the drafters took it for granted that asylum was to be afforded against persecution emanating from the state. According to the Court, international law at the time envisaged only *states* as subjects without this being questioned. The Court reasoned that the subject-matter of international refugee law has been and is the creation of particular rules applicable to states with respect to their relation with their citizens.[10] According to the Court, it follows that the granting of

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[7] The following websites proved useful for searching German case law: www.asyl.net/homeNS.html (managed by the organisations Informationsverbund Asyl and ZDWF); www.uni-wuerzburg.de/rechtsphilosophie/glaw/index.html (GLAW); http://www.userpage.fu-berlin.de/~fbjura/netlaw/links/entscheidungen.html (Freie Universitaet Berlin, Fachbereich Rechtswissenschaften); Press Releases from German Higher Courts: http://www.jura.uni-sb.de/Entscheidungen/Bundesgerichte/; Links to German courts with a website: http://www.jura.uni-sb.de/internet/gericht.html; www.bvwerg.de (Press Releases from the Federal Administrative Court; www.bundesverfassungsgericht.de (Press Releases of the Federal Constitutional Court).

[8] BverfGE = *Bundesverfassungsgericht Entscheidungssammlung* or Federal Constitutional Court's collection of decisions. BverwGE= *Bundesverwaltungsgericht Entscheidungsammlung* or Federal Administrative Court's collection of decisions.

[9] See BverfG, 2 BvR 260/98, 10 August 2000, at http://www.bundesverfassungsgericht.de/entscheidungen/frames/2000/8/10.

[10] Joachim Henkel (former Judge at the Federal Administrative Court, Berlin) criticised this approach arguing that the Refugee Convention does not address the persecuting states but the contracting states

asylum is to protect against the dangers which stem from a specifically conditioned ("*bestimmt gearteter Einsatz*") exercise of (persecutory) state power.

The legal reasoning set out is the notion based on state responsibility. It is the state who is the representative of the sovereign power (in the sense of exerting monopoly of force on a certain territory). According to the Court, by exercising sovereign power the state ensures peace and thereby enables the individual to lead a life in human dignity in community with others. The Court found that political persecution is construed to be the other side of the coin insofar as it is an abuse of sovereign power to single out some individuals and remove or isolate them from the "overall order of peace" ("*übergreifende Friedensordnung*") of the state unity.

In construing this constitutionally granted fundamental right based on German national state-theory as a right that is to be protected against interferences by the state, both the Federal Constitutional Court and the Federal Administrative Court have developed a strictly applied objective concept of 'persecution'. Several authors have suggested that this restrictive construction stems from the exceptionality in the European context of the subjective, constitutional right of asylum enshrined in the German Constitution. It was not desired to have this right extended to all kinds of refugee groups, thus "political persecution" was narrowly interpreted.[11]

The Federal Administrative Court based its interpretation of the Refugee Convention on the argument that the objects of the Convention had been "statute refugees".[12] These refugees (in particular from the Soviet-Union, Turkey, Germany) were refugees who had suffered persecution by the state. Moreover, referring to Grahl-Madsen (The Status of refugees in International law, 1966, p. 78), the Federal Administrative Court inferred from the purpose and objective of the Convention that persecution must emanate from the State. The rupture of the connection between the refugee and his/her state is be considered as a basic feature of a refugee.[13] Moreover, the five enumerated grounds in the Refugee Convention on account of which a person is persecuted, emphasise the human features and behaviour that historically gave rise to persecution by the state. The Court argued that differing state practice is irrelevant as their jurisprudence is related to the Convention as it has been transformed into national law, thus justifying an interpretation based on national law. The Court found that no customary international law prevented the Court from interpreting the Convention as they do. No protection gap can be adduced in favour of including non-state agents of persecution in the definition of political persecution as Art 53 (6) Aliens Act provides for protection against deportation for persons persecuted by non-state agents or those fleeing from dangers of a civil war.[14]

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who afford sanctuary. See Joachim Henkel, written expert opinion delivered at the hearing of the Committee of Human Rights and Humanitarian Aid (German Bundestag) on "Non-State agents of persecution" on 29 November 1999, enclosed with Ausschussdrucksache 117, at 425. Also published in: Barwig et al. (ed.), Neue Regierung-neue Auslaenderpolitik?, Nomos, Baden-Baden, 1999.

[11] See statements of Prof. Hailbronner (at p. 105), Prof. Ress (at p. 102), Reinhard Marx (at p. 109) at the Hearing before the Committee for Human Rights and Humanitarian Aid on 29 November 1999, Minutes of the 28. Session of the Committee for Human Rights and Humanitarian Aid, 29 November 1999, Nr. 14/28.

[12] See Joachim Henkel *supra*, at 426.

[13] Ibid.

[14] Ibid.

Joachim Henkel, former Judge at the Federal Administrative Court in Berlin, criticized the above-mentioned approach by the Federal Administrative Court.[15] Henkel pointed out that there is no such element as "political" in the Convention's refugee definition, nevertheless the Federal Administrative Court reads this element into the definition. Instead of interpreting the Refugee Convention according to the Vienna Convention, the Federal Administrative Court applies the Refugee Convention according to national law.[16]

b) Persecution emanating from the State or Attributable to the State

If persecution emanates directly from state organs (police, courts etc.) these acts are attributable to the state. However, acts of state organs, who have exceeded their competences ("*Amtswalterexzesse*"), are not considered to be attributable to the state, if these incidents are confined to singular cases, if the government does not passively tolerate them and puts adequate preventive measures in place.[17] If the state, by and large, is willing to successfully combat unlawful acts of state organs, failure of the state in singular cases will not entail the attribution of the persecutory act to the state and refugee status will be denied.[18] This jurisprudence is exemplified in the assessment of claims of Sri Lankan asylum seekers.[19] Persecution by a member of the state's clergy or of the state's party is considered to be persecution by the state, if they are actually identical with the state.[20]

Whether persecutory acts by non-state agents can be political persecution, depends on, according to the Federal Constitutional Court, whether these acts can be attributed to the state, that is to say whether the state's responsibility is triggered.[21] According to the Federal Constitutional Court, persecution by private parties can be attributed to the state if the state was not willing to afford protection. In this respect the Federal Constitutional Court held that it is decisive whether the state has granted protection with the means that are at its disposal.

The Federal Constitutional Court found it to be a different case if the granting of protection exceeds the capacity and means of a certain state; beyond the means that are at the state's disposal, the state's responsibility with respect to asylum does end (and no attribution to the state can be established in favour of the applicant's claim in the asylum country). According to the Federal Constitutional Court, the basis for attributing private acts to the state relevant for the granting of asylum is not found in a state's mere claim to exercise its legitimate monopoly of power, but rather in its

[15] See Joachim Henkel *supra*, at 428.
[16] Ibid.
[17] BVerfG InfAuslR 1993, 310, 312; 1990, 21, 33.
[18] BVerwG 74, 160, 163.
[19] Eg. High Administrative Court (OVG) of Sachsen, 25 January 2000 (A 4 B 411/97). The OVG ruled that the government of Sri Lanka does not condone or tolerate torture in prisons, though in singular cases, torture might occur. The OVG found that the available figures did not show a systematic and regular application of torture, in particular with the condoning of higher officials. The OVG concluded that even if the Sri Lankan state has not succeeded in completely prevention and prosecution of all incidents under its authority, these human rights violations and torture cannot be attributed to the state of Sri Lanka.
[20] See for more details on the jurisprudence relating to *Amtswalterexzesse*, Kerstin Mueller, "*Nicht-staatliche Verfolgung – Schutzlücke im Deutschen Asylrecht?*", 4 September 2000, commissioned by the Informationsverbund Asyl (Germany).
[21] BVErfGE 80, 315.

factual realization. The Federal Constitutional Court held that if the granting of asylum is supposed to offer protection against a certain exercise of persecutory state power, it follows that the constitutional provision of the right of asylum does not provide protection from consequences arising from an anarchic situation or dissolution of state power.[22]

The Federal Administrative Court followed the Federal Constitutional Court's interpretation of the constitutional right of asylum when interpreting the Refugee Convention (Section 51 (1) of the Aliens Act is meant to implement Germany's obligations under the Refugee Convention).[23] The Federal Administrative Court elaborated further that persecution by private organisations or persons qualifies only if it can be attributed to the state in that the state supports or passively tolerates the persecution by private groups by omitting to take appropriate measures at its disposal as long as the state is in principle, able to provide protection[24].

The Federal Administrative Court held that the state's responsibility is measured by objective criteria according to its duty to protect. According to the Federal Administrative Court, effective or adequate protection is not meant to be perfect and complete. Private acts cannot be attributed to the state if the state's ability to react effectively and in a timely way is hindered by objective circumstances.[25] In the Federal Administrative Court's opinion, it suffices that the state, by and large, affords protection, irrespective of whether the state in the concrete individual case has failed to provide for protection.[26] The Federal Administrative Court explicitly noted that the need of a person for protection is not the decisive factor in determining whether a state has sufficient state structures or not (in the end the need for protection is not decisive for the eligibility for asylum.)[27] According to the Federal Administrative Court, the state's responsibility with respect to asylum law ends where the affording of protection exceeds the state's capacity, for instance in the case that the state's structures have broken down, or where a state has factually lost control of parts of its territory. If the state is generally unable to provide protection including when it attempts to do so, refugee status will be denied.[28]

Some kind of propensity to come to diverging results, in particular when ascertaining whether private acts can be attributed to the state, can be illustrated in cases of female

[22] BVerfGE 80, 315.

[23] See eg BverwG 9 C 48.92, 18 January 1994; BVerwG 9 C 34.96, 4 November 1997; BVerwG 9 C 5.98, 19 May 1998 with further references. See for a different interpretation Administrative Court Frankfurt, 29 March 1999, 9 E 30919/97.A(2) in the case of a three year old girl from the Ivory Coast claiming to be subjected to female genital mutilation upon return to her country of origin. The Frankfurt court ruled that the pre-requisites of Section 51 (1) Aliens Act were fulfilled. The court held that – contrary to the jurisprudence of the 9th Senate of the Federal Administrative Court – Section 51 (1) of the Aliens Act has a broader scope of application than Art 16 a (1) of the German Constitution and followed the jurisprudence of the European Court of Human Rights relating to non-state agents in Ahmed v Austria, 29 April 1997. It argued *inter alia* that also Art 1 (1) of the German Constitution enshrines the absolute character of the prohibition of inhuman and degrading treatment, thus interpreting Section 51(1) of the Aliens Act as also applying to acts that cannot be attributed to the state.

[24] BVerwGE 67, 269 (270); 67, 317 (318); 72, 269 (270); 74, 160 (162f.)

[25] BVerwGE 79, 79; BVerwGE 72, 269; BVerwGE 70, 232.

[26] Note here the difference to e.g. the Supreme Court of Canada decision in *Ward*, 30 June 1993.

[27] BVwerG, EZAR 202 Nr. 24.

[28] BVerwGE 95, 42 (49).

genital mutilation (FGM). With regard to the question of whether the state has granted adequate protection, the Federal Administrative Court held that it suffices that the state, by and large, affords protection, irrespective of a failure of protection in a certain individual case. As one element of political persecution is the removal or isolation of an individual out of the internal peaceful order, the Administrative Court of Oldenburg (VG Oldenburg) ruled on 1 March 2000 that FGM is not done for reasons of removing the person from the peaceful order, but rather to introduce the person into the community of fully acknowledged women of the tribe as part of an initiation rite. This case involved a Nigerian woman who claimed to be subjected to FGM upon return to Nigeria. The VG Oldenburg argued that FGM cannot be attributed to the Nigerian state as it has shown its willingness to protect the persons concerned by launching campaigns and counselling on the issue. The fact that the Nigerian state does not protect the women concerned by general repressive measures (there is no special penal repression of FGM) – which the VG Oldenburg in any case judged "doubtful as to its effectiveness"– , but instead has launched campaigns and offers counseling on the issue, can not lead to a conclusion about the unwillingness of the state to protect these women.[29] It is rather a political question by which means a state offers protection.

A few months earlier, on 27 January 2000, the Administrative Court in Wiesbaden (VG Wiesbaden) decided that such private persecutory acts can be attributed to the state and thus, granted asylum. The case involved a woman from Ivory Coast who alleged that she would be subject to FGM upon return to her country of origin. The VG Wiesbaden assumed that despite the introduction of a penal prohibition of FGM (which was enacted in the meantime), and the existence of criminal liability on account of bodily injury, the Government did not employ adequate measures to prevent FGM. This conclusion was drawn from the fact that 60 % of women have been circumcised. Furthermore a change in circumstances could not be expected as FGM is deeply rooted in traditional thinking. The VG Wiesbaden court came to the conclusion that these third party acts can be attributed to the state due to the lack of effective protection and lack of willingness (*sic*) to grant protection.

The Administrative Court of Munich[30] decided that a woman from Cameroon alleging that she would be subject to FGM upon return to Cameroon is eligible for refugee status. The Munich court concluded that despite the fact that Cameroon supported international efforts to ban FGM and the infliction of FGM could be punished under the penal law (bodily injury), that "beyond lip-service, the state of Cameroon has not undertaken effective measures to curtail FGM, be it because of indifference or be it because of political considerations."

The Administrative Court of Trier[31] argued differently. In a case involving a Nigerian girl who alleged that she would be subject to FGM upon return to Nigeria, the court of Trier concluded that: "That the state first and foremost reacts to widespread traditional

[29] According to Prof. Ress, Judge of the European Court of Human Rights, the ECtHR had established in cases of sexual abuse and child abuse in schools, that the required means with which a state is obliged under the ECHR to afford protection are measures of penal law, see Minutes of the hearing before the Committee for Human Rights and Humanitarian Aid, p. 47, and more comprehensively, in his written statement to the Committee, Ausschussdrucksache No. 141.
[30] Administrative Court of München, judgment of 2 December 1998 – M 21 K 97.53552.
[31] Administrative Court of Trier, judgment of 20 May 1999 – 4 K 1157/98.TR.

conduct of the population by launching information campaigns and counselling instead of general repressive measures, is a question as to what constitutes a useful way in terms of policy for achieving the goal [eradication of FGM]." According to country information, the state has primarily relied on information campaigns and counselling on FGM. The Court, thus, held that it cannot be concluded that the Nigerian state is not willing to protect against these private acts. These private acts cannot yet be attributed to the state if effective protection was not provided in an individual case.

c) Persecution by State-like Organisations/Civil war situations

The Federal Constitutional Court held that a pre-requisite for persecution emanating from the state or attributable to the state is effective territorial sovereignty of the state in the sense of effective territorial supremacy. Thus, the Court concluded, in cases of civil war and guerilla war in which the state *de facto* takes the part of a civil war party there cannot be political persecution as an overall effective authority to maintain order does not exist. In these cases, however, there can be political persecution, according to the Court, if the state employs methods of combat in a way that is aimed at the physical annihilation of people of the opposite factions or persons imputed to be members of the opposite party on account of one of the five relevant grounds as set out in the Refugee Convention, despite having given up resistance or despite them not being, or not being anymore, combatants. Similarly, acts of the state aimed at the physical annihilation or destruction of the ethnical, cultural or religious identity of a part of the population committed for reasons relevant to asylum are considered state persecution. [32]

This interpretation excludes from consideration for asylum the victims of persecution committed by opposition groups in civil wars, as in Algeria. It also excludes persecuted individuals from countries, such as Somalia, where civil war has disintegrated governmental authority, or from countries, such as Afghanistan. [33] It has to be kept in mind, though, that the recent decision of the Federal Constitutional Court quashed the two Federal Administrative decisions on Afghanistan. According to the Federal Constitutional Court, the question whether in a situation of a civil war after the dissolution of the state, political persecution can emanate from one of the civil warring factions, has to be assessed against the backdrop of whether at least in a "core territory" a supreme power of "certain stability" (instead of the test propounded by the Federal Administrative Court that the quasi-/state-like organisation has to rest on

[32] See BVerfGE 80, 315. It appears that this view takes into account that asylum cannot be denied with arguments that legitimise conduct contrary to international law as the prohibition of genocide as long as there is a link to one of the five grounds stipulated in the Refugee Convention. The Federal Constitutional Court argued that the state in guerrilla warfare loses its capability of acting as an overall and effective power to maintain order. Thus, according to the Federal Constitutional Court, the state's measures lose then its character of persecution relevant to asylum, even if – what is not seldom the case – they are contrary to international law, in particular the Geneva Conventions of 1949 and Additional Protocols of 1977. However, in these particular circumstances there can be political persecution, if the actions of the state security forces go beyond the measures of combating the civil war opponent in the interest of restoring the state's order of peace.

[33] Steven Edminster (U.S. Committee for Refugee Policy Analyst), Recklessy Risking Lives: Restrictive Interpretations of "Agents of Persecution" in Germany and France, World Refugee Survey 1999.

effective stability and durability) in the sense of an "overall peace order" has been de facto established.[34]

The Federal Administrative Court has had a long-standing jurisprudence on state-like/quasi-state organisations.[35] In a recent judgment by the Federal Constitutional Court this jurisprudence was not held to be in conformity with the constitutional right of asylum as the Federal Administrative Court had unduly narrowed the concept of state-like organisations (see below).[36] The decisions[37] of the Federal Administrative Court were quashed; they have to be re-considered by the Federal Administrative Court in the light of the findings of the Federal Constitutional Court.

According to this long-standing jurisprudence of the Federal Administrative Court, protection will be granted when the persecution emanates from the state or is attributable to the state.[38] No state authority can be considered to exist in the event of civil war or guerilla warfare.[39] However, persecution by a *de facto* authority that is deemed to exercise state-like powers may result in the granting of refugee status. State-like organisations can be (nearly) on the same footing as states as long as they fulfill certain criteria in order to be considered to have the power to persecute.[40]

The Federal Administrative Court further elaborated the criteria for state-like organisations. State-like organisations, which have displaced the state (emerging after a civil war) are considered to be nearly on the same footing as states. The pre-requisite for extending the right of asylum to persecutory acts by state-like or quasi-state entities is that there is stability and durability to the exercise of territorial sovereignty[41]. The Federal Administrative Court held that quasi-state or state-like is an entity or organisation that internally and externally rests on organized, effective and stable territorial sovereign power.[42] According to the Federal Administrative Court, stability, effectiveness and durability mean the capability of enforcing its power and certain organisational structures over the territory.[43] In the Federal Administrative Court's view, durability cannot be assumed as long as it is possible that conflicts contesting the territorial power of regional warlords erupt.[44] The Federal Administrative Court held that this would be the case as long as each of the rivaling civil war parties fight for power with the chance of succeeding in the entire civil war

[34] Judgment of 10 August 2000, BverfG, 2 BvR 260/98. For details see below at 2. c).
[35] See particularly, BverwG 9 C 34.96, 4 November 1997; and BVerwG 9 C 5.98, 19 May 1998.
[36] BverfG, 2 BvR 260/.98, 10 August 2000.
[37] BVerwG 9 C 34.96, 4 November 1997; BVerwG 9 C 5.98, 19 May 1998.
[38] Ibid.
[39] BVerfGE 80, 315;
[40] The criteria "power to persecute" ("verfolgungsmächtig") is, according to the Federal Constitutional Court, held to be the other side of the coin of providing protection (providing protection is the legitimate purpose of the State's existence).
[41] See Federal Administrative Court, 4 November 1997 (BVerwG 9 C 34.96 and 11.97) in the case of Afghani civil war refugees where the Court held that "as long as in a persevering civil war [as in Afghanistan at the time of the decision] the warring parties fight for the supremacy of the entire country with military means and it appears to be possible that either of the civil war factions could succeed, there is a lack of the necessary stability and durability for state-like entities in the exercise of territorial sovereignty."
[42] BVerwG 9 C 34.96, 4 November 1997; BVerwG 9 C 5.98, 19 May 1998.
[43] Ibid.
[44] Ibid.

territory.[45] As long as there are competing forces fighting for the supremacy of the entire territory, a state-like organization cannot be assumed.

The process of developing and consolidating effective and durable state(-like) structures begins when the conflict is settled to the effect that one of the parties has succeeded in gaining supremacy over the (regional) territory. According to the Federal Administrative Court, organisations can be considered as state-like when they appear to be the predecessor of new or renewed state structures. The Federal Administrative Court held that this will regularly be the case, when the civil war factions have stopped fighting for power over the entire territory with the intent to destroy the enemy; when the front-lines have stabilized over a certain longer time-period and there are fights solely in marginal areas of the territory. The Federal Administrative Court has, thus, ruled, that the Taliban do not qualify as a quasi-state organisation, nor was the situation in Somalia recognized as complying with the strict criteria of state-like organisations. In particular, the supremacy over the territory of the Taliban cannot be considered sufficiently stable and durable because the Taliban have not yet been recognised by the international community. Construing persecution by state-like entities as above means that atrocities committed shortly after taking over power are not recognized as political persecution because the state-like power lacks durability.

The Federal Constitutional Court in a recent judgment on 10 August 2000 held that the Federal Court has understood the concept of quasi-state persecution too narrowly. Its decisions[46] are, thus, not in conformity with the constitutionally granted right of asylum (Art 16 a of the German Constitution) and were quashed.[47] The Federal Constitutional Court held that the Federal Administrative Court has put too much emphasis on the requirement that the territorial (regional) power of a state-like organisation must be externally stabilised on a durable basis.

The Federal Constitutional Court said that the element of "statehood" or "quasi-statehood" shall not be contemplated as detached from the constitutional element of "political" persecution and should not be examined according to an abstract definition based on state-theory. The issue of statehood or quasi-statehood has to be assessed in relation to the question of whether a certain measure constitutes political persecution in the sense of Art. 16 a of the German Constitution. The Federal Constitutional Court emphasised that political persecution emanates from a superior, regularly sovereign power, to which the claimant of protection is subjected. Thus, political persecution is persecution by the state.

According to the Federal Constitutional Court, the question whether in a situation of a civil war after the dissolution of the state, political persecution can emanate from one of the civil warring factions, has to be assessed against the backdrop of whether at least in a "core territory" a supreme power of "certain stability" (instead of the test propounded by the Federal Administrative Court that the quasi-/state-like organisation has to rest on effective stability and durability) in the sense of an "overall peace order" has been de facto established. The Federal Constitutional Court held that the

[45] Ibid.
[46] BVerwG 9 C 34.96, 4 November 1997; BVerwG 9 C 5.98, 19 May 1998. These decision have to be re-considered in the light of the finding of the Federal Constitutional Court.
[47] BverfG, 2 BvR 260/98.

continuing military threat (in a civil war) does not necessarily exclude the existence of a state-like structure in the interior of a country. According to the Federal Constitutional Court, depending on the gravity of a military threat such a military threat can indicate that a state-like organisation has not yet been established, but it is not a constitutive element for the assumption whether a state-like organisation exists or not. The Federal Constitutional Court went on to state that the more the civil war continues without substantial change in the existing power structures, the less it can be assumed that no state-like organisation has been established.

According to the Federal Constitutional Court, it follows that the Federal Administrative Court was wrong in holding that "when the civil war factions do not fight with military means with the intent of destroying the enemy with prospects of succeeding in asserting the power in the entire territory of the civil war"[48] it is at this stage that state-like structures can be assumed.

In lower courts' cases involving Kosovo-Albanians it was argued that the Yugoslav state lost its effective sovereign supremacy over Kosovo due to the Peace Accords in June 1999. As sovereign control is exercised by KFOR, it is excluded that the KLA exerts state-like power over a confined area of Kosovo. The courts assumed there cannot be competing entities exerting state-power.[49]

It is interesting to note the link between the existence of state-like structures and the existence of an internal protection alternative. In two judgments[50] of the High Administrative Court (OVG) of Schleswig-Holstein, the court reasoned that in Northern Iraq there are no state-like structures, thus there cannot be an internal protection alternative as this concept implies the possibility of being granted state protection. However, the Federal Administrative Court decided on 8 December 1998[51] that there could be an internal protection alternative in the de facto autonomous provinces of Northern Iraq which are in part under the protection of the UN and the gulf-war allies. The question is whether the asylum seeker is sufficiently secure from being persecuted, that is to say whether there is a threat that the asylum seeker may be subject to attacks by Iraqi agents.

d) Conclusion

The Federal Administrative Court propounds the principle that private acts can only be attributed to the state if there is an element of complicity in the denial of protection against private persecution. There has to be a volitional element in that the state condones, actively supports, or simply passively does not use the means that are at its disposal to protect a person from private persecutory acts. If the state is hindered in providing protection because of objective circumstances, refugee status will be denied as the protection cannot be perfect and complete.

The departure of the German jurisprudence from state practice, in particular the jurisprudence of the Federal Administrative Court, can be best illustrated by

[48] BVErwGE 105, 306.
[49] See for instance High Administrative Court of Niedersachsen, ruling of 3 March 2000 (12 L 778/00)
[50] High Administrative court of Schleswig-Holstein, judgements of 18 February 1998, 2 L 166/96 and 2 L 41/96.
[51] BVerwG 9 C 17.98.

comparing the approach taken by the Supreme Court of Canada (SCC) case in *Ward*[52]. In *Ward* the SCC found that there is a general assumption that a state is willing and able to protect its citizens which the refugee can rebut by showing that in his/her concrete case the state was unwilling or unable to provide protection. The German jurisprudence propounds that as long as the state, by and large, is willing to protect, the failure to protect in a specific case will not harm the finding that refugee status will be denied. The asylum seeker has no opportunity to establish that in his/her case the state will not protect, as long as there is no element of volition in the failure of state protection.

The German Federal Administrative Court repudiates that a protection gap exists pointing to Section 53 (6) of the Aliens Act, whose protection does not require an intentional act by the state to refuse protection. However, Section 53 (6) of the Aliens Act only grants, on a discretionary basis, a three-month suspension of deportation, i.e. a tolerated status that does not provide for a legal residence status.[53] Moreover, Section 53 (6) does not apply if there is a general threat for the entire population in the country of origin. If the *Länder* do not order a suspension of deportation according to Section 54 of the Aliens Act (which up to now has never been applied), the person is only protected from deportation if s/he is knowingly exposed to a sure death or severest violations. The burden of proof is, thus, substantially higher than the burden of proof in the ECtHR case law ("real risk of being subjected to treatment contrary to Article 3").[54]

Reinhard Marx, a German expert in asylum law, said that his experiences with the aliens authorities showed that it is extremely difficult for "tolerated" refugees to be granted a legal residence status. Marx concluded that Section 53 (6) of the Aliens Act does not provide for adequate protection.[55] Marx suggested that in the wake of the ECtHR decision in TI v UK, Section 53 (6) of the Aliens Act has to be changed from a discretionary provision to a legal right in compliance with the absolute character of Article 3 of the ECHR.[56]

Some movement in the rather stalled jurisprudence on non-state agents of persecution might have been brought about by the recent Federal Constitutional Court's decision on Afghanistan. The Federal Constitutional Court has recently quashed the Federal Administrative Court's jurisprudence on state-like organizations. According to the

[52] Supreme Court of Canada, Ward [1993] SCJ 74.

[53] See Henkel, supra, p. 23. Joachim Henkel, former judge of the Federal Administrative Court, drew attention to the case of Ahmed. The European Court of Human Rights (ECtHR) in *Ahmed v Austria*, 17 December 1996, 71/1995/577/663) held that Ahmed's deportation would be in violation of Art 3 ECHR. While the Austrian authorities did not *refoule* him, they did not grant him a legal residence status. He was simply tolerated, his status being pending without the opportunity to be integrated into the Austrian society. Ahmed committed suicide.

[54] Interestingly, the ECtHR in T.I. v U.K., 7 March 2000, 43844/98, did not consider the threshold for asylum seekers in Germany too high: "Finally, as regards the applicant's arguments concerning the high burden of proof placed on asylum seekers in Germany, the Court is not persuaded that this has been substantiated as preventing meritorious claims in practice. It notes that this matter was considered by the English Court of Appeal and rejected. The record of Germany in granting large numbers of asylum claims gives an indication that the threshold being applied in practice is not excessively high." (at p. 22).

[55] See Minutes of the Hearing on Non-State Agents of Persecution before the Committee of Human Rights and Humanitarian Aid, held on 29 November 1999, p. 86.

[56] See Reinhard Marx, InfAuslR 2000, 313.

Federal Constitutional Court, the question of whether political persecution can emanate from one of the civil warring factions following the dissolution of the state, has to be assessed against the backdrop of whether at least in a "core territory" a supreme power of "certain stability" (instead of the test propounded by the Federal Administrative Court that the quasi-/state-like organisation has to rest on effective stability and durability) in the sense of an "overall peace order" has been de facto established.

Former "allies" who have subscribed to the accountability theory (in its extreme form of necessitating an element of complicity in the conduct of the state), such as France, Italy and Switzerland, appear to have broken away, if not in doctrine, in practice, though in a discretionary and informal way. Although France has not yet formally changed its doctrine, a certain tendency to interpret generously and widely the concept of "tolérance volontaire", in particular in some Algerian cases, has resulted in an increased recognition of refugees fleeing from persecution by non-state agents.[57]

In Italy, there is some evidence to suggest that the Italian authorities interpret 'persecution' as action by state authorities or action tolerated by state authorities.[58] However, according to the UNHCR Delegation for Italy, whose representative attends the meeting of the Central Commission on an advisory basis, in the last two years the Central Commission has demonstrated a wider and more liberal approach towards asylum seekers fleeing from non-state agents of persecution. Also some Algerian asylum seekers who had fled because of a fear of persecution from Islamic terrorists were recognised as refugees under the Geneva Convention.[59]

Germany's argument that their "hard-liner" position is justified in light of the EU Joint Position of 1996[60], is not valid.[61] Apart from its non-binding nature, the Joint

[57] See ELENA Research Paper on Non-State Agents of Persecution, updated as of autumn 2000. See also US Committee for Refugees, Country Report 1999 at www.refugees.org: "With the heightened press coverage of large-scale massacres and other violence in Algeria in 1997 and early 1998, however, France has somewhat liberalized its interpretation of agents of persecution. Certain French asylum officers and judges began to approve some victims of non-state persecution on the grounds that the Algerian authorities tolerated the persecution or because they determined that the victim's request for protection would have been in vain. One observer noted that some asylum judges had gone to great lengths to stretch the notion of "voluntary tolerance" to grant asylum to Algerians persecuted by the militant Islamic opposition, even in cases where state toleration of the persecution was not in evidence. By granting asylum to Algerian applicants who did not request their government's protection because their requests would have been in vain, French asylum officers and judges also appeared to move closer to UNHCR's position on agents of persecution, accepting the reality that the Algerian government was, in many cases, unable to effectively protect its citizens, despite its alleged willingness to do so. While viewing this as a positive development, various refugee advocates pointed out that this trend does not represent a stated change in policy, but remains informal and discretionary. Moreover, despite the changes, the overwhelming majority of Algerians continue to be denied refugee status. Approval rates for 1997 suggest that other nationalities traditionally affected by France's interpretation on agents of persecution, including Somalis, Afghans, and Bosnians, have fared better than Algerians as a result of France's more liberal approach."

[58] See ECRE, Research Paper on Persecution by Non-state Agents of Persecution, 1998, updated in 2000.

[59] Ibid.

[60] 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

[61] See eg. Prof. Hailbronner representing the German government's opinion before the ECtHR in T.I v UK.

Position can hardly be adduced as showing a consistent common state practice that favours the strict application of the "accountability theory". The European Commission Working Document "Towards Common Standards on Asylum Procedures" of 3 March 1999 acknowledged the issue of persecution by non-state agents as a "controversial feature" of the Joint Position and declared that the Joint Position has to be revised as it contains contentious issues, which will not be useful with a view to the harmonization of asylum law in the EU.[62]

Reference should also be made to research conducted by the lawyer Kerstin Mueller commissioned by the Informationsverbund Asyl (Germany). The Paper "*Nicht-staatliche Verfolgung – Schutzlücke im Deutschen Asylrecht?*", 4 September 2000, examines the jurisprudence of the Federal Constitutional Court, Federal Administrative Court and lower courts as to whether a protection gap exists with respect to refugees fearing non-state persecution. In summary, the analysis of the German jurisprudence shows that a protection gap exists in cases of non-state persecution, in which due to a tendency of a restrictive jurisprudence of the Federal Administrative Court on Sections 51 (1), 53 (4) Aliens Act, no legal protection fom *refoulement* is granted.[63] The same conclusion was drawn in relation to Section 53 (6) Aliens Act to benefit from which an extremely high standard of proof is required.[64] Kerstin Müller concludes that Section 53 (6) Aliens Act compensates only *partly* the protection gap that is opened by the jurisprudence to 53 (4) Aliens Act. Secondly, against the backdrop of the recent decision on Afghanistan and state-like/quasi-state organization of the Federal Constitutional Court, Kerstin Müller's analysis shows that the protection gap is only partly closed by the aforementioned decision and this presumably applies only rudimentarily to one of different cases constellation.

[62] See para 5 (4) "An instrument in this area will be concerned with interpretation of the refugee definition contained in Article1 of the Geneva Convention i.e. with substantive questions of who is a refugee. Issues such as persecution by non-state agents, which has been a controversial feature of the 1996 Joint Position on the harmonized application of the term "refugee" in Article 1 of the Geneva Convention, will need to be revisited in the context of this instrument."

[63] In contrast to that, see ECtHR in T.I. v U.K., supra.

[64] Section 53 (6) Aliens Act does not apply in cases where the entire population or a group of a population is generally at risk (in that case whether the persons concerned are protected from deportation depends on a political decision to stop deportation (*Abschiebestopp*)). In these cases Section 53 (6) applies only (by interpretation in conformity with the Constitution) when there is a situation of extreme danger and it is totally apparent that the refugee upon return would face certain death or severest violations (*der Fluechtling "gleichsam sehenden Auges dem sicheren Tod oder schwersten Verletzungen" ausgelieft waere*). The threshold is thus higher than the one applied to cases of state or state-like persecution. In the latter a return is only possible if there is a sufficient security (*hinreichende Sicherheit*) from persecution when the person had previously been persecuted; protection from being refouled is granted when there is a remarkable probability of persecution upon return in cases where no previous persecution took place.

3. THE PARLIAMENTARY DISCUSSION

In the last years the discussion on victims of non-state persecution focused primarily on gender-specific persecution.[65] A Conference of the Equal Treatment and Women's Affairs Ministers (of the *Bundesländer*) on 26/27 June 1997 agreed on a resolution to call on the Federal Government to ensure that certain measures are taken to the effect that gender-specific persecution is taken into account in asylum proceedings as well as to provide protection to persecuted women. Among the proposed measures was the implementation of the resolutions of the Executive Committee for the Programme of the UNHCR for the protection of women refugees, special training for asylum eligibility officers, and improvements in the asylum procedures.

A hearing on Non-State Agents of Persecution, particularly with respect to gender-specific persecution, took place before the Committee of Human Rights and Humanitarian Aid of the Lower House of the German Parliament on 29 November 1999. A number of experts on this issue were heard, among these, the German representative of the UNHCR, international lawyers and German jurists.[66]

The discussion was divided into three main strands:

1) Non-state persecution in a changing world (categories and patterns of non-state persecution; persecution on account of gender in this context; the content of state responsibility (state's obligation to protect);

2) Public International human rights law and refugee protection/ public international law discussion (how can a state comply with its duty to protect the individual and minority groups against human rights abuses when the state has not committed human rights violations?; which legal instruments are at the disposal of the international community to stop persecution by non-state agents?)

    a) International standards (Refugee Convention);

    b) European standards (ECHR and state practice; the EU);

3) Refugee protection standards in Germany; relationship between Germany's jurisprudence and international/European standards).

In summary, the majority of experts invited before the Committee were of the opinion that a restrictive interpretation such as the German, is neither adequate nor within the purpose and objective of international standards of human rights and refugee

[65] See numerous interpellations by the Greens and the PDS, for instance, *Entschlieszungsantrag (*motion for resolution) 13/10032, on the event of the deliberations of the *Grosze Anfrage* (interpellation) 13/8217, 13/9715; motion 13/9384, Entschlieszungsantrag 14/1083, interpellation 14/833.

[66] Mona Rishmawi (independent expert of the UN Human Rights Commission for Somalia, director of the International Commission of Jurists); Stephanie Farrior (Amnesty International London), Jean-Noel Wetterwald and Anja Klug (UNHCR in Germany); Prof. Tomuschat (Humboldt-University Berlin), Thomas Spijkerboer (University Nijmegen, Centre for Migration Law); Harald Loehlein (on behalf of ECRE); Prof. Ress (Judge at the European Court of Human Rights); Georg Dusch (President of the Federal Office for the Recognition of Foreign Refugees); Dr. Renner (Presiding Judge at the Administrative Court Kassel); Prof. Hailbronner (University Konstanz); Dr. Marx (Refugee and asylum law expert, lawyer); Peter Bartels (Refugee law expert of the Diakonisches Werk).

protection.[67] Emphasis was put on the individual's need for protection and the duty of states to actively protect individuals and ensure respect for their human rights against non-state agents of persecution (according to the principle of "due diligence"). At the end of the day, the individual's need for protection corresponds to failure of state protection, being the decisive aspects under which refugee claims have to be considered.[68] Attention was drawn to the blatant divergence between German state practice and state practice of other Contracting Parties to the Refugee Convention, as well as international jurisprudence, in particular the European Court of Human Rights findings in favour of the inclusion of non-state agents of persecution within the scope of protection.

It was further noted that the focus on the agent was not useful in situations where in most cases it cannot be ascertained or a precise line drawn between state and non-state persecution. It was pointed out that this divergence of interpretation causes considerable problems at the European level, in particular with respect to the application of the Dublin Convention. As the UK Court of Appeal decided to the effect that France and Germany could not be considered safe third countries due to their restrictive interpretation, endeavours as to the harmonisation of asylum law in the EU could be impaired.

In June 2000, the Minister of Interior in his response to a motion (*Entschlieszungsantrag* 14/1083) calling for a legal amendment to include gender-specific persecution as a ground for granting asylum, reiterated that persecution has to emanate from the state or be attributable to the state.[69]

[67] In fact, only the President of the Federal Office for the Recognition of Foreign Aliens and Prof. Hailbronner (who represented the government in T.I. v UK before the ECtHR) were of the opinion that German practice was in conformity with international standards and that no protection gap existed.

[68] Reinhard Marx suggested that the alleged dichotomy between the "accountability-theory" and the "protection-theory" generated by stretching them to their logical extreme, can be overcome and their essential elements easily be combined. Henkel referred to the neutral character of the granting of asylum. According to Henkel, the Refugee Convention did not mean to require an assessment of a certain state of origin's responsibility, but rather in order to avoid the granting of asylum as being perceived as an unfriendly act, one has to abstain from judging the country of origin and instead focus on the fear of the refugee.

[69] Bundesministerium des Innern, A 3 – 125 410/2b, 23 June 2000, Stellungnahme fuer die Beratung des Antrages der Abgeordneten Patra Blaess u.a. und der Fraktion der PDS, Anerkennung geschlechtsspezifischer Fluchtursachen als Asylgrund – BT –DRs. 14/1083- im Rechtsausschuss des Deutschen Bundestages.

Annex

The following is a summary of the written and oral statements of the participants of the hearing of 29 November 1999 before the Committee for Human Rights and Humanitarian Aid of the German Parliament.

1) Non-State persecution in a changing world

The first strand concerned "Non-State persecution in a changing world." Mona Rishmawi[70] emphasised the inadequacy of the requirement of the state as a criterion for persecution. To focus on the agent of persecution rather on the victim is not adequate in a world in which the sovereignty, as for instance in Somalia, Afghanistan etc. is at stake. Rishmawi points out that the central focus of human rights legislation is the protection of the victims of human rights violations. Relevant are two aspects in the context of refugee protection: the fact that a persecuted person does not enjoy protection in his/her country of origin, and the principle of *non-refoulement* when the persecuted person has fled his/her country. In the case there is no protection, several questions will arise, such as whether the persecuted person has sought the state's protection and whether protection was denied; whether the authorities who are in control of the territory knew about the violations and whether they undertook measures to protect, finally, whether the persecuted person had sufficiently objective reasons to believe that seeking protection will be ineffective. Thus, in the context of non-state agents of persecution, as for instance where the state has broken down (as in the case of Somalia), one could take the perspective that a person must have protection in his/her own country irrespective of the country's situation. Referring to the European Court of Human Rights' decision in the case *Ahmed v Austria*, Mrs. Rishmawi pointed out that the Court relied on the protection theory. In the context of gender-specific persecution, attention was drawn to the UN-Declaration on the Elimination of Violence against Women and the UK House of Lords decision in the Islam case where two Pakistani women were recognized as members of a particular social group and where the state failed to protect them.

Stephanie Farrior (Amnesty International) took the floor and pointed out that the denotation "non-state agents of persecution" is a misleading concept insofar as it alludes that states have no responsibility for protecting people of human rights abuses. Referring to various human rights instruments, Ms. Farrior emphasized the states' duty to ensure the respect for human rights, including protecting against violations by private parties. The criterion of the state as the agent of persecution is irrelevant in the determination of whether a person needs protection or not, thus advocating for the protection-theory.

2) International Standards of Human Rights and Refugee Protection

The second strand was dedicated to international standards of human rights and refugee protection. Jean Noel Wetterwald, representative of the UNHCR in Germany, reiterated UNHCR's opinion with respect to non-state agents of persecution. Failure of state protection is the central aspect in determining whether to grant protection to a refugee. Counter-arguing the German jurisprudence argument that asylum was not

[70] Independent Expert of the UN Human Rights Commission for Somalia.

meant to be granted to refugees fleeing from civil war, Mr. Wetterwald drew attention to the refugees fleeing from the breakdown of the Ottoman Empire, the Russian Zar Empire and from the Spanish Civil War, refugee mass flight movements as the backdrop against which the Refugee Convention was drafted. Referring to the principle of *non-refoulement*, the central point of the refugee regime is protection. As to recent developments in international criminal law, persecution as an element of crimes against humanity defined in the Rome Statute of the International Criminal Court is not limited to state persecution. Furthermore, the overwhelming state practice reveals that failure of state protection is the decisive criterion whereas Germany is in an isolated position with its restrictive interpretation of "political persecution".

Prof. Tomuschat pointed out that states have the duty, not only to abstain from committing human rights abuses, but also to protect against violations by third parties. As to the scope of the duty to protect, in the context of refugee law we are dealing with elementary rights, in particular the right to life and physical integrity. A point of reference in that respect can be the principle of *non-refoulement* and the principle of due diligence. In the framework of international humanitarian law, Common Article 3 of the Geneva Conventions of 1949, as well as Additional Protocol II of 1977 set out the minimum guarantees by which both parties of an internal conflict have to abide. Serious violations of these provisions are the concern of the international community as a whole and can be invoked by each single state, as the workings of the International Law Commission with respect to state responsibility make clear. Serious violations of international humanitarian law do entail individual criminal responsibility.

The line between non-state persecution and state persecutions gets more and more blurred, according to the present experts. Prof. Tomuschat in his written statements commented that "German Courts have attempted to come to differentiation [what kind of persecution is relevant for the recognition as a refugee] that are utterly irrelevant to the person concerned." Asked to clarify this point before the hearing, Prof. Tomuschat states that a clear-cut differentiation between non-state and state persecution is impossible. German jurisprudence has the illusion to clarify on a foreign country's situation by referring to expert opinion, in particular to the reports of the German Ministry of Foreign Affairs. The fact that a German judge cannot "penetrate the realities of remote countries" casts an unfavourable light to a differentiation of non-state persecution and state persecution.

Prof. Tomuschat opined that the Refugee Convention should have the opportunity, as well as the European Convention on Human Rights (the ECHR as a "living instrument"), to evolve in the light of changing circumstances; the need for protection, the individual, is the central focus point.

Anja Klug, UNHCR's expert on non-state persecution, explains that the German jurisprudence reflected the political motivation to prevent a mass influx of civil war refugees and refugees fleeing from other conflicts. The jurisprudence in the 60's and 70's did consider non-state agents of persecution relevant in the context of a failure of state protection. The turning point in this case law in the late 70's and beginning of the 80's was marked by the mass flight movements due to civil wars rather than refugees fleeing from European countries. This development to a more restrictive interpretation of the Refugee Convention was fostered by the Federal Administrative

stance to apply the Refugee Convention according to domestic interpretation rules given its transformation into domestic law.

Ms. Klug followed Prof. Tomuschat's assessment of the difficulty to draw an exact line between non-state and state persecution. To her mind, there is no point in the realm of refugee protection to deal with very difficult questions relating to public international law and partly social science. At the end of the day irrespective of the outcome of these questions determining state or non-state persecution, there is always the individual who is persecuted and without protection.

The discussion turned to European standards and state practice. Prof. Ress, Judge at the European Court of Human Rights, pointed out at the start that a certain differentiation between state and non-state persecution is already envisaged in the system of the ECHR as complaint can only be brought before the Court against states. Prof. Ress then outlined the case law with respect to non-state agents coming to the conclusion that it is amply accepted that states are also responsible for acts committed by private parties. The Convention requires states to protect *effectively* against non-state actors by providing for criminal sanctions against the offenders.[71] The Convention thus imposes a duty on states to actively act to ensure the rights and freedoms set out in the Convention.[72] Ress pointed out that sometimes, in particular, in cases against Turkey, it was impossible to ascertain whether the persecution emanated from state or non-state agents. Ress drew attention to the case *Tanrikulu v Turkey* which was decided on 8 July 1999, where it could not be established from which source the persecution emanated.

Ress elaborated on the case law with respect to the duty of states not to expel a person on account of Art 2, 3, 4 of the Convention. Regarding the criticism by the German Federal Administrative Court, (which applies Art 3 of the Convention only with respect to state agents of persecution), that the European Court extended far beyond its judicial mandate the scope of Art 3 to include cases of general danger, such as to situations in civil wars, civil strife or a climate of general violence, Ress refers to the case of *Vilvarajah et al. v the United Kingdom*. In this case the European Court pointed out that aliens who flee from a civil war, civil strife or a climate of general violence cannot invoke the rights in Art 3 if they are not victims of ill treatment which is personally aimed at them (" A mere possibility of ill treatment, however, …, is not itself sufficient to give rise to a breach of Art 3."). In *Chahal v United Kingdom*, the Court considered the failure of state protection to be the decisive factor for the attribution to the state of an illegal conduct.

Thomas Spijkerboer[73] drew attention to the UK Court of Appeal decision *Aitseguer et al* where the Court held that France and Germany cannot be considered safe third countries due to their restrictive interpretation of the refugee definition. Spijkerboer pointed out that seen from this perspective, the difference in the state practice is very problematic.

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[71] Ress cites for instance *X and Y v The Netherlands*, judgment of 26 March 1985, Series No. 9; *Stubbings, J.P. and D.S v United Kingdom*, judgment of 22 October 1996, Reports 1996-IV, No 18.

[72] Ress cited the land mark decision in the case *Marckx* of 13 June 1976 (Series A No 31); *McCann v Unted Kingdom*, judgment of 21 December 1994, Series A, No 324; *Kaya v Turkey*, judgment of 19 February 1998.

[73] University Nijmegen, Centre for Migration Law.

Harald Loehlein [74]drew attention to the exceptional isolation of Germany in the application of a very restrictive accountability theory, as state practice in other European and non-European states advocates the inclusion of non-state agents of persecution. According to Loehlein. even those states, such as Switzerland, Italy and France who apply a restrictive interpretation are much more generous in the de facto application of the law insofar as the existence of quasi-state structures is much more easily acknowledged and thus state accountability established. The consequences of this isolation would be that Germany is not considered as a safe third country, as the UK Court of Appeal has found with respect to the application of the Dublin Convention. Loehlein argued that the core of the entire system of the Dublin Convention as well as the future of a harmonized asylum policy in the EU is put into question. Germany would have to change its state practice if a comprehensive interpretation of the Geneva Convention as a foundation of a future asylum policy in the EU were to be realized.[75]

3) Germany's standards of refugee protection

The third strand was dedicated to Germany's standards of refugee protection. The President of the Federal Office for the Recognition of Foreign Aliens basically outlined the German jurisprudence and concluded that no protection gap existed in the German system as Section 53 (6) of the Aliens Act provides for protection of those persons who flee from civil war, civil strife situations and as well from persecution by non-state agents where these acts cannot be attributed to the state.

Dr. Renner, Presiding Judge of the Administrative Court of Kassel, highlighted the differentiation between state and non-state persecution as interpreted by the German Courts. However, with regard to the protection by virtue of Section 53 (6) Aliens Act (discretionary protection), Prof. Renner stated that this last resort provision under which cases of existential dangers are recognized, is restricted to very exceptional cases. Prof Renner pointed out that "when looking at the single cases of the jurisprudence, for instance cases of sick and starving children, one comes to the conclusion [that this provision is applied in a spirit] of coincidence and inhumanity." Prof. Renner came to the conclusion that this narrow interpretation is barely comprehensible.

Prof. Hailbronner conceded that the majority of state practice favour inclusion of non-state agents of persecution ("a certain tendency of a perhaps majority interpretation" [with respect to acknowledging non-state agents of persecution]); however, he pointed out that the Joint Position of the Council of the EU is an important reference point with a view to determining international practice. According to Prof. Hailbronner, it can be inferred from the Joint Position that state accountability was explicitly mentioned as a pre-requisite for persecution in accordance with the Refugee Convention as *one* possible interpretation of the Refugee Convention. He concluded

[74] Representative of ECRE.

[75] In fact, the European Commission in its Working Document "Towards Common Standards on Asylum Procedures" of 3 March 1999 declared that the Joint Position on the harmonized application of the definition of the term 'refugee' of 1996 has to be revised as it contains some contentious issues, among which the issue of non-state agents of persecution, which will not be conducive to the harmonization of asylum policy in the EU.

that the Joint Position reflected the legal position of the German Federal Administrative Court. Prof. Hailbronner considered a teleological aspect as well as state practice as important. As to the object of the Convention, the need for protection, the decisive and central question is how and with what appropriate instruments the need for protection can be taken into account, rather than focusing on a supposedly correct interpretation. He suggested that it is rather a question of policy than the law what instruments do correspond to the need for protection. With regard to female genital mutilation, Prof. Hailbronner referred to the duty of the state to protect these women, thus to the accountability of the state for private persecutory acts. In any event, these women will be granted the protection under Section 53 (6) of the Aliens Act, though without the entitlement of the rights afforded under Art 16 a (1) Basic Law. Prof. Hailbronner drew attention to the fact that in addition to Section 53 (6) Aliens Act, there are alternative protection mechanisms that one should take into account instead of pointing to the German isolation. When comparing different state practice one should also take notice of a direct correlation between the amount of asylum seekers and asylum policy. Hailbronner referred to the Court of Appeal's judgments and alluded that it was somehow easy to have such a [liberal or extended] jurisprudence if a country like the UK has only had to deal with a far fewer amount of asylum seekers for years in relation to Germany.

With regard to the question whether the Refugee Convention encompasses protection against non-state agents, Reinhard Marx (lawyer and German expert in refugee law) emphasizes the need to look into states' practice (in reference to Art. 31 (3) b) Vienna Convention) as wording and legislative history remains unproductive for the interpretation of the refugee definition. State practice shows that refugee status is granted when a state is unable to afford protection or when persecution emanates from de facto authorities. Marx comes to the conclusion that the Contracting Parties to the Refugee Convention do refer primarily to the responsibility of the state of origin or of established local or regional de facto authorities. Marx suggested the transfering of the principle of international law, that is to say liability or state responsibility according to international law, to refugee law. Marx elaborated that international refugee law purports to fill in the protection gap that stems from the lack of diplomatic protection as a consequence of persecution by transposing diplomatic protection from the state where persecution originated to the state of asylum. According to the international law, as enshrined in Common Art 3 of the Geneva Convention of 1949, the decisive question under which the individual need for protection is to be assessed is the effective granting of protection by a de facto authority that is in control of a certain territory. According to international law, an organization can be considered to be liable for violations of international law, when they are able to effective enforce orders in the interior of the territory they control.

Reinhard Marx pointed out that in the case of civil war refugees, it has to be individually determined whether a person has a well founded fear of persecution. Marx suggested to center the discussion on the changes of human rights protection mechanisms. Whereas in the years 1989-1991 before the focus was on protecting *against* the state, the issue now is how to define protection *by* the state and the possible repercussions, in particular with a view to asylum law. Marx considered it necessary to differentiate between two constellations: the first case being the yet existing state that, however, is unable to provide protection, the second case being the state in the process of dissolving or yet completely dissolved state. In the first case,

referring to the differentiation between protection theory and accountability theory, Marx pointed out that the dualism between these theories can be overcome. The Canadian jurisprudence, for instance presumes that the state, in principle, is willing and able to protect. The asylum seeker can rebut this presumption by presenting his/her individual case. However, the German jurisprudence creates this dissent between the two theories by not taking into account the failure of state protection in an individual case as long as the state, by and large, can be deemed willing to protect irrespective of the individual failure to provide protection. The accountability theory stems from international (aliens) law which cannot be interpreted without taking the individual's human rights into account.

In the second case, where the state has broken down and de facto authorities have substituted the state, German jurisprudence applies very strict criteria for acknowledging a state-like authority in order to attribute persecutory acts in accordance with German's approach to accountability. Marx made the criticism that it is totally unclear from an international law perspective on what concept these criteria for state-like entities are based on. Instead of taking up developments in international law that do acknowledge de facto authorities for attributing international rights and obligations, the German jurisprudence focuses on durability and effective supremacy.

With regard to Section 53 (6) Aliens Act to which the German jurisprudence refers as the last resort to close a possible protection gap, Marx considered this to be an illusion and concluded that Section 53 (6) is not an adequate substitute for persons that fall outside the scope of a state-centered jurisprudence. Marx pointed out that it is extremely difficult for persons who are tolerated by virtue of Section 53 (6) to get a residence permit.

Peter Bartels, expert in refugee matters of the *Diakonische Werk*, drew attention to the de facto protection gap by narrow application of Section 53 (6), in particular for civil war refugees. [76]

[76] It is interesting to note in this context that the European Court of Human Rights in the case T.I. v U.K., supra, concluded that Article 53(6) of the German Aliens Act would meet the gap in protection left by Germany's exclusion of non-state agents of persecution and which Germany promised would be applied to the applicant. In the wake of the judgment, the German Government contended to have counter-argued the critics who spoke of a protection gap in the German system. See in that respect Kerstin Mueller's research, supra.