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RESEARCH PAPER ON

NON-STATE AGENTS OF PERSECUTION

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SUR LES REFUGIES
ET LES EXILES

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1. INTRODUCTION

This paper examines the recognition given in international and (selected) national jurisprudence on asylum to the interpretation that persecution, under Article 1A of the 1951 Geneva Convention relating to the Status of Refugees, may relate to action, not only by the State but also by non-state agents or third parties. This paper aims to set out the positions of the UNHCR, the European Union, the European Court of Human Rights (in relation to Article 3 of the European Convention on Human Rights) and selected academicians on asylum. The position of ECRE is also outlined. The materials were originally compiled during 1997 and 1998 and were updated in autumn 2000.

Neither the 1951 Geneva Convention nor the *travaux préparatoires* are explicit with regard to the interpretation to be given relating to the source of the persecution feared by a refugee. When dealing with the issue of non-state agents of persecution, courts have identified four situations:

- a) Persecution is carried out by non-state agents, and instigated, condoned or tolerated by the State (the State is unwilling to protect, thus being an accomplice of the persecutors): state practice is uniform in granting refugee status in such situations.
- b) Persecution by quasi-states or de facto authorities who have gained control over the whole or part of the territory: in spite of the fact that courts have elaborated different criteria for a group to become a de facto authority, there is uniform practice in acknowledging de facto authorities as relevant agents of persecution.
- c) Persecution is carried out by non-state agents of persecution, against which the state is willing but unable to provide protection: in these situations, state practice lacks uniformity. The expression of the conceptual difference in approaching these situations is sometimes referred to as either the “accountability-view”, or the “protection-view”.¹
- d) Persecution is carried out by non-state agents of persecution in situations of a total collapse of the governmental power where there are no state authorities left at all that could provide protection against persecution: Some courts argue that there cannot be persecution without a functioning state (e.g. the German Administrative Court), whereas other courts grant refugee status also in these situations.

It should be noted here that the issue of non-state agents of persecution is somewhat limited to the Western European practice only. As Prof. Hathaway noted: “The two main characteristics of the [1951] Convention refugee definition are its strategic conceptualization and its Eurocentric (in particular, Western European) focus.”² A wider approach is envisaged in Article I (2) of the Organization of African Unity

¹ Courts adhering to the accountability-view, such as German courts, require that the persecution must be attributable to the state, insofar as the failure of state protection is deliberate; in other words, when the state appears in one way or the other as an accomplice by tolerance or inertia insofar as the state is unwilling to provide protection. In contrast, the “protection-view” emphasises the purpose of the Refugee Convention to provide victims of persecution with international protection where the state is unwilling or unable to provide protection.

² The Law of Refugee Status, James Hathaway, Butterworths, 1991, at page 6.

(OAU) Convention governing the specific aspects of refugee problems in Africa³ which states:

“The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

Similarly, the definition set out in the Cartagena Declaration of the Organization of American States⁴, adopted by ten Latin American in 1984, extended protection to

“...persons who have fled 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.”⁵

ECRE would like to acknowledge the generous contributions of the ELENA National Coordinators and the work of Claudia Reinprecht in up-dating this paper. This paper has been drafted with significant reference to the publications “Who is a Refugee? A Comparative Case Law Study”⁶ and “Persecution by Third Parties” – a research paper commissioned by the Research and Documentation Centre of the Ministry of Justice of The Netherlands⁷. Further information has been obtained from the UNHCR website⁸ and “Judicial Interpretation of Refugeehood: a Critical Comparative Analysis with Special Reference to Contemporary British, French and German Jurisprudence” by Nicholas Sitaropoulos. Detailed information on asylum procedures in Western European Countries can be obtained from the publication by Fabrice Liebaut, Legal and Social Conditions for Asylum Seekers and Refugees in Western Europe, Danish Refugee Council, May 2000. A useful resource for country information is the Country Reports published by ECRE.⁹ Information has also been drawn from the ECRE Documentation Service. A substantial part of the research regarding the case law for this paper has been carried out on the internet. In the annex, we have listed the relevant websites to search for national and international case law.

³ U.N.T.S., 14, 691, entered into force 20 June 1974.

⁴ See Annual Report of the Inter-American Commission on Human rights 1984-85, OEA/Ser.L/II.66, doc. 10, rev.1, at 190-193.

⁵ Conclusion 3 of the Cartagena Declaration. The definition was approved by the 1985 General Assembly of the OAS.

⁶ Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann and Carlos Peña Galiano (Eds.), Kluwer Law International, 1997.

⁷ Ben Vermeulen, Thomas Spijkerboer, Karin Zwaan, Roel Fernhout (researchers), University of Nijmegen, Centre for Migration Law, May 1998.

⁸ www.unhcr.org/refworld/.

⁹ Both publications are available at www.ecre.org.

2. UNHCR'S POSITION

2.1. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ¹⁰

The UNHCR Handbook is not binding on states, but courts have referred to it as an instrument for guidance.¹¹

Paragraph 65 of the UNHCR Handbook states:

“Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbors. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”

Paragraph 98 is also of relevance for the purposes of this paper:

“Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.”

2.2. UNHCR Overview of Protection Issues (1995)¹²

UNHCR elaborated its viewpoint on the issue of non-state agents of persecution in September 1995 (the following are quotes from the above mentioned paper):

According to Article 1A of the 1951 Convention, the decisive criterion for refugee status is that an individual having a well-founded fear of persecution is “unable or, owing to such fear, is unwilling to avail himself of the protection” of his country of origin. Thus the essential element for the extension of international protection is the absence of national protection against persecution, irrespective of whether this absence can be attributed to an affirmative intention to harm on the part of the state. A situation in which the state is incapable of providing national protection against

¹⁰ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1979, HCR/IP/4/Eng/REV.1 Reedited January 1992, Geneva (thereinafter the “UNHCR Handbook”).

¹¹ See e.g. the U.K. House of Lords in *Islam v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] UKHL 20 (25 March, 1999).

¹² An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR, European Series, September 1995. An updated UNHCR position is expected at the end of 2000.

persecution by non-government agents clearly renders the individual unable to avail himself of the protection of his country of origin. This is also the case, a fortiori, when non-recognised entities exercise de facto authority over a part of the national territory.

It has been evidenced on several occasions that persecution, including threats to life, liberty and security of the person, is not perpetrated solely by agents of the state. Persecution that does not involve direct or indirect state complicity is still persecution. Thus, it is not inherent in the nature of persecution itself that it should emanate from the state or be imputable to it.

There is nothing in the wording of Article 1A of the 1951 Convention to indicate that persons who fear persecution otherwise than by – or with the complicity of – state authorities should be excluded from refugee status. Article 1A of the 1951 Convention does not, in fact, address the questions of the authors of persecution when determining a claim to refugee status. Thus, the interpretation that only persecution perpetrated with the direct or indirect complicity of the state justifies a claim to refugee status would be adding a condition to the refugee definition which cannot be found in the wording of Article 1A itself.

The general principles of interpretation, as codified in Article 31 of the Vienna Convention of the Law of Treaties, require a treaty to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. The ordinary meaning of the term "persecution" as explained above is that it embraces all persecutory acts irrespective of whether or not the complicity of the state is involved. Moreover, the object and purpose of the 1951 Convention is to ensure that individuals who have a well-founded fear of persecution on the grounds enumerated in the Convention be granted international protection as a substitute for the, lacking, national protection. Having regard to these considerations, a restrictive interpretation according to which individuals fleeing from threat of persecution by non-state agents would be excluded from refugee status would be clearly contrary to the object and purpose of the 1951 Convention.

It is also appropriate to mention the Preamble to the 1951 Convention which stresses the importance of human rights in the refugee context. In view of this, it would be contrary to the object and purpose of the 1951 Convention to exclude from its scope persons exposed to the danger of persecution. Finally, there is no indication in the *travaux préparatoires* to the 1951 Convention that the authors of that instrument intended to impose a requirement that a well-founded fear of persecution must emanate from the government or those perceived to be acting in its interest. On the contrary, it is clear from the *travaux préparatoires* that the definition of a refugee in Article 1A was meant to be given an inclusive rather than a restrictive interpretation.

Hence, the position of UNHCR ... is that denial of refugee status to persons fleeing persecution by non-government agents, who have no link with the state and whose activities the state is unable to control, has no foundation in the 1951 Convention. Clearly, the letter, object and purpose of the Convention would be contravened and the system for the international protection of refugees would be rendered less effective if it were to be held that an asylum seeker should be denied protection unless a state could be held accountable for the violation of his/her fundamental rights by a

non-governmental actor. It is thus essential that international protection is extended to such refugees and that the principle of *non-refoulement* is fully respected.

2.3. Opinion of UNHCR regarding the question of “non-State agents persecution”, as discussed with the Committee on Human Rights and Humanitarian Aid of the German Parliament (Lower House) on 29 November 1999

UNHCR reiterated in its opinion before the Committee on Human Rights and Humanitarian Aid of the German *Bundestag* that an interpretation of the refugee definition according to the Vienna Convention of the Law of the Treaties supports the view that persecution is not limited to acts of state agents. Rather it can be properly deduced from the wording, the origins, the ordinary meaning given to the term persecution, as well as the purpose and object of the Refugee Convention in the light of the drafting history, that the Convention affords protection irrespective of whether the persecution is by State or non-State agents. In UNHCR’s opinion, the crucial factor in the interpretation of the term refugee is the ability of the person concerned to avail him/herself of the protection of the State.¹³ “The Convention could ... 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. (...) 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’.”¹⁴

Pointing to developments in the protection of human rights, reference is made to the unconditionality of the *non-refoulement* principle as acknowledged by rulings of the European Court of Human Rights (see below) and enshrined in numerous other human rights treaties. It is argued that the UN Committee against Torture for the first time affirmed in proceedings against Australia (see below) the applicability of the *non-refoulement*- principle under the Convention against Torture to entities other than the state (de facto authorities). The UNHCR further pointed out that Germany was among the “like-minded” states to promote a fair and effective International Criminal Court whose statute was adopted in Rome in July 1998. The Rome Statute of the International Criminal Court 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.¹⁵ States involved in the drafting of the statute 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

¹³ See Opinion of UNHCR regarding the question of “non-State agents persecution”, para 12: “Reference [in the refugee definition] 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.”

¹⁴ Ibid, at para 13.

¹⁵ Article 7 (h) of the Rome Statute of the International Criminal Court (ICC). See for the Statute and more information on the ICC www.iccnw.org.

refuse to acknowledge an offence of persecution under refugee law and deny the victims reasonable international protection.”¹⁶

With regard to the “accountability-view”¹⁷ (to which Germany and, somehow modified, France adhere), the UNHCR argued that

“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.”¹⁸

“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.”¹⁹ “(...) Article 33, paragraph 1, of the 1951 Convention speaks of ‘territories’ where a refugee is threatened and not of ‘States’ which threaten refugees.”

3. POSITION OF THE EUROPEAN UNION (MEMBER STATES) AS REGARDS PERSECUTION BY NON-STATE AGENTS (THIRD PARTIES)²⁰

On 4 March 1996, the European Union Member States adopted a Joint Position on the harmonized application of the definition of the term ‘refugee’.²¹ Point 5.2. of this Position, which is not legally binding, states:

¹⁶ See Opinion of the UNHCR regarding the question of “non-State agents persecution”, supra, para 18.

¹⁷ The “accountability view” 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” regards inability to obtain State protection as the decisive criterion.

¹⁸ See Opinion of UNHCR, supra, para 22.

¹⁹ Ibid, para 10.

²⁰ See for a more detailed analysis on the EU asylum policy, ECRE Tampere Dossier. A Compilation of Non and Inter-Governmental Observations on the Special Meeting of the European Council on the Establishment of an Area of Freedom, Security and Justice, 15/16 October 1999, Tampere, Finland and a selection of Presentations made at the “ECRE EU Tampere Summit Parallel Meeting”, June 2000; Joint publication of ECRE, European Network Against Racism (ENAR), Migration Policy Group (MPG), Guarding Standards – Shaping the Agenda (Analysis of the Treaty of Amsterdam and Present EU-Policy on Migration, Asylum and Anti-Discrimination, updated version May 1999; Position on the Enlargement of the European Union in Relation to Asylum, September 1998; Position on the Functioning of the Treaty of the European Union in Relation to Asylum Policy, update March 1997; Note from the European Council On Refugees And Exiles on the Harmonisation of the Interpretation of Article 1 of The 1951 Geneva Convention, June 1995; EU Policy on Minimum Guarantees for Asylum Procedures: NGO’s Shared Concerns, January 1995, available at www.ecre.org.

²¹ 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.

“Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law.”

This position excludes those cases where the state authorities are unable to provide protection or unintentionally fail to provide protection. In other words, it reaffirms the position taken by a small number of European Union States that persecution must be imputable, either directly or indirectly, to the State. It, thereby, opposes the view of refugee law as a response to the failure of national protection whilst at the same time endorsing the grant of complementary forms of protection.²²

Sweden publicly disagreed with this position. The above paragraph of the Joint Position was subject to a unilateral ‘Statement’ by the Swedish delegation:

“In relation to the question of origins of persecution, Sweden is of the opinion that persecution by third parties falls within the scope of the 1951 Geneva Convention where it is encouraged or permitted by the authorities. It may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection”.

The European Parliament (EP) in its “Resolution on the harmonization of forms of protection complementing refugee status in the European Union” noted that the main effect of the Joint Position is to validate a restrictive interpretation of the Geneva Convention. The EP reaffirmed “that the Geneva Convention must apply also to persons who are persecuted by non-state agents in cases where the state itself is incapable of protecting its own citizens.”²³

UNHCR considered the Joint Position serious enough to warrant a press release “UNHCR expresses reservation over E.U. asylum policy”, 27 November 1995. In this update, UNHCR stated,

“UNHCR’s main concern is that the E.U. Position will allow states to avoid recognizing as refugees people persecuted by ‘non-state agents’ – such as rebel groups or extremist organizations. This interpretation creates an anomalous situation in which someone targeted by the government in a civil conflict could gain asylum abroad, but not an equally innocent civilian persecuted by the opposition, as has been the case with many Algerians. If governmental authority collapses altogether – as happened recently in Somalia or Liberia – no one might qualify for refugee status.”

On the issue of civil war and other internal or generalised armed conflicts, Point 6 of the E.U. Joint Position notes:

²² See ECRE Position Papers on the Interpretation of Article 1 of the Refugee Convention, September 2000, and ECRE Position Paper on Complementary Protection, September 2000, both available at www.ecre.org.

²³ A4-0450/98, 10 February 1999, at p. 5.

“Reference to a civil war or internal or generalised armed conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status. Fear of persecution must in all cases be based on one of the grounds in Article 1A and be individual in nature. “In such situations, persecution may stem either from the legal authorities or third parties encouraged or tolerated by them, or from de facto authorities in control of part of the territory within which the State cannot afford its nationals protection.”

It has to be noted here that the U.K. Court of Appeal in *Adan* in 1999²⁴ and the Dutch *Rechtseenheidskamer* in 1998²⁵ did not accord any importance to the Joint Position.

In July 1998, Austria, then the holder of the EU’s presidency, submitted a “Strategy Paper on Immigration and Asylum policy” for adoption as common EU policy.²⁶ The author, Mr. Matzka, suggested a move away from the Geneva Convention in cases of civil war, inter-ethnic conflicts and persecution by non-State agents.²⁷ The EU-member states backed off, rejecting the Austrian proposal in September 1998 as widespread protest throughout Europe arose.²⁸

The European Commission Working Document “Towards Common Standards on Asylum Procedures” of 3 March 1999 declared that the Joint Position has to be revised, in particular as it contained contentious issues which will not be useful with a view to the harmonization of asylum law in the EU.²⁹

On 15 and 16 October 1999, the Heads of States of the 15 European Union Member States met in Tampere, Finland, to discuss the establishment of an area of Freedom, Security and Justice. The Presidency Conclusions of Tampere, European Council 15, 16 October 1999 (“Towards a Union of Freedom, Security and Justice: The Tampere Milestones”)³⁰ stated the following: “4. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity.” “13. The European Council reaffirms

²⁴ See Court of Appeal, *R v. Secretary of State for the Home Department, ex parte Adan et al.*, [1999] EWCA 3340, 23 July 1999. See also for the case and a comment on the implication of the decision, also in relation to the harmonisation of asylum in the EU, by Guy Goodwin-Gill, *International Journal of Refugee Law*, Vol. 11, No. 4, 1999, pp. 702-737. (below at chapter 8.13); on the web: <http://www.bailii.org/ew/cases/EWCA/1999/3340.html>.

²⁵ See *Rechtseenheidskamer*, 27 August 1998, AWB 98/3068 en AWB 98/3072 (below at chapter 8.9)

²⁶ Presented to the K.4 Committee (on Justice and Home Affairs issues) of senior officials in the Council of European Union on 1 July 1998.

²⁷ The paper further suggested “whether a new approach should not include steps harking back to the beginnings of the development of asylum law when the affording of protection was not seen as a subjective individual right but rather as a political offer on the part of the host country”.

²⁸ ECRE Documentation Service (Brussels developments) December 1998 and February 1999. See also *Migration News Sheet*, October and November 1998 and January 1999.

²⁹ See the European Commission Working Document “Towards Common Standards on Asylum Procedures” of 3 March 1999, at para 5 (4) “An instrument in this area will be concerned with interpretation of the refugee definition contained in Article 1 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”.

³⁰ Available at <http://presidency.finland.fi>.

the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*.”³¹

In March 2000, the European Commission developed a "Scoreboard for monitoring the setting up of the Area of Freedom, Security and Justice" to track member countries' adoption of the legislation needed to achieve a common approach to immigration, asylum and cross-border crime. The EU plans to have a unified set of asylum and immigration policies by 2004.³² As regards the asylum-related initiatives, these follow the provisions of Article 63 of the Amsterdam Treaty and the elements of the common asylum system, as identified in the Tampere Summit Conclusions. The Commission expects to prepare most, if not all, of the asylum proposals. The "Scoreboard" is based on the deadlines set by the Amsterdam Treaty (five-year period), the 1998 Vienna Action Plan (short- and medium-term priorities) and the Tampere Council Conclusions (for instance, regarding a Commission Communication on a common asylum procedure and a uniform status for those who are granted asylum by the end of the year 2000 – Tampere Conclusion no. 15). A full European Council debate assessing progress in developing the area of freedom, security and justice will take place at the end of the Belgian Presidency in 2001.³³

4. RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. The jurisprudence of the European Court of Human Rights (ECtHR) has held that the responsibility of the Contracting Party is engaged under Article 3 ECHR when the state fails to provide adequate protection against action by non-state agents.³⁴ Article 3 ECHR provides an

³¹ See ECRE Tampere Dossier. A Compilation of Non and Inter-Governmental Observations on the Special Meeting of the European Council on the Establishment of an Area of Freedom, Security and Justice, 15/16 October 1999, Tampere, Finland and a selection of Presentations made at the “ECRE EU Tampere Summit Parallel Meeting”, June 2000, available at www.ecre.org. See also ECRE Documentation Service (Brussels Developments), November 1999.

³² See ECRE Documentation Service (Policy Developments), May 2000. For an analysis of the Treaty of Amsterdam and Present EU Policy on Migration, Asylum and Anti-Discrimination, see *Guarding Standards – Shaping the Agenda*, updated version May 1999, joint publication by the European Council of Refugees and Exiles (ECRE), European Network Against Racism (ENAR) and the Migration Policy Group (MPG), available at www.ecre.org.

³³ See ECRE Documentation Service (Brussels Developments), January 2000.

³⁴ The jurisprudence of the European Court has recognised the liability of States Parties to the ECHR for violations of Convention rights committed by private persons. In *Costello-Roberts v United Kingdom*, Application No. 00013134/87, 25 March 1993, the Court found that the state has a positive obligation to secure the Convention rights, concluding that the state cannot absolve itself from the responsibility by delegating its obligation to private bodies or individuals. See for the precedent setting case concerning positive duties of the states, *Marckx*, Application No. 00006833/74, judgment of 13 June 1976. For more on the positive obligations and the required system for protecting and ensuring Convention rights, see also *X and Y v the Netherlands*, Application No. 00008978/80, 26 March 1985; *Stubbings, J.P. and D.S v United Kingdom*, Application Nos. 00022083/93; 00022095/93, 22 October 1996; *McCann v United Kingdom*, Application No. 00018984/91, 27 November 1995, *Kaya v Turkey*,

absolute guarantee and States are bound to protect individuals within their jurisdiction even if the ill-treatment is likely to take place outside the Contracting State.³⁵ In the case of *Soering v. the United Kingdom*³⁶, the Court, in a unanimous judgment, held that it would be contrary to Article 3 for a Party to the Convention to return an individual to another State “where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”. This position, that expulsion by a Contracting State may give rise to an issue under Article 3 ECHR, has subsequently become well established in the case law of the Court.³⁷

However, what is interesting for the purposes of this paper is that liability under the Convention does not fall on the government of the country to which it is planned to expel the applicant. An applicant may not be expelled if s/he risks any form of ill-treatment contrary to Article 3, whether that ill-treatment is likely to be by state-agents, private groups e.g. insurgents or criminals or, in exceptional circumstances, a lack of adequate medical facilities. In other words, it is irrelevant whether the source of the action prohibited by Article 3 is a state authority or a non-state agent. The failure of state protection in the country where the claimant faces a real risk of ill-treatment, including lack of state authority to protect (e.g. Somalia), is the constitutive element in this respect.³⁸ This point is illustrated by the following cases, which have come before the Court.

4.1. Ahmed v. Austria (71/1995/577/663), 17 December 1996

Mr. Ahmed, a national of Somalia, arrived in Austria on 30 October 1990 and applied for asylum on 4 November 1990. He was recognised as a refugee under the 1951 Geneva Convention on 15 May 1992. In August 1993, Mr. Ahmed was sentenced by the Graz Regional Court to two and a half years’ imprisonment for attempted robbery. His refugee status was withdrawn following the conviction and the proposed expulsion of Mr. Ahmed was declared to be lawful on the grounds that he constituted a danger to the community. The Austrian government argued that he could be sent back to Somalia because Ahmed did not fear governmental persecution but torture and death by a designated clan. Somalia was ravaged with civil war following the overthrow of President Siyad Barre. On appeal, this decision was overturned as

Application No. 00022729/93, 19 February 1998. All cases can be retrieved from the HUDOC case law search at www.echr.coe.int.

³⁵ For further details, see *Prohibition of Refoulement: The Meaning of Article 3 of the European Convention on Human Rights* by Clare Ovey, Lawyer at the European Court of Human Rights, in the ELENA report from the International Course on the European Human Rights Convention in relation to Asylum, May 1997. See also *The Concept of Inhuman and Degrading Treatment in International Law and its Application in Asylum Case*, by Alberta Fabbriotti, *International Journal of Refugee Law*, Vol. 10, No. 4, 1998, pp. 637-661.

³⁶ *Soering v UK*, Application No. 00014038/88, 7 July 1989.

³⁷ *Cruz Varas and Others v. Sweden*, (46/1990/237/307), 20 March 1991; *Vilvarajah and Others v. United Kingdom*, (45/1990/236/302-306), 30 October 1991; *Chahal v. United Kingdom*, (70/1995/576/662), 15 November 1996.

³⁸ See for further details, Walter Kälin, *Tragweite und Begründung des Abschiebungshindernisses von Art. 3 EMRK bei Nichtstaatlicher Gefährdung*, in: Kay Hailbronner/Eckart Klein (ed.), *Einwanderungskontrolle und Menschenrechte - Immigration Control and Human Rights*, Heidelberg 1999, pp. 51 - 72; see also W. Kälin, *The Impact of the Prohibition of Inhuman Return upon Refugee Status Determination*, UNHCR “14th San Remo Refugee Law Course”, November 1998.

there was found to be a risk of persecution and the expulsion was stayed for a renewable period of one year.

The Court began by restating its case law that Contracting States had the right to control the entry, residence and expulsion of aliens and that there is no right to asylum in the European Convention on Human Rights or any of its Protocols.

“However, the expulsion of an alien by a Contracting State might give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implied the obligation not to expel the person in question to that country”.

The Court held that “for as long as the applicant faces a real risk of being subjected in Somalia to treatment contrary to Article 3 of the Convention there would be a breach of that provision in the event of the decision to deport him there being implemented.” Importantly, it noted that this conclusion was not “invalidated by ... the current lack of State authority in Somalia.” The fact that “[t]here was no indication (...) that any public authority would be able to protect him” was, on the contrary, regarded as one of the decisive factors.³⁹

4.2. H.L.R. v. France (11/1996/630/813), 29 April 1997

The case H. L. R. v. France involved a Colombian national who alleged that France’s expulsion of him back to Colombia would be in breach of Article 3 ECHR. The applicant had been found guilty of smuggling a prohibited drug to France and was sentenced to imprisonment following which he was issued with a deportation order. He had, however, supplied information to the French police, which had enabled them to arrest another Colombian drug trafficker. The applicant argued that if returned to Colombia he would face reprisals from the drug cartels against which the Colombian authorities would not be able to protect him. The case is important as the Court confirmed that a breach of Article 3 ECHR could arise where the receiving State was itself not specifically responsible for the danger existing in that State but where it was unable to afford adequate protection. The Court, therefore, acknowledged that Article 3 could apply where the danger emanates from persons or groups of persons who are not public officials (in this case drug cartels). The Court stated, “owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”

4.3. D. v. The United Kingdom (Case 146/1996/767/964), 2 May 1997

In this judgment, the Court found that the U.K. would be in breach of Article 3 ECHR if it returned the applicant, who had been convicted of a drugs offence and was suffering from AIDS, to his country of origin (St. Kitts) which lacked the appropriate

³⁹ See para 44 of the ECtHR decision in *Ahmed v Austria*, supra.

health care for his illness. The Court in its decision stated that it was not “prevented from scrutinising an applicant’s claim under Article 3 ECHR where the source of the risk of prescribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country ..”. In his concurring opinion, Judge Pettiti reaffirmed that “Article 3 is construed broadly ... because the Court considers that the principle of State responsibility, for the purposes of Article 1 and Article 3, may be extended to cases where the risk does not stem solely from the public authorities”.

This legal reasoning has been subsequently confirmed in the cases *S.C.C. v Sweden*, No. 46553/99, of 15 February 2000 (despite being declared inadmissible) and *B.B. v France*, No. 30930/96, of 9 March 1998 (case subsequently struck out by the Court on 7 September 1998).

4.4. T.I. v U.K. (No. 43844/98), 7 March 2000, Decision as to the admissibility.⁴⁰

The case concerned a Sri Lankan national who had been subjected to inhuman treatment at the hands of the LTTE, the Army, ENDLF (a pro-government Tamil group) and the police. He eventually fled Sri Lanka to Germany, where he claimed asylum. His claim was rejected, however, on the grounds that the evidence he produced was of no relevance, due to the fact that it could not be imputed to the Sri Lankan State (see Germany’s position on non-state agents of persecution below). His appeal in 1997 was also rejected, on similar grounds, and a deportation order was issued. Consequently, the applicant clandestinely fled to the U.K., where he was discovered by immigration officers and then claimed asylum. In 1998, the U.K. requested that Germany accept responsibility for the application under the Dublin Convention. The applicant appealed to the Court of Appeal, complaining that the German standard of proof was too high. He also challenged the certification of Germany as a safe third country as, *inter alia*, Germany failed to recognise persons as refugees where the persecution emanated from non-state agents. The Secretary of State informed the applicant in August 1998 that Germany was a safe third country and his appeal was refused. He then took his case to the European Court of Human Rights, claiming a violation of Articles 2, 3, 8, and 13 of the Convention, as the German authorities would not take into account any risk of persecution or ill-treatment that is not directly linked to the Sri Lankan State.

Most importantly, the Court confirmed its position enshrined in *H.L.R. v France* and *D. v United Kingdom* stating that “Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials, or from consequences to health from the effects of serious illness.”

The Court found that the U.K. could not automatically rely on the Dublin Convention, especially when differing approaches to the scope of protection existed between the EU Member States.⁴¹ It indicated the responsibility of the U.K. to ensure that the

⁴⁰ Since 1 November 1998 when Protocol No. 11 entered into force, the “new” ECtHR replaced the European Commission. For details of the procedures before the ECtHR see www.echr.coe.int.

⁴¹ See ECtHR in *T.I. v UK*, No. 43844/98, 7 March 2000: “Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-

applicant would not, as a result of the decision to send him back to Germany, face exposure to treatment contrary to Article 3 of the European Convention. The fact that Germany excluded non-state agents when considering the scope of protection was not considered to be the main issue;⁴² the Court's concern was whether there were procedural safeguards of any kind protecting the applicant from removal to Sri Lanka. Its conclusion was 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. The Court found that none of the Articles of the ECHR had been breached, and declared the case inadmissible.

Erika Feller of the UNHCR⁴³ stated that the decision would hopefully contribute to a further harmonization among states of the application of both the 1951 Refugee Convention and Article 3 of the European Convention of Human Rights, which is essential in the context of the needs of persons facing risk to their life or liberty from non-state agents.

“The decision provides a number of important clarifications on issues of international law which can assist governments in improving existing protection mechanisms for asylum-seekers in Europe...For the first time, an international human rights court confirmed that the principle of *non-refoulement* also covers the indirect removal to a situation of danger. This reflects the position the UNHCR has taken in regard to the *non-refoulement* provision of the 1951 Refugee Convention.”

4.5. Goldstein v Sweden (Application No. 46636/99), 12 September 2000, Decision as to Admissibility

The case involved an American who had claimed asylum in Sweden alleging severe police persecution against him. The Swedish asylum authorities declined to grant him international protection on the basis that the alleged persecution was the result of criminal acts committed by individuals and not attributable to the state.

The European Court reiterated its jurisprudence by stating that :

“It is true, owing to the absolute character of the right guaranteed by Article 3 of the Convention, that this Article may apply also where the danger emanates not from public authorities but from persons or groups of persons who are not, or who are not acting as, public officials. However, it must then be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (cf., e.g., the H.L.R. v. France judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 758, § 40).”

operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. Waite and Kennedy v. Germany judgment of 18 February 1999, *Reports* 1999, § 67)”.⁴²

⁴² Although the court reiterated that it was not its function to examine asylum claims, it nevertheless considered that the materials presented by the applicant gave rise to concerns as to the risks faced by the applicant upon return to Sri Lanka.

⁴³ Director of the Department of International Protection.

It went on to hold that it did not

“(…)find it established that the risks alleged by the applicant of his being ill-treated in the United States stem from any public authority or other organ of the State. Furthermore, if the applicant upon his return to the United States were to be subjected to illegal acts, the Court does not find it substantiated that the remedies at his disposal within the domestic legal system of that country could not provide appropriate protection.”

Accordingly the complaint was dismissed as manifestly ill-founded.

5. UN COMMITTEE AGAINST TORTURE (CAT)

Communication No 120/1998: Australia. 25/05/99 (CAT/C/D/120/98)

Article 1(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁴ (“the Torture Convention”) provides that:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 3 (1) of the Torture Convention reads as follows:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁴⁵

The Torture Convention's definition of torture is, thus, limited to state agents, or where torture carried out by non-state agents is instigated, condoned or tolerated by public officials.⁴⁶

The UN Committee Against Torture's decision of 25 May 1999 in the case of a Somali asylum seeker established for the first time that the Convention Against

⁴⁴ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force 26 June 1987, available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm. The Committee against Torture (CAT) is the body entrusted with monitoring the implementation of the Torture Convention.

⁴⁵ The Committee against Torture, at its nineteenth session, 317th meeting, held on 21 November 1997, adopted the following general comment for the guidance of States parties and authors of communications: “2. The Committee is of the view that the phrase "another State" in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited”.

⁴⁶ It should be noted that in *G.R.B. v Sweden*, Communication No 83/1997, 15 May 1998, the Committee against Torture clearly excluded acts of non-governmental entities from the scope of article 3 of the Torture Convention.

Torture (Articles 1 and 3) can apply even in relation to a collapsed state lacking any central government authorities where some of the factions in the country have set up quasi-governmental institutions:

“The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in article 1”⁴⁷

It should be noted that in particular Germany does not recognise quasi-governmental entities existing in Somalia and consequently, does not grant refugee status (or other protection against deportation contrary to Art 3 of the ECHR). In addition, it should be noted that the judgment of U.K. Court of Appeal, *R v. Secretary of State for the Home Department, ex parte Adan et al.*, 23 July 1999⁴⁸, is in line with the CAT’s decision (although there is no reference to the decision in the judgment). The U.K judgment rejected Germany as a safe third country on the grounds of its restrictive interpretation of the concept of agent of persecution.

6. POSITION OF ECRE

The paragraphs below refer to the ECRE Paper “Position on the Interpretation of Article 1 of the Refugee Convention”, September 2000

24. In ECRE's view, a fear of persecution can be well-founded irrespective of whether it is the actions of the state which are feared, or non-state agents. Article 1A (2) of the Refugee Convention does not refer to or require action by the state or a state authority. As paragraph 65 of the Handbook makes plain, persecution is in practice often the result of acts of persons who are not controlled by any state authority and against whom the state is unable to provide protection.⁴⁹ To deny people the protection of the Refugee Convention simply because they are being persecuted by the wrong person or organ creates an anomaly in the law.

25. Asylum claims submitted by women are frequently rejected on the grounds that the persecutor is a family member, i.e. that the persecution is “private” and, therefore, does not engage the international community in any protection obligations.⁵⁰ ECRE notes that states do have duties in international law to prevent harm by non-state agents and that in situations where there is a violation of human rights then there is persecution. A family member can be considered just as much

⁴⁷ At paragraph 6.5.

⁴⁸ See below at Chapter 8.14.

⁴⁹ As the Supreme Court of Canada stated in the 1993 case of *Canada (Attorney-General) v Ward*: "Persecution under the Convention includes situations where the State is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens".

⁵⁰ See doctoral thesis “Gender and Refugee Status”, Thomas Spijkerboer 1999.

an agent of persecution as an armed opposition group.⁵¹ We re-iterate that whether a fear of persecution is well-founded in these cases depends upon the willingness and ability of the state to protect.

26. ECRE's position is that state complicity in persecution is not a pre-requisite to a valid refugee claim. This view flows from the language of Article 1A(2) itself and has been confirmed by the overwhelming trend of international case law.⁵²
27. This position is especially relevant to situations where there has been a breakdown of state structures in a country and one group is persecuting another on one of the Refugee Convention grounds. In such cases the members of the persecuted group should be considered refugees. If the state ceases to exist then *ipso facto* it is unable to protect its citizens against persecution.
28. Protection of citizens is quintessentially a state function. However, some European states have taken the view that refugees can be rejected on the grounds that they can be protected by so-called *de facto* authorities, which have either replaced an extinct state or which control parts of state territory previously under the control of a still existing state. The latter notion has become closely linked to the idea of an internal protection alternative. ECRE's position is that no-one can be returned to an authority which has not been accepted into the international community of states and/or which has no status in international law. Returning refugees to *de facto* authorities undermines the international system and weakens refugee protection. In the context of protection of human rights, it is crucially important that the authorities in the country of origin have the ability and willingness to fulfil obligations under human rights treaties. Part of their ability to do so depends upon whether they have obligations under human rights treaties to protect human rights and to prevent human rights abuses: this is a question of legal standing as well as practical reality. ECRE notes that human rights obligations relate to state actors and not to non-governmental actors. These obligations mean not only the prevention of rights violations but also the promotion of the enjoyment of rights.⁵³
30. ECRE notes that it is hard to conceive of a recent war or civil war situation which has not resulted in or been motivated by persecution for one of the grounds in Article 1A(2) of the Refugee Convention and agrees with the Conclusion of the 49th Session of the UNHCR Executive Committee about "the increasing use of war and violence as a means to carry out persecutory policies against groups

⁵¹ See House of Lords, *Islam v Secretary of State for the Home Department (SSHD)*, ex parte Shah, 25 March 1999. See for further details below at chapter 8.14.

⁵² See *T.I. v U.K.* ECtHR admissibility decision.

⁵³ In the 1990s, the international community devised new approaches to refugee protection which involved the creation of "safe havens" for groups of refugees, usually within the territory of a power which was persecuting the group (Northern Iraq 1991; Bosnia 1993; Rwanda 1994). In these cases "protection" was provided by an international armed force, an intervening power, or by a client group of an intervening power. In none of the cases so far seen has the creation of a safe haven explicitly challenged the sovereignty of the persecuting power over the safe haven area. This represents the ultimate contradiction and danger of safe havens. Too often, such places have become death traps, especially as the persecutor usually has time on his side (Bill Frelick, the World Refugee Survey 2000, US Committee for Refugees).

targeted on account of their race, religion, nationality, membership of a particular social group, or political opinion.”⁵⁴

31. The Refugee Convention requires that a well-founded fear of persecution be for reason of one of the five permitted Convention grounds. Unless this link can be established, the claim to refugee status must fail. Persecution can and does occur in situations of war or internal armed conflict. It is ECRE's position, therefore, that persons fleeing from situations of war or internal armed conflict should never be automatically denied refugee status, since generalised violence does not preclude the existence of a well-founded fear of persecution by an individual person or a group of people.
32. An argument has been advanced by some commentators and courts that unless a person fleeing a civil war situation can show that they are "differentially at risk" i.e. more at risk than other victims or potential victims of generalised violence, for a Convention reason then that person is not a refugee. This argument has been advanced as a way of highlighting the need for a refugee claimant to show a fear of persecution for reason of one of the Convention grounds rather than a fear of violence which affects everyone equally. However, it has been taken to mean that one must show an additional risk of persecution even in situations where there is a conflict which is based on racial or religious differences.
33. ECRE believes that in a situation of generalised violence only those who can show a risk of serious harm for a Convention reason qualify for asylum. However, if everyone within a state in a conflict situation is at risk for a Convention reason then they will all potentially qualify for asylum, irrespective of the size of the group at risk.⁵⁵

7. SELECTED ACADEMIC ARGUMENT

7.1. Jean-Yves Carlier⁵⁶

“Case law is consistent in considering that the agent of persecution is not necessarily a constituent part of the state; there can be indirect persecution. Case law, however, adopts differing positions when it comes to examining the extent of the responsibility of the state when the persecution is the act of a third party, private parties or entities. A restrictive view considers that it is necessary to prove that the state tolerates or encourages such persecution, at least by passive tolerance. A more expansive view

⁵⁴ Executive Committee Conclusion No.85 (XLIX) on International Protection.

⁵⁵ The error is most easily shown by an example: a situation could arise where, in an internal armed conflict between two opposed religions, every citizen of the state has a well-founded fear of persecution -because he or she belongs to one religion or another. On one view, as every citizen faces exactly the same risk of persecution, there is no "differential" risk. But if one were to ask why any specific refugee claimant from that country had a well-founded fear of persecution, the answer would have to be that it was "for reason of" his or her religion. This answer would satisfy the Refugee Convention definition.

⁵⁶ Who is a Refugee? A Comparative Case Law Study, Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann, & Carlos Peña Galiano (Eds.), Kluwer Law International, 1997. Jean-Yves Carlier takes the very same position in: Refugee Rights and Realities. Evolving International Concepts and Regimes, Nichol森 & Twomey (ed.), Cambridge (1999) at 48/49.

holds that it is sufficient for the state to be unable to assure protection in a manner such that, in certain cases, the persecution can be of a very private level.”⁵⁷

“The applicant must have tried to secure the protection of the authorities of his or her country as long as such an attempt would appear reasonable under the circumstances. This expansive view is justified from the standpoint of the [protective] function of international refugee law, which consists of substituting international protection for that which is lacking from the state. In the case of civil war, the case law examines whether another organised authority has substituted that of the state and can be held responsible for the persecution, even if by a failure to protect. This view may lead to decisions denying refugee status in cases of absence of government or organised authority.”

“In reality, the Geneva Convention definition makes no reference to the agent of persecution; it is enough that the victim of persecution cannot or no longer wishes to claim the protection of the authorities of the country of origin. It would therefore appear that, whoever the agent of persecution may be and whatever the situation of the authorities in the country of origin, it is sufficient, once the risk of persecution has been established, to conclude that no adequate national protection exists in order to substitute international protection. The role of the international community, through the action of the receiving state, is not – according to international refugee law – to condemn the country of origin, but to protect a refugee. It thus appears unjustified for American case law to examine the motivation of the foreign state in failing to protect with respect to the five causes set out in the Geneva Convention. Such motivation has more to do with the intent of the persecutor, whoever he or she may be, than with the failure on the part of the state that could have resulted from the simple inability to protect its nationals.”⁵⁸

7.2. Guy Goodwin-Gill⁵⁹

According to Guy Goodwin-Gill, in cases where governments are unable or unwilling to suppress persecution or when governments are co-operating with third parties, persecution within the meaning of the 1951 Geneva Convention can result “for it does not follow that the concept is limited to the actions of governments or their agents”. Goodwin-Gill further states that “no necessary linkage between persecution and government authority is formally required” by the 1951 Convention.⁶⁰ On the issue of agents of persecution and state responsibility, he adds, “The purpose is not to attribute responsibility, in the sense of state responsibility, for the persecution. If it were, then qualifying as a refugee would be conditional on the rules of attribution, and protection would be denied in cases where, for any reason, the actions of the persecutors were not such as to involve the responsibility of the State.”

Concerning the question of the impact of an existing government on a claim for refugee status Goodwin-Gill states that “...there is no basis in the 1951 Convention, or in general international law, for requiring the existence of effective, operating

⁵⁷ Ibid. at p.705.

⁵⁸ Ibid at p.706.

⁵⁹ Guy S. Goodwin-Gill. *The Refugee in International Law*, second edition, 1996.

⁶⁰ Goodwin-Gill pp. 71.

institutions of government as a pre-condition to a successful claim to refugee status”.⁶¹

With regard to civil war situations, Goodwin-Gill notes that the fact “of having fled from civil war is not incompatible with a well-founded fear of persecution in the sense of the 1951 Convention. Too often, the existence of civil conflict is perceived by decision-makers as giving rise to situations of general insecurity that somehow exclude the possibility of persecution.”

7.3. James Hathaway⁶²

“The most obvious form of persecution is the abuse of human rights by organs of the state, such as the police or the military. This may take the form of either pursuance of a formally sanctioned persecutory scheme, or non-conforming behaviour by the official agents which is not subject to a timely and effective rectification by the state.”

“Similarly, there is no meaningful protection when a government supports or condones privately inflicted violations of core human rights.”

“Beyond these acts of commission carried out by entities with which the state is formally or implicitly linked, persecution may also consist of either the failure or the inability of a government effectively to protect the basic human rights of its populace. Specifically, there is a failure of protection where a government is *unwilling* to defend citizens against private harm, as well as in situations of objective *inability* to provide meaningful protection.”

“Thus, the state which ignores or is unable to respond to legitimate expectations of protection fails to comply with its most basic duty, thereby raising the prospect of a need for surrogate protection. Intention to harm on the part of the state is irrelevant: whether as the result of commission, omission, or incapacity, it remains that people are denied access to basic guarantees of human dignity, and therefore merit protection through refugee law.”

8. PRACTICE OF SELECTED EUROPEAN STATES WITH REGARD TO THE INTERPRETATION OF PERSECUTION BY NON-STATE AGENTS

8.1. Austria

The first instance decision on an asylum application in the determination procedure and the procedure according to Section 57 of the Aliens Act 1997 on the legality of *refoulement* is taken by the Federal Asylum Office (*Bundesasylamt*). Prior to 1 January 1998, negative decisions could be appealed to the Ministry of the Interior (*Bundesministerium des Innern*). Since 1 January 1998, when the Federal Law Concerning the Granting of Asylum (1997 Asylum Act) entered into force, negative decisions may be appealed to the Independent Federal Asylum Review Board

⁶¹ Goodwin-Gill pp. 73.

⁶² The Law of Refugee Status, James Hathaway, Butterworths, 1991.

(*Unabhaengiger Bundesasylsenat*).⁶³ An appeal against the Federal Independent Asylum Review Board (UBAS) may be made to the Administrative Court (*Verwaltungsgerichtshof*).⁶⁴

In earlier years, Austrian asylum authorities and the Austrian Administrative Court did not recognize non-state agents of persecution to be covered by the definition of a refugee.⁶⁵ The jurisprudence has changed to the effect that to be eligible for asylum, the feared persecution must either emanate from the state or be condoned by the state; tantamount to state persecution or persecution tolerated by the state, is persecution by private parties when the state is *in general* unable to prevent persecution due to absence of a functioning of the state power.⁶⁶ In proceedings on (*non-*)*refoulement*, the formula is used that persecution that cannot be prevented by the state “due to a *insufficient* functioning of the state power” will also be attributed to the state.⁶⁷ Furthermore, it has to be assessed whether the asylum seeker can be expected to seek protection from the state. There is no general assumption that the authorities in the country of origin will provide protection to the asylum seeker. An individual assessment has to be made whether the asylum seeker’s claim that the officials of her/his country of origin would refuse to afford protection is wellfounded or not.⁶⁸ Regularly eligibility will depend on whether the asylum seeker is subject to a threat or danger in the entire territory of his/her country of origin.

In general, the jurisprudence of the Independent Federal Asylum Board (UBAS) is more restrictive. The UBAS has held that the danger of being persecuted must be attributed to the state. According to the UBAS, attribution to the state means not only being the cause of an existing danger of being persecuted, but denotes a responsibility as regards an existing danger of being persecuted. If the state does not condone persecution by private persons, and if the state is generally able (according to the UBAS, absolute protection is not possible) to afford protection to its citizens, refugee status will be denied.

The following cases are demonstrative.

Administrative Court (VwGH), 11 March 1993, 93/18/0083: Persecution must be attributable to state authorities. Private persecution without reference to the state

⁶³ Please note in the case summaries prior to 1 January 1998 set out below, that the second instance was the Federal Minister of Interior, now replaced by the Federal Independent Asylum Review Board.

⁶⁴ The Administrative Court is entitled to turn down a complaint according to Art. 131 (3) of the Austrian Constitution: “The Administrative Court can reject consideration of a complaint against an independent administrative tribunal in an administrative penal matter by a decision if only a small monetary penalty was imposed and the decision does not depend on the resolution of a legal issue of fundamental importance, especially inasmuch as the independent administrative tribunal deviates from that of the Administrative Court, [or] such adjudication is lacking or the legal issue to be resolved has not been consistently [einheitlich] settled [beantwortet] by the adjudication of the Administrative Court.” A simultaneous/further appeal to the Constitutional Court can be made if the asylum seeker claims a violation of constitutionally protected rights. See for further details, ECRE Country report, 1999.

⁶⁵ See Administrative Court (VwGH), 11 March 1993, 93/18/0083.

⁶⁶ See eg VwGH, 94/18/0731, 1 February 1995; VwGH, 95/18/0946, 20 July 1995; VwGH, 94/18/0474, 8 September 1994.

⁶⁷ See eg, VwGH, 5 November 1999, 97/21/0911, VwGH, 26 November 1999, 96/21/0499; VwGH, 24 February 2000, 96/21/0536 (below).

⁶⁸ See e.g. Administrative Court, 9 May 1996, 95/20/0166.

(without that the state has condoned private persecution) does not guarantee protection by the Austrian State and the Geneva Convention.⁶⁹

Administrative Court (VwGH), 30 September 1993, 93/18/0256: The case concerned a Liberian national who entered Austria, without travel documents, on 11 January 1993. The Administrative Court (*Verwaltungsgerichtshof*) noted that according to Section 37 (1) of the Austrian Aliens Act 1993 (*Fremdengesetz, FrG*)⁷⁰ deportation of an alien is prohibited when there are valid grounds for believing that s/he is at risk of being subjected to inhuman treatment or punishment, or capital punishment. Furthermore, Section 37(2) Aliens Act 1993 prohibited deportation of an alien when there are grounds to believe that his/her life or freedom would be at risk on account of his/her race, religion, nationality, social group or political opinion. The applicant claimed that he was entitled to remain in Austria due to the fact that he risked persecution by private agents in his country of origin, Liberia. As a consequence of the civil war in Liberia, there was no functioning state power and, therefore, there was no (state) protection for the applicant. The Court questioned whether threats emanating from private individuals or from hostile clans were grounds for a prohibition of deportation in the sense of Section 37 (1) Aliens Act 1993. The Court held that the harm referred to in Section 37 (1) Aliens Act 1993 (inhuman treatment or punishment or the death penalty), against which aliens should be protected, only falls within this Section when it emanates from or is carried out with the consent of the State. According to the case law of the Administrative Court, persecution by private individuals or rebel groups did not qualify under this Section

Administrative Court (VwGH) Zlen, 16 March 1994, 93/01/0249, 93/01/0286: Whether the actions carried out by Serbs against citizens of the Former Republic of Yugoslavia, from Bosnian and Muslim regions “can be attributed to the State in the country of origin, and thus amount to persecution, depends on the capacity of this State to prevent these acts. Where the authority of the State is no longer effective in the regions concerned, these acts could then be assimilated to State measures”.⁷¹ In other words, the Court considered that persecution by a de facto power could be considered as ‘persecution’ for the purpose of refugee status.

Administrative Court (VwGH), 9 May 1996, 95/20/0166: The applicant, a Kurd of Turkish citizenship, entered Austria on 20 July 1992 and applied for asylum on 24 July 1992. On 13 August 1992, the Federal authorities rejected his application for asylum. In the application, the applicant claimed that Kurds living in Turkey were disadvantaged in all aspects of life, and that the applicant had personally experienced such discrimination. After finishing school in June 1991, he was persuaded to become active for the PKK, and for a period of some months, he carried out actions in support of the PKK. This included putting up posters carrying the message “Long Live Kurdistan” (*Es lebe Kurdistan*). He was caught by the police on one occasion and detained for two days. His activities on behalf of the PKK were known to the Turkish authorities and in mid-June 1992, he was detained for several days and questioned. He claimed that he was beaten and pressurized greatly. Even after his release, he was

⁶⁹ Carlier a. o. p. 44.

⁷⁰ Take note of the fact that the Aliens Act 1997, entered into force on 1 January 1998, derogated the Aliens Act of 1993.

⁷¹ Web-site: <http://www.unhcr.org/refworld/refworld/legal/refcas.htm>.

under constant surveillance by the Turkish police. After his release, the applicant decided that he no longer wanted to be active on behalf of the PKK. His contact person within the PKK explained that he had to continue to work for and be a member of the PKK otherwise he would be “finished off” (*man wurde ihn fertigmachen*).

The applicant felt threatened by both the PKK and the state authorities. He claimed he could not expect protection against persecution by the PKK, and further support to the PKK would result in persecution by the state authorities. Consequently, the applicant decided to flee. He also claimed that his illegal departure from Turkey would be further ground for persecution by the state authorities. The applicant claimed that he had gone directly to Istanbul and that he had continued his journey the same day via Bulgaria, Yugoslavia and Hungary to Austria. However, he later added that he had not departed immediately following his release from detention, but that he had stayed for about three weeks with relatives in Sorgun. He had not been persecuted by the state authorities in Sorgun.

The *Bundesasylamt* (Federal Office) rejected the asylum application on the grounds that the applicant did not fear persecution in his country of origin, and also that he was safe against persecution in the states he had travelled through to reach Austria. The applicant appealed against the decision, claiming that the first instance had made an incomplete establishment of the facts in the case.

The second instance ruled that on the facts given by the applicant, it could not be concluded that following his release from detention, he had a well-founded fear of persecution from the state. Concerning his fear of persecution by the PKK and the assertion that he would not receive any protection against this persecution, this was according to the second instance, a solely subjective perception, that was not supported by facts or arguments. The second instance ruled that the persecution the applicant feared by the PKK could not be the basis for refugee status, since the persecution did not emanate from nor was tolerated by the State.

The applicant appealed to the Administrative Court which ruled that the judgment was flawed as procedural rules had not been heeded. It held that the second instance had not enquired into the crucial question of whether the authorities would have protected the applicant against persecution by the PKK.

Administrative Court (VwGH) 14 November 1996, 95/18/1135: The applicant, an Afghan citizen, claimed his life was threatened by the Mujahidin because he had assisted in the detention of a Mujahidin member. The Court held that persecution by a non-state agent is, according to the established case law of the highest administrative court, tantamount to persecution emanating from the state or approved by the state is persecution by non-state agents when the state is not able to prevent such persecution because of the absence of a functioning state power. There is no functioning state power in Afghanistan and the state is therefore not able to stop persecution emanating from the Mujahidin groups.

Administrative Court (VwGH), 9 May 1996, 95/20/0166: “There is no general empirical theorem (*Erfahrungssatz*) how the Turkish authorities will deal with persons, who claim to fear persecution by the PKK, and who have been detained by the Turkish authorities because of a former support of the cause of the PKK and who

now seek protection from the PKK. Because further investigations have been missed out, the asylum seeker's claim that the state authorities will not protect him is not ill-founded." The lower instance decision was thus quashed.

Administrative Court (VwGH), 9 October 1997, 95/20/0679: The applicant, an Iraqi national, entered Austrian territory on 31 May 1994, and requested that the asylum granted to her husband (in January 1989) should be extended to her in accordance with Section 4 of the Asylum Act 1991 (*Asylgesetz, AsylG*). The application was rejected by the asylum authorities on the grounds that the applicant only married her husband on 17 May 1992, after he entered Austria. On 6 February 1996, the appeal against this decision was rejected by the authorities as being unfounded.

After the administrative procedure was completed on the 28 and 29 March, the applicant re-applied for asylum, stating that she was not aware that her own grounds for flight would not be considered in an application based on Section 4 Asylum Act 1991, and that she did, however, have her own reasons for fleeing from Iraq. She stated that she had joined the PDK (Democratic Party of Kurdistan) in 1991. Her father was a member since 1983. On account of this membership he had been detained for two years from 1983. In 1991, the applicant had also joined the music group Barzani. She had earlier written and composed songs, amongst which, she composed a song (*Der Weg Barazani*) which, in 1993, was chosen by the Kurdish Parliament as the PDK anthem. At an event celebrating the founding of the Kurdish Parliament, she was honoured as the composer of the anthem, and this was broadcasted on television. As a result, she became a public figure, and consequently had more opportunities to perform in public.

On 1 May 1994, fighting began between the rival Kurdish parties PDK and PUK. Kurdistan consists of the provinces Souleymania, Arbil and Dohuk. In the home town of the applicant, Souleymania, the PUK party was in power. On 8 March 1994, the party offices in her home town were surrounded by PUK members and the PDK members were apprehended. The applicants father was apprehended, and at first his whereabouts were unknown. On the same day, the PUK security forces searched the home of the applicant and she was brought to prison. She was questioned, beaten and humiliated (*gedemütigt*). She was also shown a video of her performing the PDK anthem. Later it was revealed to the applicant that her father had managed to flee on the 8 May 1994, and that the PUK were also questioning her in an attempt to find out where he was. After two days she was released.

Her asylum application was rejected by the *Bundesasylamt* (Federal Asylum Office) on the 6 April 1995. The *Bundesasylamt* gave a shortened version of the statement given by the applicant. In her appeal against the decision, the applicant complained that, due to drastic abridgements, the *Bundesasylamt* had given a totally distorted picture of the facts. The appeal was rejected. The second instance held that the threat of harm by Kurdish parties gave no basis for recognition as a refugee. It held that the persecution must emanate from the state.

The applicant appealed to the Administrative Court, which reversed the judgment on procedural grounds. The Administrative Court stated that the second instance, as a consequence of its selectivity in the reproduction of the applicant's story, failed to

notice that the applicant had stated that the PUK “was in power” in her home town. In the appeal, the Court stated, the applicant had correctly argued that persecution by non-state agents should be ascribed to the state when it is not willing or in a position to protect its citizens against asylum relevant persecution carried out by private bodies. The Administrative Court could not concur with the second instance since *inter alia*, without giving any reasoning and without investigating the power structures of the applicant’s home-country, it could not establish that the alleged persecution did not emanate from the State.

Administrative Court (VwGH), 26 November 1999, 96/21/0499: The case involved a Sudanese national of Christian religion who fled the civil war and feared persecution by Muslim groups. The first instance authority denied the application of asylum on the grounds that the asylum seeker could not establish that state measures have been taken personally against him. It came to the conclusion that the assaults by the parties to the conflict could not be attributed to the state. The Administrative Court reiterated its jurisprudence that “in a procedure according to Section 54 Aliens Act 1993, the alien has to establish the existence of a current, ie. in the case of deportation of the alien to the state stated in his/her application, a threat that is at least condoned by state authorities, or a threat in the sense of Section 37 (1) and/or (2) Aliens Act 1993 that cannot be prevented due to a insufficient functioning of the state power.” The Administrative Court, however, dismissed the complaint on the grounds that the appellant had not sufficiently individualised a danger that is directed concretely against him.

Administrative Court (VwGH), 24 February 2000, 96/21/0536: The Court held that: “In a procedure according to Section 54 Aliens Act 1993, the alien has to establish the existence of a current, ie. in the case of deportation of the alien to the state stated in his/her application, a threat that is at least condoned by state authorities, or a threat in the sense of Section 37 (1) and/or (2) Aliens Act 1993 that cannot be prevented due to a insufficient functioning of the state power”. The Court emphasised that, as well as in refugee status determination proceedings, in proceeding on (non-) *refoulement* according to Section 54 Aliens Act 1993 the concrete individual situation of the asylum seeker has to be examined. The asylum seeker has to establish a current situation of danger by putting forward concrete corroborated statements concerning his/her person (“*wobei diese aktuelle Bedrohungssituation mittels konkreter, die Person des Fremden betreffender, durch entsprechende Bescheinigungsmittel untermauerter Angaben darzutun ist.*”)

See also VwGH (*Verwaltungsgerichtshof*) judgment, 21 December 1998, 98/18/0076; VwGH judgment, 27 November 1998, 95/21/0344, 97/21/0568; 10 June 1999, 97/21/0245.

UBAS, 22 February 1999, 204.523/0-XII/37/98, (Egyptian converted to Christianity, fear of persecution on religious grounds): The UBAS held that in order to recognise refugee status it is necessary that the persecution feared emanates from the state or that the state is [generally] unable or unwilling to prevent non-state persecution. The assaults by fundamentalist Muslims can be considered as private encroachments. The UBAS stated that it would be beyond the capacity of a state to prevent each possible encroachment by third parties. The UBAS found that the Egyptian government

responded to terrorist acts with raids, mass-imprisonment and death sentences and held that the deportation to Egypt was lawful.

UBAS, 14 September 1999, 211.106/0-III/07/99, (Nigeria, private revenge): The asylum seeker feared revenge by a private person. The asylum seeker could not establish any link to the feared persecution and a Convention reason. The UBAS held that a fear of persecution could only be relevant for the granting of asylum when the native state is not willing or [generally] unable to afford protection. Against the backdrop of the current political situation in Nigeria it could have been expected from the asylum seeker to avail himself of the protection of his state. The contention of the asylum seeker that the state is corrupt (and thus will not protect) cannot be understood as meaning the state is, in general, not able to prevent persecution. It is not possible, even for a highly developed state, to guarantee absolute protection against assault by non-state agents, the lack of complete protection not being a reason to assume state persecution or persecution attributable to the state relevant to the granting of asylum. (*“Es ist aber auch einem hochentwickelten Staat nicht moeglich, gegen Uebergriffe nichtstaatlicher Kraefte absoluten Schutz des Lebens und der Sicherheit zu gewaehrleisten, ohne dass darin eine staatliche oder dem Staat zurechenbare – asylrechtliche relevante – Verfolgung gelegen waere.”*). It has not been established that the Nigerian state would deny protection to the asylum seeker for reason of race, religion, nationality, and membership of a particular social group. Therefore, these private acts could not be attributed to the native state of the asylum seeker. See also, practically in identical wording, **UBAS, 7 September 1999, 210. 485/0-III/07/99**, (Nigeria, fear of being killed by private persons for private revenge); **UBAS, 201.224/0-V/1/98** (Nigeria, two villages in feud over pipeline). NB: It has to be noted, though, that in the latter cases, there was no causal link between the feared persecution and a Convention ground.

UBAS, 4 August 1999, 210.018/0-V/13/99, (Sierra Leone, threat of being coerced into rebel militia troops): The UBAS held that non-state agents of persecution is only relevant for asylum if the state in question is [generally] unable or unwilling to prevent private persecution. If the state, though, as in this case, the UBAS went on to say, puts massive preventive and repressive measures against offenders (here, against the rebels) in place, it cannot be assumed that a state is not able or unwilling to protect. The UBAS said that the fact that there might be encroachments by the militias does not change this assessment, because no state in the world is able to protect its citizens against any encroachments of third parties in a preventive way; this, the UBAS went on to state, independent from whether one assumes that it is not possible to protect each single citizen in an isolated case against possible assaults by armed state-enemy groups, or whether one assumes that the state in a concrete civil war situation cannot afford protection to each citizen.

See, with the very same reasoning, also in a Sierra Leonean case, **UBAS, 9 June 1999, 201.483/0-V/14/98**. This case involved a minor national of Sierra Leone who was abducted and forced to combat for the rebel troops. He managed to flee and was brought to a camp of the Red Cross where the cholera broke out killing his brother and sister. The applicant feared persecution by the rebel and the government troops, both of whom wanted him to fight. The asylum seeker then fled his country. The UBAS reiterated that attribution to the state means responsibility in relation of a certain current threat of persecution. The UBAS found that the fear of the applicant

was not founded in one of the Convention grounds and concluded that the state was not unwilling or unable to protect.

8.2. Belgium

The first instance decision on asylum applications is taken by the General Commissioner for Refugees and Stateless Persons (CGRA). An appeal against a negative decision may be made to the *Commission Permanente de Recours des Réfugiés* (CPRR; Permanent Commission for Refugee Appeals) which is an administrative tribunal. Its decision may be further appealed, on legal grounds rather than on its merits, to the *Conseil d'Etat* (Council of State). A number of decisions by the CPRR indicate that the agent of persecution does not need to be a state-agent. "Serious discriminatory or offending acts consciously tolerated by the authorities or against which the authorities are unable to offer protection, constitute persecution under the Geneva Convention."⁷²

Since the first version of this paper, there has been no fundamental change. It results from the jurisprudence of the CPRR that a situation of civil war is not sufficient to exclude a refugee from the benefit of the Convention⁷³, and so the status of refugee has been given to persons from Somalia⁷⁴, Sierra-Leone⁷⁵ and Liberia⁷⁶. The position of the Commission of appeal is clear: a civil war is not an obstacle to filing an asylum application but this element is not sufficient to establish a fear of persecution if the applicant cannot establish an individual fear of being persecuted. The CPRR decided that : "Whereas the Geneva Convention does provide for particular protection in case that the country of origin of the foreigner is in civil war (...); Whereas, however, the fact of a civil war in itself does not exclude a violation of the Convention, but in each individual case the fear of persecution for one of the reasons of the Convention must be investigated (...); Whereas the appellant does not show that he is a possible or effective differentiated victim of persecution based upon race, religion, nationality."⁷⁷

The CPRR has had explicit reference to article 65 of the UNHCR Handbook. This also applies to de facto powers.⁷⁸ In cases of small armed groups operating on a part of the territory, CPRR acknowledges refugee status depending on the capacity of the state to protect its national: "Whereas his explanations during the hearing convinced of the reality of his activist commitment against Islamic movements; Whereas it's plausible that this commitment will expose him to a risk of persecution upon return to his country of origin, without the possibility for him to expect protection from the Algerian authorities; Whereas the particularly dramatic situation in Algeria justifies to be very cautious".⁷⁹ Similar decisions have been taken in the case of a Pakistani.⁸⁰

⁷² Carlier a. o. p. 93.

⁷³ See L. Lejeune, La Notion d'Agent de Persécution, *Revue du droit des étrangers*, 1999, no. 105, p. 656.

⁷⁴ VBC, 92-803/E63, 30 September 1993; VBC, 92-475/E35, 3 September 1992.

⁷⁵ CPRR, 96-1229/R3920, 25 July 1996.

⁷⁶ VBC, 93-230/E58, 10 Juni 1993.

⁷⁷ VBC, 96/2264, W3368, 12 June 1997.

⁷⁸ CPRR, 92-688/F144, 18 November 1992.

⁷⁹ CPRR, 98-0246/F760, 19 February 1999.

⁸⁰ VBC, 99-0072/E329, 8 April 1999.

Commission Permanente de Recours des Réfugiés, 8 November 1990, F015:

The case concerned a Turkish asylum seeker who claimed that he had suffered persecution by third persons because of his religion. The tribunal ruled that “[a]cts of persecution by third persons qualify an applicant for asylum where the State knowingly tolerates these acts or where it cannot protect the applicant”.

See also, **Commission Permanente de Recours des Réfugiés (1 ch.), 21 November 1991, F 035. Commission Permanente de Recours des Réfugiés, 1 October 1993, Marazoglou Sahim:** In this case, regarding a Turkish citizen who was persecuted by private individuals because of his religion, the Commission followed precedent: “international protection may be granted to persons who are victims of persecution of private origin in their national State”. The case law is based on UNHCR’s doctrine, as it is expressed in the Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 65. In the ruling, the Commission made reference to this paragraph and to the opinion of UNHCR’s representative in Belgium.

The Council of State, deciding on the admissibility of an application, has confirmed this interpretation given by the CPRR that persecution by third parties need not only be tolerated or encouraged by the State but may also exist where the state authorities are incapable of offering effective protection.

In the case of a Syrian applicant of Armenian origin, who was responsible for a fatal car accident and who feared reprisals at the hands of the victim’s family, it was stated “for persecution emanating from private persons to amount to persecution according to the Geneva Convention, one has to establish, according to the criteria of UNHCR, that the action was tolerated by the authorities or that the authorities were incapable of offering effective protection.”⁸¹

According to Jean-Yves Carlier, the “protection offered must not be absolute. The obligation to offer protection ‘is not violated if the protection that is offered is not effective in every individual situation or if the efficiency of this protection differs depending on the region and the moment. The state cannot offer perfect protection without shortcomings to its citizens against acts of persecution by third persons (*Bundesverfassungsgericht*, 6 March 1990, 9C14.89, InfAusIR, 1990, 221).”⁸²

“Nevertheless, protection must be sufficient in relation to the activities undertaken by third parties.”⁸³

Vaste Beroepscommissie voor vluchtelingen (Refugee Appeals Board, Dutch-speaking divisions), 2 ch., 3 September 1992, E no number: A Liberian national feared persecution because he belonged to the Mandingo tribe. He was granted refugee status by the Belgian authorities because “the effective power in the country remained with fighting parties and the interim government could not offer him effective protection”.⁸⁴

⁸¹ Carlier a. p. 114 (French language version), paragraph 76b referring to C.E., 6 November 1996, n.62.976. Rev. dr. étr., 1996, p. 759

⁸² V.B.C. (2 ch.), 2 September 1993, W1014 (Lebanon) cited in Carlier a. p.95 C.P.R. (1 ch.), 21 November 1991, FO35. See Carlier a. p. 96 for further details.

⁸³ C.P.R. (1 ch.), 21 November 1991, FO35. See Carlier a. p. 96 for further details.

⁸⁴ Carlier a. o. p. 96.

8.3. Denmark⁸⁵

Under the refugee status determination procedure, the first decision on an asylum application is taken by the Immigration Service with a right of appeal to the Refugee Appeals Board (*Flygtningenævnet*), which is an independent body. Denmark was one of two European Union States (together with Sweden) that considered making an explicit reservation to Point 5.2 of the 1996 European Union Joint Position on the term 'refugee'.⁸⁶ Denmark initially stated during the drafting process that "persecution by third parties falls within the scope of the 1951 Geneva Convention where it is encouraged or permitted by the authorities. It may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection". However, Denmark withdrew its reservation before the Position was adopted on the grounds that it did not consider a reservation necessary in order for it to continue its practice of including within the scope of the Convention, cases where the authorities prove unable to provide protection. Danish case law supports this position. The following case law of the Refugee Appeals Board, which largely relates to persecution of Jewish persons by non-state agents, illustrates this:

Refugee Appeals Board, 13 March 1998: This case concerned a Jewish woman of Russian citizenship who claimed she had been subject to persecution by non-state agents. The applicant had been working on the publication of a Jewish newspaper and had received threats, been assaulted and raped. Since it had not been possible for her to obtain protection from the Russian authorities, the Danish Refugee Appeals Board granted her asylum.⁸⁷

This case is in line with earlier decisions by the Refugee Appeals Board:

Refugee Appeals Board (R.A.B.), 18 October 1991, No. 21-2827; R.A.B., 18 December 1991, No. 21-2574; R.A.B., 30 January 1992, No. 21-2546; R.A.B., 18 February 1993, No. 21-3861.

8.4. Finland

In accordance with Section 33 of the Finnish Aliens Act, first instance decisions on the granting or denial of Convention status, residence permit based on the need for protection, or residence permit for other reasons, are made by the Directorate of Immigration.⁸⁸ All negative decisions by the Directorate of Immigration are

⁸⁵ There has been no fundamental change since the first edition of this paper, according to the ELENA National Coordinator.

⁸⁶ See above at chapter 3.

⁸⁷ Information from the ELENA National Coordinator.

⁸⁸ See also Fabrice Liebaut, *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries*, Danish Refugee Council, May 2000, available at www.ecre.org: "The decision is based on a written record of the police interview. The applicant is not re-interviewed except in very special cases. The government intends to modify the procedure, so that the Directorate of Immigration will be responsible for conducting the interviews in the future. Training will start this year but the change will not be adopted before year 2001. According to the same Section 33, the Ombudsman for Aliens must be given the opportunity to be heard during the determination procedure, "unless evidently unnecessary". In practice, the Directorate either forwards the case to the Ombudsman for comments, or

automatically referred to the Helsinki Administrative Court for examination pursuant to Section 57 of the Aliens Act.⁸⁹ If the Court's decision is negative, the applicant can lodge a request for a leave to appeal with the Supreme Administrative Court. However, this can only be granted if the Supreme Court considers that ruling on this issue is important for the application of the law in other similar cases, for reasons of uniform judicial practice or if there are other weighty grounds. In practice, leaves to appeal are granted very rarely.

Finnish legislation and legal practice accept non-state agent of persecution to be covered by the refugee definition.⁹⁰ The Supreme Administrative Court has given decisions in which the principles laid down in the UNHCR's Handbook have been considered as binding.⁹¹ The Court has stated as follows:

" The Parliament has in its response to the Bill on New Aliens' Act (HE 47/1990 vp) required that the deliberation by virtue of Article 30 of the Act be used in such a manner that the principles accepted by UNHCR are abided by." The Handbook published by UNHCR defines the general procedures and principles/grounds which must be followed when determining refugee status. "

8.5. France

Refugee status is determined in the first instance by the French Office for the Protection of Refugees and Stateless Persons (*Office français de protection des réfugiés et apatrides* (OFPRA)) which is an independent body under the supervision of the Ministry of Foreign Affairs. A negative decision by OFPRA may be appealed to the Appeals Board for Refugees (*Commission des Recours des Réfugiés* (CRR)). Occasionally, a negative decision by the CRR may be further appealed to the Council of State (*Conseil d'Etat*). In France, there are three forms of protection: 1) Refugee Convention status; 2) Constitutional status⁹²; 3) Territorial asylum.

simply asks for a statement over the telephone. So far, the Ombudsman's involvement in the asylum procedure has very rarely had any impact on the outcome.

⁸⁹ See Fabrice Liebaut, *supra*. The Administrative Court considers whether Convention status or another form for residence permit should be granted to the appellant, and it may also examine whether there are other reasons which may prevent him/her from being expelled from Finland. The Court's decisions are final. If the Court agrees with the Directorate's opinion, the latter's decision is final and cannot be appealed. If the Court disagrees with this decision, the case is referred back to the Directorate of Immigration for a new decision. Usually, the application will then be transferred under the normal determination procedure. It may also be that the Directorate of Immigration takes another decision declaring the application manifestly unfounded on other grounds.

⁹⁰ Helsinki Administrative Court 3.5.2000 Diary No.04755/99/5725 Decision No. 00/0544/7; Helsinki Administrative Court 3.5. Diary No. 04760/99/5725 Decision No. 00/0547/7; Helsinki Administrative Court 3.5.2000 Diary No. 05838/99/5725 Decision No. 00/0543/7; Helsinki Administrative Court 3.5.2000 Diary No. 05840/99/5725 Decision No. 00/0542/7.

⁹¹ The Supreme Administrative Court 29.2.2000 decision No. 401 Diary No. 1039/3/99 ATK (a precedent); The Supreme Administrative Court 29.2.2000 Decision No. 403 Diary No. 1258/3/99; The Supreme Administrative Court 22.2.2000 Decision No. 354 Diary No. 1003/3/99 ATK (a precedent); The Supreme Administrative Court 29.2.2000 Decision No. 402 Diary No. 1002/3/99.

⁹² This new status (provided for in the amended Asylum Act of 11 May 1998) is based upon the preamble of the 1946 French Constitution, incorporated into the Constitution of 1958, which states that: "every person persecuted on grounds of his action for freedom has a right of asylum within the

The Aliens Act of 11 May 1998 provides for a right to territorial asylum. Territorial asylum will be granted to a person who cannot be recognised as a refugee, whose life and freedom are at risk and whose deportation would be in violation of Article 3 of the ECHR. Persons applying for territorial asylum are not entitled to assistance, neither financial allowances, nor accommodation. In addition they have no right to work.⁹³ A decree of the Ministry of Interior addressed to the prefectures on 25 June 1998 stipulated that the new status on territorial asylum shall be granted when the threats or risks originate from persons or groups who are distinct from the public authorities of the country in question. On 26 January 2000 a ruling by the Supreme Administrative Court (Conseil d'Etat) declared null and void four provisions of the before mentioned decree. The Conseil d'Etat cancelled a number of restrictive elements in the territorial asylum procedure. Among these was a routine priority procedure for nationalities to which France has applied the Refugee Convention's cessation clause. Also, the court decided that victims of state persecution were also entitled to apply for territorial asylum.

For a long time, the French authorities held that persecution by non-state agents of persecution could not be considered 'persecution' under the Refugee Convention. However, the Duman case (see below) marked a change in this approach. In the Dankha (see below) case in 1983, the Council of State confirmed the legal reasoning of the Duman case by holding that there may be recognition of refugee status where the state or public authorities voluntarily tolerate or encourage persecution by third parties. However, refugee status will not be recognised where the state authorities are willing, but simply unable to offer protection. In a situation where there is no government at all, refugee status will be equally denied. Another aspect of France's interpretation of non-state agents of persecution involves the concept of "de facto authority". When a power with a minimum of organisation and stability can be found on a certain territory, persecutions that this power exercises or tolerates will be taken into account.⁹⁴ France has recognised the existence of de facto authorities in Southern Lebanon, Liberia and Afghanistan. However, France continues to deny asylum to

territories of the Republic." Constitutional asylum is granted under the same procedure as Convention status.

⁹³ US Committee for Refugees, Country Report 2000, at www.refugees.org: "The overwhelming majority of Algerians were denied refugee status in 1999, based on narrow interpretations of agents of persecution. Approval rates in recent years suggest that other nationalities affected by non-state violence, including Afghans and Bosnians, have generally fared better than Algerians. Paradoxically, formalizing territorial asylum in law—a status that seemed tailor made for such cases, since it does not require that the state be the persecutor—has resulted in fewer individuals receiving the status than under the previous, ad hoc system. In 1998, 1,339 asylum seekers (73 percent of whom were Algerian nationals) filed claims for territorial asylum, often in addition to a Convention asylum application. France only rendered eight positive decisions that year, of which six were Algerians. During the first five months of 1999, new applications soared by 116 percent, and the recognition rate doubled to nine percent. Amnesty International observed that the territorial asylum procedure lacked the safeguards and transparency of the normal asylum procedure. Furthermore, while the standard of persecution that territorial asylum applicants must prove is in theory lower than for Convention status, there has been no observable difference in practice—even though the rights and benefits awarded are weaker. Refugee advocates have criticized France's accumulation of subsidiary statuses for potentially eroding the awarding of Convention refugee status and the rights associated with it".

⁹⁴ See Michel Combarous, President of the *Commission des recours des réfugiés*, lecture on the French practice at the 4th Conference of the International Association of Refugee Law Judges, "The Changing Nature of Persecution", 25-27 October 2000 in Bern.

applicants from Somalia where it considers that no de facto authorities exist (see the decisions: Conseil d'Etat, 12 May 1999, n. 184280 and n.184281).⁹⁵

Commission des Recours des Réfugiés (Appeals Board), 3 April 1979, Duman: An asylum seeker who alleged repeated and systematic ill-treatment organised by the population against inhabitants of Christian denomination, where this ill-treatment was tolerated by the government, was recognised as a refugee.⁹⁶

Conseil d'Etat, 27 May 1983, 42.074, Dankha: The Council of State held that persecution does not automatically imply action by a public authority. Persecution that does not emanate from the public authorities can lead to recognition where “the facts are in fact voluntarily tolerated or encouraged by the public authorities, effectively making it impossible for the interested party to claim the protection of these authorities”.⁹⁷ As noted by Jean-Yves Carlier, “this issue directly concerns cases relating to Algerians who have been the victim of persecution by Islamic fundamentalists. The case law maintains the requirement for the indirect participation of the authority through its tolerance or encouragement, whilst trying to allow more flexibility on the point at which private acts are considered as being tolerated by the state.”⁹⁸ Subsequently, there has been an abundance of case law elaborating what might constitute ‘voluntary tolerance’ and ‘encouragement’ by the State. There is significant case law indicating that the actions of non-state agents opposed by the authorities cannot be considered tolerated.⁹⁹ Generally, the jurisprudence suggests that the applicant must have sought the protection of the authorities or show that the authorities were aware but they took no action.

In the case of *Elkebir* (22 July 1994, CRR), the applicant was an Algerian national who alleged persecution by Islamic groups on account of her professional work as a secretary. As a result of continuing violent aggression against her, she resigned from her work and fled Algeria. It was held that due to the fact that the local authorities were aware of the situation but did not take any action to intervene, this could be considered voluntary tolerance. However, during 1997 the jurisprudence has developed to provide that it is not necessary to seek the protection of the authorities, if this would clearly be in vain.

In the case of **Lahmari**, the applicant was an Algerian national from Kabyle. Fearing further persecution from Muslim fundamentalists, he sought asylum in France. Whilst the applicant had not sought protection from the authorities in Algeria, the Appeals Board acknowledged that this was because any such request would have been made in vain. Accordingly, the Board found that the applicant had a well-founded fear of persecution. This decision recognises that failure by the applicant to avail him/herself of it should not *per se* be a ground for refusing refugee status.

⁹⁵ For further details of French jurisprudence relating to the issue of agents of persecution, reference should be made to the article ‘Persecution by Non Public Agents in Refugee and Asylum Law: Assessing the Scope for Judicial Protection; International Association of Refugee Law Judges, January 1997’ by Frédéric Tiberghien.

⁹⁶ Carlier a. o. p. 401 (nationality not mentioned).

⁹⁷ Carlier a. o. p. 401.

⁹⁸ Carlier at p. 402.

⁹⁹ Frédéric Tiberghien, ‘Persecution by Non Public Agents’ in Refugee and Asylum Law: Assessing the Scope for Judicial Protection; International Association of Refugee Law Judges, January 1997 at p.105.

The case of **Bessafi** involved a female Algerian national from Oran who worked as a Rai singer. She was repeatedly threatened by “unknown individuals” and as a result was forced to give up her job. In support of her asylum application before the French Appeals Board, the applicant argued that if she were returned to Algeria, the Algerian authorities would refuse to protect her on account of her profession and origins in Algeria. The Appeals Board agreed with the applicant’s argument and granted her refugee status. In the case of **Namaoui**, from 9 December 1996, the Appeals Board likewise found that the police’s refusal to afford protection to a female medical assistant, who had been persecuted by Muslim fundamentalists, on account of her “activité professionnelle” constituted grounds for granting refugee status.

Conseil d’Etat, 22 November 1996, case 167.195: M. Messara claimed that the Algerian government implicitly tolerated the actions of terrorist groups and was, in any case, incapable of providing protection. The Council of State rejected this position and insisted that the actions must be intentionally encouraged or tolerated. The Council of State has followed the jurisprudence of the European Court of Human Rights with regard to the issue of the return of a person to his/her country of origin where s/he risks torture, inhuman or degrading treatment.

Conseil d’Etat, 1 December 1997, case 184053, Kechemir: The asylum application of Mr. Kechemir, an Algerian national, had been rejected by both OFPRA and the CRR on the grounds that the risk of persecution was not imputable to the state authorities. Mr. Kechemir was then issued a deportation order for his return to Algeria. In its decision to order the annulment of the instruction to return Mr. Kechemir to Algeria, the Council noted that article 27 bis amending the Ordonnance of 2 November 1945, provides that an alien may not be returned to a state where it can be established that there would be a risk to his life or liberty or where he would be exposed to treatment in violation of Article 3 of the European Convention of Human Rights. The Council held that this was the case regardless of whether the risk emanated from state authorities or persons or groups of persons unrelated to the public authorities as long as the state authorities were unable to provide appropriate protection. If one looks at the line of reasoning in the Dankha case, it must be concluded that there can be no persecution if there is no government or de facto authority.¹⁰⁰ As a consequence, asylum applications from Somalis have been rejected.

Commission des Recours des Réfugiés, 28 February 1995, case 270.619: The Geneva Convention is considered to be applicable in situations of civil war. But the mere existence of civil war is not sufficient for refugee status.¹⁰¹ An asylum seeker from a civil war area was not considered to be persecuted since he could still “benefit from the protection of the authorities in his country of origin”.¹⁰²

Commission des Recours des Réfugiés , 7 September 1990, case 105.028: After the break up of Yugoslavia, a number of decisions were taken that granted refugee status to claimants who invoked fear of persecution by *de facto*/local authorities. **CRR 12-02-1993 case 216.617;CRR 122-02-1993 case 230.571;CRR 07-04-1993 case 125.617; CRR 06-09-1993 case 247.455**

¹⁰⁰ Nijmegen report p. 47.

¹⁰¹ Nijmegen report p. 48.

¹⁰² Nijmegen report p. 48.

In recent years, a survey of the jurisprudence of the French Appeal Board for Refugees, *Commission des Recours des Réfugiés (CRR)*, provides further developments on the French interpretation of the notion of 'agents of persecution'. Whereas it cannot be said that the French position has changed in terms of doctrine, the Board appears to be more ready to impute private acts to the state as a consequence of inability of state protection.¹⁰³ Certain French asylum officers and judges have begun to approve some victims of non-state persecution on the grounds that the authorities tolerated the persecution ("*tolerance volontaire*") or because they determined that the victim's request for protection of the Algerian government would have been in vain ("*vanité de protection*").¹⁰⁴

As Michel Combarnous pointed out, the pre-requisite to have asked the public authorities for the protection is not required in cases where it appears clear that such request would be bound to fail.¹⁰⁵ Essential to a finding that a request for protection would have been in vain, is the fact that the public authorities are well aware of a situation to which they ought to put an end and nevertheless they do not employ the means at their disposal to afford protection to those under their jurisdictions.¹⁰⁶

The attitude of the French authorities towards **Algerian nationals fleeing the violence of Muslim fundamentalists** continues to be relevant in this respect.

Conseil d'Etat, Case of Ait-Mohamed, 24 February 1999: The Conseil d'Etat held that when persecution emanating from private individuals is based on the grounds

¹⁰³ US Committee for Refugees, Country Report 1999: "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 the 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".

¹⁰⁴ See Steven Edminster, *Recklessly Risking Lives: Restrictive Interpretations of "Agents of Persecution" in Germany and France*, World Refugee Survey 1999, at www.refugees.org/world/articles/wrs99_agentspersecution.htm.

¹⁰⁵ President de la Commission des recours des réfugiés, lecture on the French practice at the 4th Conference of the International Association of Refugee Law Judges, "The Changing Nature of Persecution", 25-27 October 2000 in Bern.

¹⁰⁶ Among the most recurrent cases in that respect, specific groups that suffer persecution from certain extremist nationalists or religious groups, Combarnous mentioned citizens of Russian or Jewish origin, or Christians and Jewish persons in certain countries with an Islamic government, Chechens in Dagestan and Ingushetia. The passivity of the authorities against certain traditional customs, such as domestic slavery imposed by certain families on ethnic minorities (Mauritius, Diagara, 15 June 2000) was also mentioned.

mentioned in the Geneva Convention and is encouraged or voluntarily tolerated by the authorities, there is no need to know whether the behaviour of the authorities itself is inspired or not by the grounds of the Convention. The case involved an Algerian, pleading persecution emanating from private individuals, whose application for asylum was rejected on the grounds that the applicant did not prove that, for one of the grounds of the Geneva Convention, the Algerian authorities would have refused to protect him/her.

In several decisions, the CRR granted refugee status to Algerians nationals persecuted by Muslim fundamentalists when it was established that they could not avail themselves of the protection of the Algerian authorities. In a judgment issued on **29 January, 1999 (N°332531)**, the CRR granted refugee status to an Algerian national who was involved in the Women Rights Movement in Algeria. As an activist within the National Union of Algerian Women and the association for the “promotion and insertion of the young Algerian women”, the applicant took a position against terrorism. As a professional athlete, the applicant was targeted by the Muslim fundamentalists and subsequently had to abandon her activity as a volleyball trainer and player. She became a choreographer and was constantly threatened following her television performances. The CRR noted that the national authorities, who were aware of the death threat she had received, deliberately refrained from any intervention and were to be considered as party to the ill-treatment inflicted by the fundamentalists to the applicant.

A similar case (**N°336088, 7 May, 1999**) involved a divorced Algerian woman living with her children on her own who worked as a teacher and publicly defended equality between women and men. The applicant received death threats from Muslim fundamentalists because of her life-style and her refusal to wear the veil and abandon her job. The CRR noted that the police did not ensure any concrete protection measure and subsequently granted the applicant refugee status.

In another case (**N°332964, 7 May 1999**), the **CRR** ruled that the applicant, a victim of the Muslim fundamentalists because of his ethnic Kabyle origins, had legitimately not sought protection from the authorities since it was established that the local police was infiltrated by Muslim extremists.

In the same way, the **CRR (N°329818, 4 February, 1999)** agreed that any recourse to the official authorities would have been vain in the case of an Algerian national of Berber origins.

In other cases where the applicant did not provide evidence to demonstrate that seeking protection from the authorities in Algeria would have been made in vain, the **Conseil d’Etat** and the **CRR** have denied refugee status to the applicant (**C.E, Aneur, 28 October 1998; CRR, Chader, 15 October 1998**).

In January 1999, the CRR granted refugee status to an Algerian national, persecuted by Muslim fundamentalists. Considering the applicant’s strong attachments to France, the CRR considered that he was particularly exposed to persecution from Muslim fundamentalists groups in Algeria. According to the CRR, the risk of persecution together with the police’s refusal to afford protection constituted grounds for granting refugee status. In these circumstances, the CRR confirmed its position that

persecution by non-state actors may be imputed to the state authorities (**decision n.330665, dated 08/01/1999**).

In the **Chader** case, the applicant claimed persecution by Muslim fundamentalists on account of her profession but, unlike the **Namaoui** case (CRR, 9 December 1996), the CRR did not consider that the applicant had established the authorities unwillingness to afford protection.

On 11 July 2000, the CRR accepted in the case **No. 350323**, an Algerian woman, that she did not file a complaint against her aggressors as it was in vain to seek protection from the authorities against the backdrop of the absence of legal and administrative mechanisms of protection for women and against the backdrop of the impunity that their [the women's] aggressors enjoy.

Another woman from Algeria, being a non-married woman, who was harassed and raped by Islamists, was recognised as a refugee (**No. 340921**, 16 June 2000).

The CRR issued several decisions concerning nationals of the CIS States. These decisions uphold Frances's "mixed treatment" of non-state agent of persecution claims by granting refugee status to victims of non-state agents of persecution under the condition that the authorities actually tolerate the persecution ("*tolérance volontaire*").¹⁰⁷

Other illustrative cases concern claims from **former USSR** nationals. According to the CRR, acts of violence perpetrated by the armed nationalist groups ("*Ziemsargs*") of Latvia against residents of Russian origin have been "*voluntarily tolerated by the public authorities of Latvia*" and therefore the victims of these armed groups have a well-founded fear of persecution (cf. 3 decisions dated 14 September 1998, No. 322867, 322868 and 322869).

Similar jurisprudence concerns Moldavian citizens of ethnic Ukrainian origin who are victim of acts of violence by Moldavian nationalists (2 decisions dated 27 November 1998, No. 321902 and 321903).

Another case, referring to the conflict between Georgia and Abkhazia, identifies the Georgian militia as an agent of persecution (decision **No. 308572** dated 2 December 1998).

In Kazakhstan, Kazakh nationals may be victims of discrimination and ill-treatment because of their Russian origin or conversion to the Russian orthodox religion. It has been found they could not find protection from the public authorities of Kazakhstan

¹⁰⁷ See ECRE Documentation service November 1999, the following decisions issued in 1999: No. 332222 (residence in Latvia/ Russian origin), No. 329683 (residence in Kazakhstan/Armenian origin), No. 327023 (residence in Latvia/Russian origin), No. 327022 (residence in Latvia/Russian origin), No. 318611 (residence in Russia/ Jewish origin), No. 318610 (residence in Kazakhstan/ Russian origin), No. 338955 (residence in Russia/ Jewish origin). The same approach is also applied in relation to asylum claims from Algeria. See, for instance, the decisions No.331697, No. 333013 and No. 333667.

and were therefore granted refugee status by the CRR (decisions n.328030, 08/01/1999; n.329086, 18/11/1998).

The rise of **anti-Semitism in Russia** and the complacency of the Russian authorities towards the acts of nationalists led the CRR to grant refugee status to Russian citizens who were victims of discrimination and violence because of their Jewish origin (decisions **No. 328606**, 2 December 1998; **No. 324019**, 8 September 1998).

In **Galouchko, the CRR, 6 October 1999** the CRR recognised an **Ukrainian** woman of Jewish descent. The appellant, of Ukrainian nationality, had constantly been harassed and had on occasions been victim to racketeering by certain individuals on account of her father's Jewish origins. In this context, she had had to take refuge in Bosnia for three years from 1991 – 1993. On return to the Ukraine, she was once again a victim of racketeering, and was as such subjected to bad treatment and used for sexual services. She brought a complaint to the Home Affairs Service, who then alerted her aggressor to this fact. Consequently, the following July, she was again taken and raped. Due to this sequence of events, and having been unable to avail herself of the protection of the Ukrainian public authorities - who, the CRR asserted, should in this circumstance be regarded as having voluntarily tolerated the actions of which she was victim - the appellant had no other option but to flee the country. The CRR therefore granted her refugee status.

A national from the **Ukraine** who was a victim of anti-Semitism in the Ukraine, was granted refugee status on similar grounds (**No. 311339**, 18 September 1998).

A Russian national of ethnic German origin, who was the victim of persecution in Moldavia and in Russia because of her origin, was recognised as a refugee due to the complacency (or even complicity) of the public authorities towards individual racist acts (decision **No. 307893**, dated as of 22 October 1998).

On 29 February 2000 (**No. 351328**) the CRR recognized a Russian citizen of Jewish descent from Krasnodar as a refugee on grounds of religious beliefs. The Commission considered that it could be deduced from the attitude of the Russian authorities that they voluntarily tolerated the persecution and harassment that the applicant was subjected to. On the same grounds a Moldavian of Jewish origin was recognized as a refugee on 20 March 2000 (**No 348890**). See also the case of a Russian Jew, no. 352208, 30 June 2000 who was recognized as a refugee.

In the case of a **Slovak Roma** it was held that the Slovak authorities voluntarily tolerated the persecution committed by skin-heads. (**No. 349311**, 23 June 2000) It has to be noted here that the House of Lords decision dating as of 6 July 2000 found that the Slovak authorities with respect to Roma are willing and able to protect against infringements of skin-heads.

8.6. Germany¹⁰⁸

The Federal Office for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) is the competent authority to determine refugee status. An appeal against a negative decision may be made to the Administrative Court (*Verwaltungsgericht*). A further appeal against a decision by the Administrative Court may be made to the Higher Administrative Court (*Oberverwaltungsgericht* or *Verwaltungsgerichtshof*). A final appeal may be made to the Federal Administrative Court (*Bundesverwaltungsgericht*). 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 (*Bundesverfassungsgericht*).

In Germany, an asylum seeker may be granted

1. Political asylum by virtue of a constitutionally granted right (Art 16 a of the Constitution),¹⁰⁹
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”);¹¹⁰
3. Suspension of deportation in conformity with Art 3 of the European Convention of Human Rights (ECHR) (prohibition of torture or inhuman or degrading treatment) by virtue of Section 53 (4) of the Aliens Act (*Duldung* or tolerated residence).¹¹¹

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.¹¹²

¹⁰⁸ See for a more detailed research on the reasoning of the interpretation of German courts, ECRE Research Paper “Non-state Agents of Persecution and Inability of the State to Protect – the German Interpretation, London, September 2000.

¹⁰⁹ 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).

¹¹⁰ 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.

¹¹¹ 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.

¹¹² 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.

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.

Both the Federal Constitutional Court and the Federal Administrative Court have developed a strictly applied objective concept of 'persecution'. The term 'political' is understood to refer to those State measures which are directed at the individual's political or religious beliefs or against other inalienable characteristics.

German jurisprudence has established that persecution according to Article 16a of the Constitution and Paragraph 51, Section 1 of the Aliens Act must be directly or indirectly imputable to state organs. Persecution by third parties will only be indirectly imputable to the state if the state authorities encouraged, approved or tolerated the actions (a certain element of complicity is required). If the State is unable to provide protection including when it attempts to do so, refugee status will be denied.

The Federal Administrative Court has held that there can be no persecution within the meaning of Article 16a of the Constitution or Paragraph 51, Section 1 of the Aliens Act where there is no state authority with control over the territory.¹¹³ No state authority can be considered to exist in the event of civil war. However, persecution by a *de facto* authority that is deemed to exercise state-like powers may result in the grant of refugee status.¹¹⁴ According to a recent decision of the Federal Constitutional Court¹¹⁵, the question as to whether in a situation of 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 whether at least in a "core territory" a supreme power of certain stability in the sense of an "overall peace order" has been *de facto* established. The Federal Constitutional Court held that the Federal Administrative Court had understood the concept of quasi-state persecution too narrowly; its decisions¹¹⁶ are, thus, not in conformity with the constitutionally granted right of asylum (Art 16 a of the German Constitution). The two decisions on Afghanistan of the Federal Administrative Court were consequently quashed.

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

¹¹³ This has been affirmed by lower Administrative Courts in Kosovo Albanian cases since June 1999 when KFOR troops took control over Kosovo. The courts argued that on account of KFOR taking over, the Yugoslav state lacks the pre-requisite for political persecution – effective sovereign supremacy-enabling to exert political persecution. See for instance High Administrative Court NRW, ruling of 30 September 1999 (Az: 13 A 2807/94.A).

¹¹⁴ State-like power was not assumed in the case of Kosovo for the UCK, see for instance High Administrative Court Niedersachsen, ruling of 3 March 2000 (12 L 778/00).

¹¹⁵ BVerfG, 2 BvR 260/98, 10 August 2000.

¹¹⁶ BVerwG 9 C 34.96, 4 November 1997; BVerwG 9 C 5.98, 19 May 1998.

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 from *refoulement* is granted. 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.¹¹⁷ 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.

Federal Administrative Court, 18 March 1986, 9 C 4.88

According to the Federal Administrative Court acts of individuals can substitute for state violence and constitute persecution in the context of the law of refugee status when the state provokes individuals or groups to persecute or supports, approves or tolerates acts of that nature, and so denies the person affected the necessary protection because of lack of willingness or capability [to offer protection].¹¹⁸

Federal Constitutional Court, 10 July 1989, BVerfGE 80, 315:

In principle, only state persecution or actions attributable to the state are considered as a valid basis for a claim for refugee status.¹¹⁹ Political persecution in the sense of Article 16a of the Constitution presupposes that there is an effective State authority over the territory.

Federal Administrative Court, 12 June 1990, 9 C 37.89:

“Persecution actions performed by private persons entitle their victims to asylum when the State is responsible for the actions by inspiring, supporting or accepting passively such persecuting measures. This is not the case when the State grants protection on the whole with the help of the means at its disposal.”¹²⁰

Federal Administrative Court, 23 July 1991, 9 C 154.90:

The case concerned a Turkish citizen of Kurdish ethnic origin. Being of the Christian faith, he was at several times attacked by Muslims. The Court ruled that “[w]hen the

¹¹⁷ 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” ausgeliefert 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.

¹¹⁸ Sitaropoulos pp. 425.

¹¹⁹ Carlier a. o. pp. 269.

¹²⁰ Web-site: <http://www.unhcr.org/refworld/refworld/legal/refcas.htm>.

provision of protection by the state against threat or infliction of harm by third party outreaches its forces, the state's responsibility cannot be involved".¹²¹

Federal Administrative Court, 18 January 1994 C 48.92. Affirmed by judgment by BverwG (Bundesverwaltungsgericht), 22 March 1994, 9C 443.93:

Political persecution is in principle state persecution, but also actions carried out by organizations with power to exercise authority similar to that of the state are considered to be persecution if the state has not prevented the actions despite that it is in control of its territory.¹²²

Federal Administrative Court, 1 July 1994, 9B 181.94:

The case concerned persecution carried out by the Sri Lankan army against the Tamil population in the northern part of Sri Lanka. The Higher Administrative Court had ruled that persecution by the army of the state on the orders of the head of the army are, when the government (tacitly) accepts the measures taken, to be interpreted as actions carried out by the state itself. The purpose of the appeal to the Federal Administrative Court was to establish that the judgment by the Higher Administrative Court was in conflict with federal law on the ground that only such persecution arranged by the government or the President can be considered to constitute state persecution.

The appeal, though, was rejected as being unfounded. The Federal Administrative Court held that persecution, in a situation of civil war when the state does not have territorial sovereignty over parts of its territory but exists only as one of the fighting civil war factions, and where the state military carries out extermination measures against civilians, should be categorised as state persecution when the persecution is ordered or approved through a valid decision making process and chain of command within the State.

Federal Administrative Court, 6 August 1996, 9 C 172.95:

The applicants, a family of Muslim Bosnians from Bosnia-Herzegovina, applied for asylum in Germany on the basis of the civil war which had broken out in their country of origin. The Federal Office for the Recognition of Foreign Refugees rejected the asylum application as being manifestly unfounded, and further stated that the criteria of Section 51(1) (protection against *refoulement*) of the Aliens Act were not fulfilled and that there were no obstacles to *refoulement* (Section 53 Aliens Act).

The applicant appealed to the Administrative Court (*Verwaltungsgericht*) which instructed the Federal Office for the Recognition of Foreign Refugees to revise its decision and determine that the criteria (Section 51(1) Aliens Act) for protection against *refoulement* were fulfilled. The Higher Administrative Court (*Oberverwaltungsgericht*) rejected the appeal from the Federal Commissioner for Asylum Affairs (*Bundesbeauftragten für Asylangelegenheiten*). According to the Higher Administrative Court those parts of the territory which were occupied by the Serbs were considered to be, for the purposes of asylum law, under a state-like power. The group persecution which threatened the Muslims in that part of the territory occupied by Serbs, the lack of sufficient protection against this persecution, and the

¹²¹ Web-site: <http://www.unhcr.org/refworld/refworld/legal/refcas.htm>.

¹²² Sitaropoulos p. 423.

lack of an economically feasible internal flight alternative were grounds for protection against *refoulement*.

The Federal Commissioner for Asylum Affairs applied for judicial review of the judgment. The Federal Administrative Court was of the opinion that the application for judicial review was well founded. It stated that the judgment of the Higher Administrative Court violated federal law. It held that the asylum applicants had no basis for a claim for asylum (Article 16a of the Constitution) or for protection against *refoulement* (Section 51 (1) Aliens Act) since they could claim the protection of their state of origin, Bosnia-Herzegovina. Therefore, according to the Federal Administrative Court, it was of no importance here, if the persecution was “political” in the sense of the asylum law or if the asylum seekers were persecuted at the time when they left their country of origin. The Federal Administrative Court went on to say that, even if the measures taken by the Serbs against the Muslim population constituted group persecution at the time when the asylum seekers left, the applicants had not qualified for refugee status. It held that the asylum law only provided protection against political persecution, and only in cases of lasting lack of protection. According to the court, political persecution in the sense of the asylum law basically meant persecution by the state. It went on to hold that this included persecution by a state-like power. It said that a power was only state-like when it was organised in a state-like way, and was effective and stable. It concluded that effectiveness and stability required some continuity and durability of the power.

When applying these criteria, one can conclude that the Bosnian Serbs in the territory of Bosnia-Herzegovina did not yet have a state-like power in June 1992. At the time of the decision by the Higher Administrative Court in May 1995, though, the Republic of Srpska had this state-like power and therefore also had the capability of carrying out political persecution in the sense of Article 16a German Constitution.

According to the Federal Administrative Court, the lack of protection for a person is a requirement for an asylum application. A basis for an asylum claim does not, therefore in the court’s view, exist when the state, of which the applicant is a national, is capable and willing to protect against persecution by a state-like power on its territory. The Federal Administrative Court found that the applicants could receive the protection of the state of which they were nationals. As the Higher Administrative Court had established, they were nationals of the existing state of Bosnia-Herzegovina, the Federal Administrative Court found that this state did not persecute the applicants and provided protection against persecution by the Republic of Srpska.

Federal Administrative Court, 15 April 1997, 9 C 15.96:

The applicant, a Somali citizen from the Darod/Marehan tribe, left Somalia in 1992 and applied for asylum in Germany. She had left Somalia because of the lack of peace after the overthrow of the Government in January 1991. Many members of her tribe, whose members previously formed the Government, had been persecuted. She was assaulted, beaten and injured because of her ethnic origin. Eight months before her departure, someone had attempted to rape her. During her last months in Somalia, she had been living in hiding with a Hawiye family in Mogadishu. When soldiers found out about this she fled. She claimed that if she returned to Somalia, she risked being raped or killed by robbers or by people belonging to the Hawiye tribe. The Federal Office rejected the asylum application and decided that there were no obstacles to deportation according to the German Aliens Act (Section Act 51 (1) and Section 53

Aliens Act). The Administrative Court (*Verwaltungsgericht*) allowed part of the appeal, and ordered the Federal Office to establish that the applicant fulfilled the requirements of the Aliens Act (Section 51 (1) of the Aliens Act: protection against *refoulement*), and rejected the rest of the appeal. It reasoned that the only way into Somalia was through Mogadishu, which is controlled by the Hawiye clan. Because of her ethnic origin the applicant risked being killed or injured on her return. The court noted that this is not a question of state persecution but rather measures by social groups in Somalia. It concluded that such persecution is recognised under the Aliens Act (Section 51 (1) of the Aliens Act). Therefore, the requirements for protection against *refoulement* were fulfilled. The Higher Administrative Court (*Oberverwaltungsgericht*) changed the judgment of the Administrative Court with regard to the part concerning Section 51 (1) of the Aliens Act and dismissed the complaint as a whole. In its reasoning of the judgment, the court stated that the norm in question required political, and consequently state persecution. In cases where the state power has broken down due to war or other reasons, non-state actors could qualify as persecutors in the sense of the asylum law. The requirements on such a quasi-state actor was, in addition to possessing lasting organisational structures, that it has established what the German court calls “a regional peace order” (*regionale Friedensordnung*). The court argued that this was what distinguished persecutors relevant to German asylum law from mere spheres of influence, headquarters or other structures of power that rebel- or clan-leaders have established. It held that in Somalia, there was not, at the relevant time and could not be foreseen in the near future, a local or regional power having enough power to be capable to pursue persecution relevant for establishing a basis for an asylum claim. In the process of judicial review the applicant argued that persecution in the sense of Section 51 (1) Aliens Act need not be carried out by the state. Instead, the criteria should relate to the targeted operations against a person and the lack of protection for that person. The applicant argued that the Higher Administrative Court had taken the requirements of state-like organisations too far, and undervalued the central criterion, namely persecution.

The Federal Administrative Court was of the opinion that the request for judicial review was unfounded. It said that the Higher Administrative Court was right in its opinion that political persecution must be carried out by the state or by state-like powers. According to the Higher Administrative Court, there were in Somalia, at the time when the judgment was given, three “presidents” who were not in any position to control the whole territory, but strong enough to destroy any attempts to peacefully end the civil war (*instabiles Gleichgewicht*). Due to the lack of stability and effectiveness, none of the three powers could be classified as state-like.

Bundesverwaltungsgericht, 15 April 1997, 9 C 38.96¹²³. Affirmed by BVerwGE 104, 254; and BVerwG 9 C 5.98, 19 May 1998 (on Afghanistan):

¹²³ It has to be noted here that the Administrative Court Frankfurt, 29 March 1999, 9 E 30919/97.A(2) declined to follow this jurisprudence 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

The applicant, who was born in 1966, is a Somali national belonging to the Darod/Majeerten tribe. In March 1993, he arrived in Germany and applied for asylum. He claimed he had left Somalia because of the civil war. Many members of his family had been killed by the Hawiye, and he himself feared for his life. In April 1991, he had been detained for a two month period, during which he was beaten. Later in 1991, the rebels under general Aidid had brought the applicant and his family from Mogadishu to Jelib where they had stayed until July 1991. The applicant's uncle had been executed in Jelib. When returning to Mogadishu the applicant and his wife had been "humiliated" (*erniedrigt*), and his wife had been repeatedly raped. The *Bundesamt* rejected the asylum application as manifestly unfounded. The applicant was issued a deportation order.

The applicant appealed to the Administrative Court which reversed the decision with regard to the deportation order since it was of the opinion that there were obstacles to *refoulement* (Section 53 (4) Aliens Act). The rest of the appeal was rejected. Since there was no state or state-like powers in Somalia, the applicant had no basis for claiming asylum. The requirements for deportation were not fulfilled though, because the applicant was at risk of being subjected to inhuman treatment (Article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)) or even risked a violation of his right to life (Article 2 ECHR).

The Higher Administrative Court reversed the judgment, deciding that there was no obstacle to the Administrative Court with regard to the part concerning Section 51 (1) of the Aliens Act and dismissed the complaint as a whole. In its reasoning of the judgment the court stated that the norm in question required political, and consequently state persecution. In cases where the state power has broken down due to war or other reasons, non-state actors could qualify as persecutors in the sense of the asylum law. The requirements on such a quasi-state actor are, in addition to possessing a lasting organisational structure, that it has established what the German court calls "a regional peace order" (*regionale Friedensordnung*). This is what distinguishes asylum relevant persecutors from mere spheres of influence, headquarters or other structures of power that rebel- or clan-leaders have established. In Somalia, there was not, at the relevant time and cannot be foreseen in the near future, a local or regional power having enough power to be capable to pursue persecution relevant for establishing a basis for an asylum claim. In the process of judicial review the applicant had argued that persecution in the sense of Section 51(1) of the Aliens Act need not be carried out by the state. Instead, the criteria should relate to the targeted operations against a person and the lack of protection for that person. The applicant argued that the Higher Administrative Court had taken the requirements of state-like organisations too far, and undervalued the central criterion, namely persecution.

The Federal Administrative Court was of the opinion that the request for judicial review was unfounded. The Higher Administrative Court was right in its opinion that political persecution must be carried out by the state or by state-like powers. According to the Higher Administrative Court there were in Somalia, at the time when the judgment was given, three "presidents" who were not in any position to

interpreting Section 51(1) of the Aliens Act as also applying to acts that cannot be attributed to the state.

control the whole territory, but strong enough to destroy any attempts to peacefully end the civil war (*instabiles Gleichgewicht*). Due to the lack of stability and effectiveness, none of the three powers could be classified as state-like.

The Federal Administrative Court also ruled that the judgment of the Higher Administrative Court was in conformity with federal law in not granting the applicant protection against *refoulement* (Section 53 (4) Aliens Act in conjunction with Article 3 ECHR). According to the Federal Court, the Higher Administrative Court had correctly assumed that the requirements of the Aliens Act together with Article 3 ECHR are only to protect against *refoulement* when someone is at risk of being subjected to inhuman or degrading treatment or punishment by the state or a state-like organisation. The Federal Administrative Court further stated that it was not its task to stretch the limits of the Convention Parties' reception capacity and reception willingness through a creative interpretation of the Convention, and without regard to the protected sovereignty of the national legislator to freely decide about the composition of the population on its own territory and thereby also decide about the reception of refugees. The Federal Administrative Court maintained this position also after having considered the judgment of the European Court of Human Rights in the case *Ahmed v. Austria* (17 December 1996 - 71/1995/577/663). According to the Federal Court, an obstacle to deportation (Section 53 (4) in conjunction with Article 3 ECHR) required that the foreigner was threatened by treatment which fulfilled the same criteria of Article 3 ECHR as it would have to fulfill if the treatment took place in a State Party to the Convention. According to the Federal Court, this was only the case when there was a considerable probability that the foreigner, throughout the whole country, risked inhuman or degrading punishment or treatment which emanated from the state. The Federal Court held that in exceptional cases, abuse by third parties may constitute such treatment, if the state can be held accountable because it supports or approves the measures or because it does not provide protection although it was in the position to do so.

Federal Administrative Court, 4 November 1997, 9 C 34.94., confirmed by BVerwG 9 C 5.98, 19 May 1998:

The applicant, an Afghan national, applied for asylum in Germany in January 1992. He claimed that he had been a member of the Afghan Communist Party since 1973 and that he had also been an officer in the air force. In 1990, he took part in a coup which failed. The applicant was detained, but managed to get out of prison and leave the country. The Federal Office rejected the application for asylum on the grounds that the persecution that the applicant feared did not amount to political persecution, since no state or state-like organization existed due to the civil war. The Higher Administrative Court ordered the Federal Office to establish that an obstacle to *refoulement* (53 (4) Aliens Act) existed, but rejected the rest of the appeal. The Higher Administrative Court further ordered that it should be established that the applicant had a right to asylum because of persecution by state-like powers and that the requirements for protection against *refoulement* (Section 51 (1) of the Aliens Act) were fulfilled. The case was appealed to the Federal Administrative Court on the ground that the Higher Administrative Court was wrong in establishing that state-like powers capable of carrying out persecution existed in parts of Afghanistan. The Federal Administrative Court was of the opinion that the appeal was predominantly well-founded. The decisive factors are both the existence of state-like organised structures and an overall peaceful situation (*übergreifende Friedensordnung*).

Federal Constitutional Court, BVerfG, 2 BvR 260/98, 10 August 2000

The Federal Constitutional Court held that the Federal Administrative Court has understood the concept of quasi-state persecution too narrowly; its decisions¹²⁴ are thus not in conformity with the constitutionally granted right of asylum (Art 16 a of the German Constitution).¹²⁵ 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 shall 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 whether a certain measure constituted political persecution in the sense of Art. 16 a of the German Constitution.

The Federal Constitutional Court emphasised that political persecution emanated from superior, regularly sovereign power, to which the claimant of protection is subjected; thus political persecution was persecution by the state. According to the Constitutional Court, the decisive factor for the assessment of whether a certain act constituted political persecution was the inclusion of a person seeking protection in an overall structure which regulated the living together of a society on the basis of order and constraint. The Court went on to say that this supreme power could either afford protection to its subjects, or deprive a subject of the protection on account of certain grounds relevant to asylum and deliberately exclude the person from the community by violating the person’s rights forcing him/her into a hopeless situation from which s/he can only escape by fleeing his/her country. According to the Federal Constitutional Court, the question as to whether in a situation of 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 whether at least in a “core territory” a supreme power of certain stability in the sense of an “overall peace order” has been de facto established. The Federal Constitutional Court held that the continuing military threat did 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 (in a civil war) such a military threat could indicate that a state-like organisation has not yet been established, but it was not a constitutive element for the assumption whether a state-like organisation existed or not. The Court went on to say that the more the civil war continued without substantial change of the existing power structure, the less it could be assumed that no state-like organisation has been established. According to the Federal Constitutional Court, it followed that the Federal Administrative Court was wrong in holding that “when the warring factions in a civil war do not fight with military means with the intent of destroying the enemy and fight with prospects of succeeding in asserting the power in the entire territory of the civil war”¹²⁶, that state-like structures can be assumed.

¹²⁴ BVerwG 9 C 34.96, 4 November 1997; BVerwG 9 C 5.98, 19 May 1998.

¹²⁵ BVerfG, 2 BvR 260/98.

¹²⁶ BVerwGE 105, 306.

It is interesting to note the link between the existence of state-like structures and the existence of an internal flight alternative. In two judgments¹²⁷ of the High Administrative court of Schleswig-Holstein, the court reasoned that in Northern Iraq there were no state-like structures, thus there could not be an internal protection alternative (IPA) as the concept of IPA implied the possibility of being granted state protection. However, the Federal Administrative Court decided on 8 December 1998 (BverwG 9 C 17.98) that there could be an internal flight 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, according to the Court, is whether the asylum seeker is sufficiently secure from being persecuted; that is to say, whether there is a threat that the asylum seeker is subject to attacks of Iraqi agents.

8.7. Italy

The first instance authority in Italy is the *Commissione Centrale per il Riconoscimento dello Status di Rifugiato* (The Central Commission for the Eligibility of Refugee Status). This is an independent administrative body. Following the judgement of the Supreme Court (*Corte Suprema di Cassazione*)¹²⁸, negative decisions by the Central Commission may be appealed to the Civil Court, instead of the Regional Administrative Court.¹²⁹

The Italian refugee law scheme also provides for constitutional asylum. In the famous Ocalan case, for the first time in Italy, the Civil Court of Rome gave official recognition to the right to asylum, provided for in Art.10, Paragraph 3 of the Italian Constitution ("*any alien debarred in his/her country from the effective exercise of the democratic liberties guaranteed by the Italian Constitution, shall have the right to asylum in the territory of the Italian Republic according to the conditions established by law.*"). This Civil Court judgment thus confirmed the immediately operative, and not merely programmatic, nature of the constitutional norm on asylum. It also substantiated the distinction between the notion of constitutional asylum and that of refugee extracted from the Geneva Convention of 1951: the former defined by objective criteria (the lack of democratic liberties in the country of origin), the latter containing subjective presumptions (individual fear based on persecution).

The complete implementation of the constitutional principle of asylum is contained in the Draft law for the reform of the right to asylum and temporary protection in Italy, which has been moving through parliamentary procedures for the last three years.¹³⁰

It is difficult to establish what the Italian approach to the issue of non-state agents of persecution is as there is no significant case law on the refugee definition. The

¹²⁷ High Administrative court of Schleswig-Holstein, judgments of 18 February 1998, 2 L 166/96 and 2 L 41/96.

¹²⁸) n. 7224 dated 8 October 1999.

¹²⁹ No provisions for free or low-cost legal representation to asylum seekers in the judicial procedure of the appeal are available.

¹³⁰ For further information on the Italian refugee determination procedure and laws see 'Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries, Fabrice Liebaut, Danish Refugee Council, May 2000.

decisions of the Central Commission are not public and it is possible to obtain individual decisions without the permission of the persons concerned. Furthermore, the reasoning of the Central Commission in its decisions is generic and does not relate to the individual facts of the specific case. Moreover, a certain incoherence may be noticed in the decisions of the Central Commission due to the fact that the Commission is divided in different Sub-Commissions according to the geographic provenance of asylum seekers.

There is some evidence to suggest that the Italian authorities interpret “persecution” as action by state authorities or action tolerated by state authorities. As a consequence, asylum seekers fleeing civil war are rarely recognized as refugees, but the Commission recommends for them the release of a permit of stay on humanitarian grounds according to the principle of *non-refoulement* contained in the Aliens Act (art. 5 c. 6 Law Decree n. 286/98). To succeed an asylum applicant must show that s/he is singled out from other groups suffering from the civil war.

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 showed 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 fear of persecution from Islamic terrorists were recognised as refugees under Geneva Convention.

The jurisprudence by the Courts is not coherent either, as the following three cases can illustrate:

Regional Administrative Tribunal of Friuli-Venezia Giulia, case No. 740/96 (relating to application No. 532/95):

The appeal against the denial of refugee status by the Central Commission for Eligibility of Refugee Status, was based upon, *inter alia*, the fact that the Central Commission had not taken into account the risks faced by the applicant at the hands of Islamic groups. The Tribunal nevertheless held that the 1951 Geneva Convention definition of a refugee required the presence of persecution by the authorities of the State of the applicant. This part of the appeal was rejected on the grounds that the applicant had not claimed persecution by the state authorities in Algeria and, therefore, the first instance authority’s decision was legally correct.

Council of State, 3976/94, 12 April 1994:

The facts of the case are not re-produced in the decision by the Council of State. However, from the reasons given for the appeal, it can be deduced that the case involves an applicant of Algerian nationality who alleges persecution by the FIS and further alleges that the state authorities are unable to protect its citizens. The Council of State held that the appeal was unfounded. The Council of State found that the applicant had not shown that s/he was at any greater risk of persecution than the rest of the population and therefore, his/her flight from the country was disproportionate. Furthermore, the persecution did not emanate from the government, which did provide protection to its citizens. If there is no national government, or if the control of the national government is disputed, the asylum application is normally rejected. There is one known case, in which a Liberian applicant has been recognized as a

refugee due to the instability in Liberia.¹³¹ However, applications for asylum concerning countries in civil war are normally rejected unless the applicant can demonstrate that s/he was at greater risk than the rest of the population. Applicants may instead request a temporary residence permit on humanitarian grounds.¹³²

Regional Administrative Court (T.A.R.) of Friuli Venezia Giulia 22 October 1998 - Rwanda minor vs The Central Commission for the recognition of refugee status:

In this sentence the T.A.R. of the Italian Region of Friuli Venezia Giulia overturned its previous position concerning the definition of "agents of persecution" in evaluating the legitimacy of the application for recognition of refugee status presented by a Rwanda minor. Explicitly referring to Paragraph 65 of the Manual on Procedures and the Criteria for the Determination of the Status of Refugee, published by the UNHCR, the T.A.R. daimed "*that persecution is to be intended also as the lack or inability of a government to protect the human rights of its inhabitants; this inability can also be intended as the lack of the will to protect them.*"

8.8. Luxembourg

The Luxembourg Administrative Court held on 2 May 2000 that persons who are persecuted by non-state agents are eligible for protection under the Refugee Convention when the authorities either encouraged or tolerated persecutory acts by private parties, or when the authorities are unable to provide adequate protection.¹³³ The determining element is not the motivation of the non-state agent of persecution but the failure of state protection. The precondition is that the persecuted person has actually sought, without success, the protection of the state.¹³⁴

8.9. The Netherlands

Refugee status determination is the responsibility of the Ministry of Justice (formally the Secretary of State). An appeal against a negative decision may be made to the Ministry of Justice with a further right of appeal to one of five District Courts.

Dutch jurisprudence recognises persecution by non-state agents as persecution within the meaning of the 1951 Geneva Convention if the national authorities are unwilling or unable to provide appropriate protection and if there is no internal flight alternative. Reference may be made to the following cases: **ARRS 14 September 1981, AB 1981; HR 15 January 1993, RV 1993; Rb Den Haag, 19 August 1998, AWB 97/12038; Rb Den Haag, 14 January 1998, AWB97/13806; Rb Zwolle 26 August 1997, AWB 97/1101.**

The jurisprudence also recognises persecution by non-state agents when there is no central government.¹³⁵

Rechtseenheidskamer, 27 August 1998, AWB 98/3068 en AWB 98/3072¹³⁶:

¹³¹ Information from ELENA National Coordinator.

¹³² Information from ELENA National Coordinator.

¹³³ Case No. 11597 of the register, filed 20 October 1999.

¹³⁴ Referring to Jean-Yves Carlier et al, *Qu'est-ce qu'un réfugié?*, p. 113, para 73 and following.

¹³⁵ There has been no change in the jurisprudence since the first drafting of the paper.

On 27 August 1998, the District Court of The Hague (Rechtseenheidskamer, REK) took decisions in two cases concerning Somali asylum applicants.¹³⁷ The central issue in the cases was whether persecution in the sense of article 1A (2) of the 1951 Geneva Convention and Article 15 (1) of the Dutch Aliens Law was possible in a situation where no central or de facto government existed. The Coordinating Chamber of the Court decided in the affirmative. The Coordinating Chamber stated that its position was in line with the ordinary meaning given in the context and light of the object and purpose of the 1951 Geneva Convention. The Coordinating Chamber rejected the argument of the Council of State that other EU States, namely France and Germany, deny refugee status where no de facto government exists. Furthermore, it stated that the EU Joint Position is not legally binding and moreover there are some 130 other states party to the 1951 Geneva Convention.

8.10. Norway

Refugee status is determined by the Directorate of Immigration, the UDI (*Utlendingsdirektoratet*), on the basis of a personal declaration filled out by the applicant and an interview conducted by a decision-maker in the UDI. The UDI is a body of the Ministry of Local Government and Regional Development. All negative decisions may be appealed to the Ministry of Justice (*Det Kongelige Justis- og Politidepartementet*), or, from 1 January 2001, the Appeals Board (*Utlendingsnemnden*). In addition to refugee status, UDI may grant an applicant Convention refugee status, or grant permission to stay on humanitarian grounds, to persons who do not meet the Convention definition but are nevertheless in a "refugee-like" situation, including for health concerns. On average, the UDI requires six months to issue first- instance decisions.

The Norwegian law does not elaborate on the issue of the agent of persecution; it simply refers to Article 1 A of the 1951 Geneva Convention. Traditionally, the Norwegian government has not accepted persecution by non-state agents as a basis for refugee status. This is reflected in a number of decisions concerning asylum seekers from Algeria, Lebanon and Southern American countries. In all these cases, the asylum applications have been rejected on the grounds that there was no persecution by state-agents. Nevertheless, the Norwegian authorities reviewed their policy concerning Convention refugee status in January 1998. This has resulted in new instructions which supposedly include persecution by non-state agents, where the state is unwilling or unable to provide protection, within the definition of a Convention refugee.

¹³⁶ The District Court of the Hague is the highest administrative court in asylum cases for appeals filed after 1 March 1994. In cases where the appeal was filed before that date, the Council of State is/was the highest Court.

¹³⁷ The Council of State had ruled on 6 November 1995 (ABRS 6 November 1995, RV 1995, 4) in a Somalian case that there can be no persecution if no government existed in the country of origin. The Council had noted that this view was in accordance with the case law of central administrative and judicial authorities in France and Germany. The decision of the Council of State in 1995 had departed from previous case law which had interpreted the term persecution as persecution by any State organs or by third parties, against which the government is unwilling or unable to provide sufficient protection. The existence of a central government was not decisive. In the decisions of 27 August 1998 the Coordinating Chamber of the District Court of the Hague resumed the jurisprudence prior to the decision of the Council of State of 6 November 1995 and purported to follow the point of view of the UNHCR (in its comment on the decision of the Dutch Council of State of 6 November 1995, Position Paper with regard to persecution by non-State agents, 30 January 1996).

In January 1998, the Norwegian authorities began to recognize **non-state agents of persecution in asylum** applications.¹³⁸

8.11. Spain¹³⁹

The Ministry of Interior is responsible for the determination of refugee status following the processing of the asylum application by the *Oficina de Asilo y Refugio* (Asylum and Refugee Office) and the Inter-Ministerial Commission on Asylum and Refugees). A negative decision may be appealed to the *Audiencia Nacional* (National High Court). There is a final right of appeal to the *Tribunal Supremo* (Supreme Court).¹⁴⁰

The practice of the Spanish asylum authorities regarding the agents of persecution would appear to be somewhat different to the UNHCR position. Asylum seekers who claim persecution by a non-state agent may obtain exceptional leave to remain under Section 17 (2) of the Spanish Asylum Act, as amended in 1994. This is sometimes complemented with a specific reference to the “*non-refoulement*” clause (under Section 17(3) of the Asylum Act). The Spanish authorities do grant asylum when it is clear that the national authorities are unwilling to protect the claimant from a non-state agent. However, case law is scarce and somewhat erratic. The Council of State (the Government’s highest consultative administrative body, which made reports on individual cases before the 1994 amendment to the Asylum Act) declared that “when a Government maintains an organised and systematic repression of terrorist groups, the threats or attacks made by those groups cannot be the ground for political asylum protection, although unavoidable outrages may happen” (Report 1411/1991, 28 November 1991). This report referred to a Peruvian asylum seeker, and the *Audiencia Nacional* (National High Court) expressed a similar opinion in several subsequent rulings of 15 March, 3 and 7 June, and 19 July 1996.

The Council of State it is a consultative administrative –and not a judicial– body of the Government which has to be compulsory consulted and has to make a report in cases –among others– of administrative appeals against decisions of a Minister that have to be decided by the Council of Ministers. Since the Administrative Procedure Act of 1992 (*Ley 30/1992, de 26 de Noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*) the decision of a Minister is final in the administrative procedure, so, since 1992, there have not been more reports from the Council of State on asylum. However, the position of the report of 28 November 1991 is still followed by the Office of Asylum. The following quote is from a ruling of the Supreme Court of 8 October 1997 which serves as an example on what basis the Office of Asylum rejects an application of asylum in a non state-agent of persecution case: “...*para que la misma consideración se pueda conceder a otros grupos de poder, dentro de los Estados, como invoca el interesado, sería necesaria la renuncia e inhibición del poder público encarnado en las Autoridades gubernamentales respecto a la protección que debiera efectuar sobre sus ciudadanos...*”¹⁴¹

¹³⁸ See US Committee for Refugee, World Refugee Survey, Norway 1999.

¹³⁹ Information from ELENA National Coordinator.

¹⁴⁰ See for more details on the Spanish asylum procedures, Fabrice Liebaut, supra.

¹⁴¹ “In order that this consideration applies also to other groups of power, inside of states, as the applicant invokes (or puts forward), it is necessary that there is a renunciation and inhibition of the

Refugee status is granted only in cases of persecution by non-government agents when:

- a) The state has denied protection, although it was requested to protect against third parties;
- b) The persecution is in fact tolerated by the state, not because of inability of affording protection, but by reason of a political decision of “laissez-faire”.

Spanish authorities take into account two key factors when assessing the denial of state protection.

- 1) The situation of the state: when there are no active policies or effective measures by the state against non-government agents of persecution (amnesties...), or the state is suspected of collaborating with those agents (paramilitary...);
- 2) The situation of the asylum seeker: when he/she has requested the protection of the state, but to no avail.

Refugee status is not granted when the state is unable to grant protection. In case the state is willing to afford protection but protection is ineffective, or the state is unable to grant protection (due to terrorism, generalised violence, lack of structures in cases of civil war, etc), refugee status will be denied. In these cases asylum seekers will be only granted subsidiary protection under Section 17 (2) of the Asylum Act, or just a suspension of removal under Section 17 (3) of the Asylum Act.¹⁴²

Audiencia Nacional, 18 March 1997:

Also regarding a Peruvian asylum seeker who claimed persecution from the “Shining Path” group. The Court stated that “there is enough evidence to understand that the appellant reasonably fears that he is or may be persecuted by reason of his membership of a certain family and his work as a teacher”.

state power embodied by the public authorities with respect to the protection that they ought to afford to its citizen”.

¹⁴² See Fabrice Liebaut, *supra*. According to Section 17(2) of the Asylum Act, asylum seekers whose applications have been deemed inadmissible or rejected may obtain leave to remain in Spain on humanitarian grounds or for reasons of public interest. This may apply in particular to persons “*obliged to leave their country of origin due to conflicts or serious disturbances of a political, ethnic or religious character*”, but who do not meet the conditions for Convention status. There are no regulations with regard to the conditions required to obtain such status. In practice, health problems, close family ties in Spain or very good social integration in the country following an exceptionally long asylum determination procedure, have been considered as humanitarian grounds. However, decisions are left to the discretion of the Ministry of Interior, and there is no fixed policy in this matter. Cases where a residence permit is granted for reasons of public interest are very rare. Persons allowed to stay on humanitarian grounds (or for reasons of public interest) are issued with a residence permit for exceptional circumstances under Section 53 of the 1996 Aliens Regulation, valid for one year and renewable annually. After three years, if the reasons for granting the permit still prevail, its holder will obtain an ordinary residence permit, valid for three years. For example the Cuban “boat-people” transferred from US bases in Panama and Guantánamo in 1995 were granted residence permits on humanitarian grounds. Section 17(3) of the Asylum Act states that “[*t*he removal or expulsion of the person concerned shall in no case result in the violation of Article 33(1) of the Geneva Convention relating to the Status of Refugees, or lead to the removal to a third state in which he/she will lack effective protection against refoulement to the persecuting country, in accordance with the above-mentioned Convention”.

Audiencia Nacional, 25 November 1997:

This concerned an Algerian journalist from an anti-radical newspaper who was also a founding member of the “Hizb el Haq” political party and a candidate running for the 1991 election. He alleged persecution by radical Islamic groups. Implicitly, the Court considered that he would not obtain effective protection from the authorities and accepted that there was enough evidence to justify recognition of refugee status.

Audiencia Nacional, 10 February 1998:

The fact that an asylum claim is not based on any of the grounds which qualify for refugee status is one of the circumstances which may lead to its inadmissibility to the procedure [Section 5 (6) b of the Asylum Act]. In the case of a Peruvian asylum seeker who invoked persecution from “revolutionary groups”, the *Audiencia Nacional* ruled that the concurrence of this circumstance could not be appreciated, and therefore the claim had to be duly studied under the ordinary determination procedure. The Court decided, to the contrary, that persecution from a non-state agent (revolutionary groups) may lead to recognition of refugee status according to the 1951 Geneva Convention.

Where the authority of the national government is disputed or simply does not exist, a ruling by the **Audiencia Nacional of 23 June 1994** on an asylum application submitted by a Bosnian inter-ethnic couple from Sarajevo of Serb/Croatian origin is interesting in this respect. The *Audiencia Nacional* described the situation in Bosnia-Herzegovina at that time as the result of “a genocide action pursued by one of the belligerent parties, but counteracted with the same methods and equal hardship by the others”. The Court accepted that “it is true - as the Administration says - that the mere fact of a civil war situation is not enough for refugee status recognition; but this principle cannot reasonably be maintained in such cases when it is possible to establish the practice of continuous persecution – frequently amounting to open extermination – of specific human groups for reasons included in the 1951 Geneva Convention, going much further than the bare military objective of conquering a portion of territory”. The Court expressly rejected the possibility that the couple could have settled either in Serbia or in Croatia, due to its inter-ethnic character.

8.12. Sweden

The first instance decision-making body for applications for refugee status is the Migration Board.¹⁴³ A negative decision may be appealed to the Aliens Appeal Board.

Sweden made an explicit reservation to Point 5.2 of the 1996 European Union Joint Position on the term ‘refugee’.¹⁴⁴ The Swedish delegation stated that “persecution by third parties falls within the scope of the 1951 Geneva Convention where it is encouraged or permitted by the authorities. It may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection”.

Sweden has implemented this position in its own national legislation. Section 3, para 2 of the Aliens Act states that “the term refugee as used in this Act refers to an alien who is outside the country of his nationality, owing to a well founded fear of being

¹⁴³ Prior to 1 July 2000 the Migration Board was called the *Statens Invandraverk* (National Immigration Board).

¹⁴⁴ See above at Chapter 3.

persecuted for reasons of race, nationality, membership of a particular social group, or religious or political opinion, and who is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. This applies irrespective of whether persecution emanates from the authorities of the country or whether these cannot be expected to offer protection against persecution by individuals.”¹⁴⁵ Asylum seekers fleeing civil-war situations can be granted a new form of subsidiary protection or temporary protection.¹⁴⁶ Section 3, para 3 of the Aliens Act provides a subsidiary form of protection or B-status for those in need of protection. This includes those who cannot return to their country of origin on account of external or internal armed conflict.

On January 1, 1997, several changes in Swedish asylum law took effect. The amendments to the asylum law included an expansion of the refugee definition to encompass non-state agents of persecution and new categories of people in need of protection. The new law extended protection to persons who risk persecution because of gender or homosexuality. In May 1998, Sweden granted its first residence permit to an individual who risks persecution because of his homosexuality. Although granted permission to stay, the asylum seeker was denied status because Sweden does not recognize homosexuals as constituting a "particular social group" as stipulated in the UN Refugee Convention definition.

8.13. Switzerland

The Swiss Confederation exercises its powers to determine refugee status through the *Bundesamt für Flüchtlinge/Office Fédéral des Réfugiés* (Federal Office for Refugees). The Federal Office undertakes the substantive examination of and decides in the first instance on the asylum application. An appeal against a negative decision may be made to the *Schweizerische Asylrekurskommission/Commission Suisse de recours en matière d'asile* (Swiss Asylum Appeals Commission, ARK/CRA). Its decision is final.

Swiss jurisprudence has established that persecution must be imputable to state organs. Either the state must be directly responsible for the persecution or indirectly in that it encouraged, tolerated, or indicated an unwillingness to provide protection against persecution by a third party. The simple inability of the state to provide protection will result in a denial of refugee status. If there is no state or *de facto* authority exercising state-like powers, there can be no claim to refugee status. There may be a claim to refugee status where persecution emanates from a *de facto* authority exercising state-like powers over the territory and its population.

Swiss Asylum Appeals Commission , 7 December 1992, JICRA, 1993, No.9:

“The attitude of the state authorities is taken into account as an objective element in gauging their desire and ability to offer protection to persecuted people. Intervention by the Turkish state authorities was lacking in the case of religious persecution of syro-orthodox Christians by third parties. This has been considered to be indirect state persecution.”¹⁴⁷

¹⁴⁵ See Fabrice Liebaut, Legal and Social Conditions, *supra*.

¹⁴⁶ Nijmegen report p. 66.

¹⁴⁷ Nijmegen report p. 69.

Swiss Asylum Appeals Commission, 24 January 1994 No. 242106:

“In general, a civil war does not give entitlement to refugee status because the persecution is not targeted and the misfortune concerns the whole population of a country. A Liberian national, referring to the civil war and to the conditions in general in his country, was not recognised.”¹⁴⁸

Swiss Asylum Appeals Commission, 10 January 1995, EMARK 1995/2:

The applicant, a Muslim from Bosnia-Herzegovina, applied for asylum in Switzerland on 7 September 1993. He claims that, in 1992, he volunteered to the HVO (*Kroatischer Verteidigungsrat*, Croat Self-defense Council) to fight the Serbs. When the conflict between Croats and Muslims arose in the applicant's home country, the HVO started to detain its Muslim soldiers. The applicant claimed that, on 10 May 1993, he was picked up by several HVO soldiers at his home. He and 33 fellow Muslim HVO soldiers were held in two separate camps. On 10 June 1993, he was released. The applicant claimed that they were held under inhuman conditions, and he was beaten with rifle butts several times. They were also forced to build field fortifications on especially dangerous front-lines. He had to sleep on the floor and received insufficient food, and as a result of this treatment he lost eleven kilograms of weight and developed tuberculosis.

On 29 April 1994, the Federal Office for Refugees rejected the asylum application on the ground that the facts of the application were irrelevant for asylum purposes. A deportation order was issued. However, the unreasonableness of an execution of the deportation order was established and the applicant was temporarily admitted to Switzerland. The applicant appealed to the Swiss Asylum Appeals Commission, which overruled the decision by the Federal Office for Refugees and instructed it to grant the applicant asylum in Switzerland. The Commission reasoned that the applicant had credibly demonstrated that Muslim soldiers had been placed in internment camps. The applicant was obviously detained because of his religion. It stated that, generally, persecution by the state might result in the grant of refugee status, whereas persecution by a third party would not normally be deemed relevant for asylum purposes, unless the state could be held accountable. The state could be held accountable, if it encouraged, supported, approved or passively accepted the situation, although it was in the position to grant protection and thereby demonstrated its lack of willingness to protect. When concerned with indirect state-persecution, one has to address the issue of what happens when the state is unable to protect. Two scenarios can be distinguished: persecution by private individuals in a state that is unable to protect is not relevant for asylum purposes. Persecution by private bodies, which, without being the recognised state-power, *de facto* are in power of parts of the territory qualifies as state-like persecution and is relevant for asylum purposes. To qualify as state-like, a power needs a certain continuity, stability and effectiveness. The stability could, for example, be measured by the degree of autonomy towards the outside world. In summary, it can be established that persecution by private bodies which have a continuous and effective power over specific parts of the territory and over the civilian population living there, qualify as a state-like power. If the other asylum-requirements are fulfilled, asylum may then be granted. The Swiss Asylum

¹⁴⁸ Nijmegen report p. 70.

Appeals Commission ruled in favour of the appeal and instructed the lower instance to grant the applicant asylum in Switzerland.

Swiss Asylum Appeals Commission (ARK), 6 June 1995, *Entscheidungen und Mitteilungen der ARK*¹⁴⁹) EMARK 1996/28¹⁵⁰:

The applicants, an Algerian couple, arrived in Switzerland on 1 September 1994, and applied for asylum on 3 October 1994. They claimed that the wife had received a letter with threats from Islamic fundamentalists wanting to stop her from taking up her work as a teacher. They had been too frightened to go to the police. In August 1994, posters saying that all teachers taking up their profession would be killed, were put up in their village. The applicants claimed that in some other villages, where schools opened, teachers had been killed. This was a decisive factor in their decision to seek asylum. Furthermore, the local chairman, his representative and the parish clerk had recently been killed in their home village. The husband claimed he feared violence at his work (he was employed by the post and had been robbed twice), but stated that he left Algeria primarily to save the life of his wife. The Federal Office for Refugees rejected the asylum application, on the grounds that the threats did not emanate from the state but from a private body and that the state was trying to fight this organisation. Therefore, the threats were not relevant for asylum purposes, regardless of whether the state was successful in fighting the organisation that carried out the threats. A deportation order was issued. The applicants appealed to the Swiss Asylum Appeals Commission and requested that they be granted asylum, or that it, in any case, establish that they should not be forced to return. The Commission stated that persecution which is not attributable to the State is not relevant for asylum. Only when a State indicates that it is not intending to protect its citizens, is this persecution relevant for Geneva Convention refugee status. The Algerian authorities cannot be considered unable to protect. Still, it is evident that it cannot always protect its citizens from fundamentalists. Relevant in this matter, though, is that no state can succeed in guaranteeing its citizens absolute safety. It can be established, though, that the fundamentalist groups have no effective or continuous power over any parts of the Algerian state territory. Therefore, the threats emanating from them are not relevant for asylum purposes. The Commission rejected the appeal in the part requesting refugee status but, on the other hand, approved the part regarding non-execution of the deportation order.

Swiss Asylum Appeals Commission (CRA=ARK) 29 June 1995:

“Because there has to be indirect state responsibility to apply the Convention refugee definition, someone from a country without a central/local/de facto government cannot be a refugee”. According to the Commission, the consequence is that persecution in the sense of the Geneva Convention does not exist in Somalia.¹⁵¹

Swiss Asylum Appeals Commission, 11 March 1996, I/N 250 200:

“Persecution has to be imputable to state organs. The persecution does not have to emanate from the organs directly but can also emanate from them indirectly. This indirect persecution can be persecution by non-state organs. Persecution in the sense

¹⁴⁹ Decisions and information from the Asylum Appeal Board.

¹⁵⁰ Information from ELENA National Coordinator.

¹⁵¹ Nijmegen report p. 70.

of the Geneva Convention can occur when the state encourages, tolerates or indicates that they are not willing to provide protection against persecution”.¹⁵²

Swiss Asylum Appeals Commission, 5 February 1997, EMARK 1997/6:

The applicant, an Afghan citizen, applied for asylum in Switzerland on 25 September 1992. The Federal Office for Refugees rejected the claim on 11 May 1994. It was of the opinion that the situation in Afghanistan consisted of a total division of state-power between different factions and a total lack of state or state-like institutions. The applicant appealed to the Asylum Appeals Commission which stated that two situations can be distinguished when a state is unable to offer protection (typically in a civil war situation). The persecution in question is irrelevant for asylum purposes if private parties are responsible. If, on the other hand, private bodies which, without being the recognised state-power, are *de facto* in power of parts of the territory, the persecution qualifies as state-like and is relevant for asylum purposes. As a next step the Commission looked at whether the Taliban authority could be considered to be a state-like power. It concluded that because of the length of time, as well as the stability and effectiveness of their rule, the Taliban had state-like powers over the civilian population and that persecution by the Taliban qualified as quasi-state persecution. The Swiss Asylum Appeals Commission ruled in favour of the appellant and instructed the Federal Office for Refugees to grant the applicant asylum in Switzerland.

Swiss Asylum Appeals Commission, 28 May 1997, EMARK 1997/14:

The Swiss Asylum Appeals Commission held that Serbian forces exercised *de facto* authority in Srebrenica in July 1995 and therefore the persecution of Muslims could be considered to fall within the definition of a refugee according to the 1951 Convention. See also **EMARK 1996/6**, **EMARK 1996/16** and **EMARK 1995/2**.

Generally, the ARK splits quasi-States into two aspects: the aspect of being able to be an agent of persecution and the aspect to offer protection.¹⁵³

Swiss Asylum Appeals Commission, decision from 12 July 2000, Case of M.O.:

The jurisprudence concerning quasi-states is confirmed (groups or organisations which do control effectively a certain territory that is no longer ruled by the government). The Kurdish parties in Northern Iraq (Kurdistan Democratic Party, KDP; Patriotic Union of Kurdistan, PUK) are considered to be quasi-States. As a consequence they are eligible to be agents of persecution. Persons persecuted by them are eligible for refugee status. However, due to the lack of the required degree of durability of their authorities they are not sufficiently able to afford protection, thus the ARK ruled out an internal protection alternative in Northern Iraq.

8.14. United Kingdom

The first decision on an asylum application is taken by the Home Office. An appeal may be made to the Immigration Appellate authority where cases are heard by a Special Adjudicator. Both the asylum seeker and the Home Office may request leave

¹⁵² Nijmegen report p.68 also Swiss Commission of Asylum Appeals, 29 June 1995/25.

¹⁵³ The following is a short summary of a decision concerning Northern Iraq published by the Swiss Asylum Appeals Commission (ARK) on 7 September 2000. The full text of the decisions will be published end of October 2000.

to appeal against the decision of the Special Adjudicator to the Immigration Appeal Tribunal (IAT). If leave is granted and the IAT rejects the appeal, an application for leave to appeal to the Court of Appeal may be made on a question of law. If the IAT does not grant leave to appeal, the applicant may apply for judicial review at the High Court. The decision of the Court of Appeal may be further appealed to the House of Lords.

United Kingdom jurisprudence requires the asylum seeker to show that persecution by non-state agents is knowingly tolerated by the authorities or that the authorities refuse or are unable to offer effective protection.¹⁵⁴

The U.K. approach as regards persecution by non-state agents can be outlined in the words of Lord Hope of Craighead in *Horvath*¹⁵⁵:

“To sum up therefore on this issue, I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy.”¹⁵⁶

¹⁵⁴ *R. v. Secretary of State for the Home Department ex. parte Choudhury*, Court of Appeal (Civil Division), 19 September 1991.

¹⁵⁵ House of Lords, *Horvath v State Secretary for the Home Department* [2000] UKHL 37, 6 July 2000, at <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000706/horv-1.htm>.

¹⁵⁶ Lord Hope of Craighead's conclusion in *Horvath* reads as follows: “Where the allegation is of persecution by non-state agents, the sufficiency of state protection is relevant to a consideration whether each of the two tests - the "fear" test [the first part of the refugee definition] and the "protection" test [the second part of the refugee definition] - is satisfied. The proper starting point, once the tribunal is satisfied that the applicant has a genuine and well-founded fear of serious violence or ill-treatment for a Convention reason, is to consider whether what he fears is "persecution" within the meaning of the Convention. At that stage the question whether the state is able and willing to afford protection is put directly in issue by a holistic approach to the definition which is based on the principle of surrogacy. “ To the contrary, Lord Lloyd of Berwick dissenting on this issue, but concurring with rest of the Lords in the result, said: “(...) the principle of surrogate protection finds its proper place in the second half of article 1A(2). If there is a failure of protection by the country of origin, the applicant will be unable to avail himself of that country's protection. But I can see no reason, let alone any need, to introduce the idea into the first half of the clause [failure of state protection as an ingredient in “persecution”]. Indeed, to do so could only lead to unnecessary complications. (...) It is the severity and persistence of the means adopted, whether by the state itself, or factions within the state, which turns discrimination into persecution; not the absence of state protection. It is surely simpler, and therefore better from every point of view, not least that of an appellate court considering an appeal on a question of law, that the fact-finding tribunal should first assess the ill-treatment, and answer the question whether it amounts to persecution for a Convention reason, and then, as a separate question, evaluate the protection available to the applicant. I can see no advantage in running these two questions together”.

The formula propounded by Lord Hoffman in **Islam** v Secretary of State for the Home Department, R v Immigration Appeal Tribunal, ex parte **Shah**¹⁵⁷ [1999] 2 A.C. 629 was also accepted by the majority of the Lords in **Horvath** v State Secretary for the Home Department [2000] UKHL 37, 6 July 2000: “Persecution = Serious harm + The Failure of State Protection”.¹⁵⁸

In principle it is accepted in the U.K. that the Convention applies also to persons fleeing civil war. However, the ability of persons fleeing a civil war to make a Convention claim in practice will be dependent on whether they are able to show distinctive persecution (a differential impact), “over and above the ordinary risks of warfare”.¹⁵⁹

In **Horvath** and in **Islam and Shah**, the Lords held that the refugee scheme is surrogate or substitute protection, actuated only upon failure of national protection.¹⁶⁰ According to these cases state complicity in persecution is not a pre-requisite to a valid refugee claim. The question which arose in **Horvath** was the standard against which the sufficiency of state protection is to be measured where the agent of persecution is a non-state agent. In the opinion of the Lords a refugee claimant who has a well founded fear of persecution will not be recognized as a refugee if there is available in the home state a system for protection of the citizen and a reasonable willingness by the state to operate it.¹⁶¹ Lord Hope of Craighead said as regards the test for determining whether there is sufficient protection against persecution in the person's country of origin:

¹⁵⁷ See for the case and comment, International Journal of Refugee Law, Vol. 11, No. 3, 1999, pp.496-543, or at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm>.

¹⁵⁸ The reason given in **Horvath** was that a holistic approach to the interpretation of the refugee definition was preferred and, as Lord Clyde said that if the term “persecution” was construed as to exclude the state’s attitude, it would create an anomaly: “It seems to me that on the contrary the appellant's approach gives rise to anomaly. If consideration of the state's attitude is excluded from the definition of persecution and considerations of protection in the first part are confined to the well-foundedness of the fear, then it would seem that some cases which ought to justify asylum would be excluded. The persecution must be for a Convention reason. But it is not difficult to conceive of cases where a person might be persecuted by other citizens for reasons of private gain which involve no element of Convention rights. If the state was motivated by considerations which were contrary to the Convention rights to tolerate such activity and deliberately refrain from protecting the person, such a case would appear not to be covered by the approach promoted by the appellant. That does not seem to be sound”.

¹⁵⁹ See R. v. Secretary of State for the Home Department ex. parte Adan, House of Lords, 2 April 1998 (below), at <http://www.parliament.the-stationery-office.co.uk/pa/ld199798/ldjudgmt/jd980402/adan01.htm>.

¹⁶⁰ The formula propounded by Lord Hoffman in **Shah** was also accepted by the majority of the Lords in **Horvath**: “Persecution = Serious harm + The Failure of State Protection”.

¹⁶¹ In the words of Lord Clyde in **Horvath**: “There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case. It seems to me that the formulation presented by Stuart-Smith L.J. in the Court of Appeal [**Horvath** v Secretary of State for the Home Department, 2 December 1999] may well serve as a useful description of what is intended, where he said [2000] I.N.L.R. 15, 26, para. 22):

“In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders. And in relation to the matter

“But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals.”

Referring to the position taken by the European Court of Human Rights in *Osman v United Kingdom* (Case No. 23452/94, 28 October 1998), Lord Clyde (in *Horvath*) recognised that account should be taken of the “operational responsibilities and the constraints on the provision of police protection”.

Notwithstanding that the person holds a well founded fear of persecution, the person can be returned to his or her country of origin.¹⁶² This approach was highly criticized by the Refugee Status Appeals Authority of New Zealand: “With the greatest respect, this interpretation of the Refugee Convention is at odds with the fundamental obligation of *non-refoulement*. Art. 33 (1) is explicit in prohibiting return in any manner to a country where the life or freedom of the refugee would be threatened for a Convention reason. This obligation cannot be avoided by a process of interpretation which measures the sufficiency of state protection not against the absence of real risk of persecution, but against the availability of a system for the protection of the citizen and a reasonable willingness by a state to operate that system. (...) If the net result of a state’s ‘reasonable willingness’ to operate a system for the protection of the citizen is that it is incapable of preventing a real chance of persecution of a particular individual, refugee status cannot be denied to that individual.”¹⁶³

Court of Appeal, *R v. Secretary of State for the Home Department, ex parte Adan et al.*, 23 July 1999¹⁶⁴:

The case involved three asylum seekers who claimed they would be persecuted by non-state agents if returned to their countries of origin. Two of the three, nationals of Somalia and Sri Lanka, arrived in the U.K having first passed through Germany. The other, an Algerian citizen, had first passed through France. The applicants claimed asylum in the U.K but the government decided to return them respectively to Germany and France for substantive consideration of their claims. The applicants

of unwillingness he pointed out that inefficiency and incompetence is not the same as unwillingness, that there may be various sound reasons why criminals may not be brought to justice, and that the corruption, sympathy or weakness of some individuals in the system of justice does not mean that the state is unwilling to afford protection. "It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy".

Lord Clyde went on to say that this “formulation does not claim to be exhaustive or comprehensive, but it seems to me to give helpful guidance.” (...) He concluded that: “The sufficiency of state protection is not measured by the existence of a real risk of an abuse of rights but by the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate it.” Lord Lloyd of Berwick agreed also to the test propounded by Stuart-Smith L.J. at para 20-23 in the Court of Appeal decision in *Horvath*.

¹⁶² As acknowledged by the Immigration Appeals Tribunal in *Kovac v Secretary of State* (15 February 2000).

¹⁶³ Refugee Appeal No 71427/99, 16 August 2000, para 63, at www.refugee.org.nz/71427-99.htm

¹⁶⁴ See for the case and a comment on the implication of the decision, also in relation to the harmonisation of asylum in the EU, by Guy Goodwin-Gill, *International Journal of Refugee Law*, Vol. 11, No. 4, 1999, pp. 702-737.

asserted that Germany and France were not safe third countries to which they could lawfully be returned for France and Germany do not recognise persecution by non-state agents as falling within the definition of the 1951 Convention - at least if the State itself is not complicit in the persecution.

The Court examined the issue of whether or not the scope of Article 1A(2) extends to persons who fear persecution from non-state agents. In the view of the Court of Appeal “the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded. Looked at in this light, the Geneva Convention is apt unequivocally to offer protection against non-State agent of persecution, where for whatever cause the State is unwilling or unable to offer protection itself.”

The Court pointed out that “our courts recognise persecution by non-state agents (...) indeed whether or not there exists competent or effective governmental or State authorities in the country in question.”

The government had argued that it could not be criticised for treating Germany and France as safe destinations considering that this decision was consistent with the terms of the Joint Position of the Council of the European Union. In response to this argument, the Court pointed out that the Joint Position does not fall within any area of Community Law competence. Moreover, leaving aside the legal force of the Joint Position, the Court stressed that the document states no more than a minimum necessary stance and does not reach a consensus as to the position relating to persecution by non-state agents. It is therefore not sufficient for the purpose of asserting the true interpretation of Article 1A(2) of the 1951 Convention.

The Court agreed that complementary forms of protection were available for asylum seekers, both in France and Germany but the Court considered that an examination of the efficacy of alternative forms of protections was not an issue in this concrete case.

According to the Court’s reasoning France’s and Germany’s are not “safe third countries” in this particular case. The judgement stated that the U.K should have *only* been concerned with the question of whether there exists a real risk that the third country will “refoule” the asylum seekers in breach of Article 33 of the Convention. And, according to the Court’s reasoning, such a risk exists in light of France’s and Germany’s approach to the 1951 Geneva Convention and the interpretation of agents of persecution.¹⁶⁵

¹⁶⁵ See also for the implication of differing state practice in cases arising from the application of the Dublin Convention. Ex parte Bouheraoua affords a practical illustration of the kind of evidence needed to counter the Secretary of State’s assertion that Greece is a safe third country. High Court, R v SSHD, ex parte Bouheraoua, and Kerkeb, CO/878/1998, CO/2734/1998, 22 May 2000, Dyson J: This case turned on the question whether Greece can be considered as a safe third country due to Greece’s interpretation of the Refugee Convention on non-state agents of persecution. While the Secretary of State of the Home Department (SSHD) accepted that he could not return an applicant to a third country which adopts the accountability approach if there is a real risk that it will remove or expel the applicant on the basis of that interpretation of the Refugee Convention, the SSHD was of the opinion that Greece applies the protection approach. The accountability theory is that a state is not responsible for persecution by non-state agents unless persecution emanates from the state or can be attributed to the state, whereas the protection theory is that failure of effective state protection (state is unwilling or unable to afford protection against persecution by non-state agents) suffices to warrant international protection under the Refugee Convention. Dyson J held that it was not reasonably open to the SSHD to

R. v. Secretary of State for the Home Department ex. parte Adan, House of Lords, 2 April 1998¹⁶⁶:

Hassan Hussein Adan, a Somali national, fled from Somalia in June 1988 on account of his fear of persecution at the hands of the then government. On 15 October 1990, he arrived in the United Kingdom with his wife and two children. He was not accorded refugee status but he and his family were granted exceptional leave to remain on humanitarian grounds. His appeal for refugee status was contested on the grounds that he no longer had a fear of persecution, as there had been a change of government in Somalia. President Barre had fallen from power. This was upheld by the House of Lords which required the existence of a present fear. Mr. Adan further argued that due to the political situation in Northern Somalia where local clans were engaged in civil war, if returned to Somalia his life would be in danger owing to his membership of one of the warring clans. He claimed that this amounted to persecution for a Convention reason of which he had a current well-founded fear. The House of Lords posed the following question:

“Can a state of civil war whose incidents are widespread clan and sub-clan based killing and torture give rise to well-founded fear of persecution” even where the applicant “is at no greater risk of such adverse treatment than others who are at risk in the civil war for reasons of their clan and sub-clan membership?”

The Special Adjudicator had held that “the agents of persecution in the case of this appellant are not the authorities of the country but the members of the armed groups or militias of other clans or alliances.” Accordingly she held that Mr. Adan was entitled to refugee status. The Immigration Appeal Tribunal disagreed. It stated “we find that there is no evidence that the respondent would suffer persecution on account of his membership of the Habrawal sub-clan of the Issaq clan, from members of the armed groups of other clans or sub-clans, and we find that, while we accept that inter-clan fighting continues, that fighting and the disturbances are indiscriminate and that individuals from all sections of society are at risk of being caught up therein, and that the situation is no worse for members of the Issaq clan and the Habrawal sub-clan

decide on the totality of the material that was before him that there was no real risk that the Greek authorities would not apply the accountability approach when considering the claims by the applicant. Materially relevant for the reasoning of Dyson J was the evidence of the case of Ali Ali, a Iraqi Kurd whose application of asylum was rejected by a Committee of Greek senior officials of various legal, diplomatic and foreign and police departments on the grounds that his fears were of persecution by non-state agents. Note that in *Berisha and Elishani (R v Secretary of State for the Home Department, ex parte Agon Elshani and Mentor Berisha [1999] EWCA 1264, 23rd March, 1999)*, the Court of Appeal upheld the decision of the High Court that Greece is a safe third country to which Kosovo Albanians can be returned.

¹⁶⁶ This judgment was rejected by the New Zealand Refugee Status Appeals Authority (Refugee Appeal No. 71462/99, 27 September, available at www.io.knowledge-basket.co.nz/refugee/71462-99.htm), who, at para 75 and 76, in turn refers to a decision by the Full Court of the Australian Federal Court (*Minister for Immigration and Multicultural Affairs v Abdi [1999] 162 ALR 105*). See more recently, High Court of Australia in *Minister for Immigration and Multicultural Affairs v Ibrahim [2000] HCA 55, 26 October 2000*, at www.austlii.edu.au/au/cases/cth/high_ct/2000/55.html, at para 70: “The test of ‘differential impact’, as propounded in *Adan*, finds no support in the text of the Convention and it should not be followed in Australia. It is not the degree or differentiation of risk that determines whether a person caught in a civil war is a refugee under the Convention definition. It is a complex of factors that is determinative - the motivation of the oppressor; the degree and repetition of harm to the rights, interests or dignity of the individual; the justification, if any, for the infliction of that harm and the proportionality of the means used to achieve the justification”.

than for the general population and the members of any other clan or sub-clan.” The Court of Appeal reversed the decision of the Immigration Appeal Tribunal.

The House of Lords held that where a state of civil war exists, it is not enough for an asylum seeker to show that he would be at risk if he were returned to his country where s/he was at no greater risk of such ill-treatment by reason of his clan or sub-clan membership than others at risk in the war.¹⁶⁷ He must be able to show a differential impact. In other words, he must be able to show fear of persecution for Convention reasons “over and above the ordinary risks of clan warfare”¹⁶⁸. However, Lord Lloyd of Berwick went on to state:

“It was also common ground that article 1A (2) covers four categories of refugees: (1) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and are unable to avail themselves of the protection of their country...(304C) If category (1) were confined to refugees who are subject to state persecution, then I can well see that such persons would, ex hypothesi, be unable to avail themselves of state protection. On that view the words would indeed serve no purpose. But category (1) is not so confined. It also includes the important class of those who are sometimes called “third party refugees, “ i.e. those who are subject to persecution by factions within the state.(...) But if, *for whatever reason*, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete.”

Immigration Appeals Tribunal, Doudetski (HX/86083/98, 29 June 2000:

In this case a Russian Jew was recognized as a refugee. The decision provides a useful list of factors to show the insufficiency of protection in Russia. The Tribunal found that 1) there is anti-Semitism in Russia which is deeply rooted; 2) local officials do not respond as clearly and as willingly as they might and in some cases at quite high

¹⁶⁷ At para 308 in Adan, Lord Lloyd said:” “[I]f [counsel for the Secretary of State for the Home Department] is right, it involves drawing a line between the persecution of individuals and groups, including very large groups, on the one hand, and the existence of a state of civil war on the other. [Counsel for the Secretary of State for the Home Department] accepts that protection under the Convention is not confined to individuals. He accepts further that the persecution of individuals and groups, however large, because of their membership of a particular clan is very likely to be persecution for a Convention reason. But he says that where there is a state of civil war between clans, the picture changes. Otherwise the participants on both sides of the civil war would be entitled to protection under the Convention. Indeed, as Simon Brown LJ pointed out, the only persons who would *not* be entitled to protection, on that view, would be those who were *not* the active participants on either side but were, as Simon Brown LJ [1997] 1 WLR 1107, 1120 put it, 'lucklessly endangered on the sidelines.' Simon Brown LJ found this unappealing. So do I. It drives me to the conclusion that fighting between clans engaged in civil war is not what the framers of the Convention had in mind by the word persecution. What then is the critical factor which distinguishes persecution from the ordinary incidents of civil war?" The answer Lord Lloyd gave to this question was “differential impact”. By way of contrast, the High Court of Australia in Ibrahim, supra, at para 71, found that Art 1 F of the Refugee Convention excluded persons from benefiting from the protection of the Convention, thus finding that contrary to Lord Lloyd’s concerns, not all participants on both sides of the civil war would be entitled to protection under the Convention.

¹⁶⁸ See the New Zealand Refugee Status Appeals Authority’ (RSAA) decision No 71462/99, 27 September 1999. The RSAA declined to follow the judgment in Adan. The RSSA concluded at para 77 that “[T]he inquiry mandated by Article 1A(2) of the Refugee Convention in civil war situations is no different from that required in other situations. What must be borne in mind, however, is that the factual inquiry may be more complex and there is a need to ensure that what the refugee claimant faces is not generalized violence, but a specific risk of harm ‘for reason of’ one of the Convention reasons”.

levels exhibit anti-Semitic tendencies themselves; 3) this is more likely to be the case with petty officials, including the police, where problems are in any event exacerbated by a lack of post-Soviet criminal legislation and inefficiency in the court system, with the result that the deterrent effect of a normal law enforcement is further exacerbated by corruption at local level in the police force; 4) those likely to be targeted by extreme elements are those who have clearly distinguishable characteristics.

The Tribunal concluded that the risk of persecution applied throughout Russia and that “for him [the appellant] the lack of deterrence arising from the present state of law enforcement institutions leads to the real possibility that the state would be unable to provide him with the protection to which he is entitled against such persecution.”

In *The Secretary of State for the Home Department v Dzhygun*, Appeal No. CC/50627/00 (00/TH/00728), 17 May 2000, the Immigration Appeal Tribunal (IAT) held in the case of a Ukrainian woman who had been lured to Budapest and forced into prostitution, that there was no sufficiency of state protection in Ukraine. The fact the claimant had not sought protection with the authorities, however, did not harm her case. The IAT found the case to be different to its determination in *Storozhenko* [19935] where the IAT had held that the government in the Ukraine had taken steps to punish officials who have offended and to purge local law enforcement agencies of corrupt elements. The IAT had held in *Storozhenko* that “it is quite impossible to say that the government is unable or unwilling to provide protection. This does not mean that such protection is always available: it is not, as the experience of the appellant perhaps indicate. But there has not been such a breakdown of law and order as means that citizens are without protection.”

R v. Secretary of State for the Home Department ex parte S. Jeyakumaran, 28 June 1985, QBD CO/290/84:

The applicant, a Tamil and citizen of Sri Lanka, arrived in the United Kingdom on 9 October 1983 and applied for asylum. The applicant claimed that as a result of racial riots in Colombo, during which he and his father had been beaten up, he and his parents were forced to leave their home for a refugee camp and later another village in northern Sri Lanka. He claimed that the Tamil minority was harassed by Sinhalese soldiers within the armed forces and consequently he went into hiding. His home in Colombo was looted, badly damaged and sprayed with anti-Tamil slogans. His neighbours had warned him to stay away for fear of injury. The Home Office had concluded that insofar as violence had been directed against the Tamil minority in Sri Lanka, this had not been directed against the applicant or any member of his family in particular. Furthermore, the most recent violence was more in the nature of a conflict between factions than persecution of individuals. The High Court rejected the notion that the applicant had to be personally singled out as an individual rather than as a Tamil. The Court further rejected the implication that violence to individuals flowing from a conflict between factions cannot amount to persecution and cited paragraph 65 of the UNHCR Handbook on procedures and criteria for determining refugee status. “The government need not to be the agent of persecution, rather persecution by a faction of the population which is tolerated by the government or persecution which the government is unable to prevent supports a claim for refugee status.”¹⁶⁹

¹⁶⁹ Web-site: <http://www.unhcr.org/refworld/refworld/legal/refcas.htm>.

Immigration Appeals Tribunal, February 1996, Yousfi-case, unpublished:

“The real question is not whether the State authorities are doing the best they can in all the circumstances, but whether viewed objectively the domestic protection offered by or available from the State to the Appellant is or is not reasonably likely to prevent persecution”.

ANNEX

ELENA JURISPRUDENCE WEBSITES

Australia	<p>Australian Refugee Review Tribunal</p> <p>Australasian Legal Information Institute (cases and legislation)</p>	<p>www.rrt.gov.au/</p> <p>www.austlii.edu.au</p>
Austria	<p>Legal Information Service of the Federal Chancellery</p>	<p>www.ris.bka.gv.at/</p>
Belgium	<p>Case Law of the Permanent Refugee Appeals Commission</p> <p>Conseil d'etat (Supreme Administrative Court)</p>	<p>http://www.ufsia.ac.be/fre/vbc/casesuk.html</p> <p>www.raadvst-consetat.be</p>
Canada	<p>Immigration and Refugee Board of Canada</p> <p>Canada Supreme Court</p> <p>Federal Court of Canada</p>	<p>www.irb.gc.ca</p> <p>www.scc-csc.gc.ca</p> <p>http://www.fja.gc.ca/en/cf/decisions.html</p>
Council of Europe	<p>Homepage</p> <p>The Council of Europe link collection of constitutional courts' websites</p>	<p>www.coe.fr</p> <p>http://stars.coe.fr/index_e.htm (click "Links to the Council of Europe", scroll down to "European Commission for Democracy through Law "Venice Commission" [see also http://venice.coe.int/])</p>
European Court of		<p>www.echr.coe.int</p>

Human Rights		
European Committee for the Prevention of Torture (CPT)		www.cpt.coe.int
France	French Constitutional Court	www.conseil-constitutionnel.fr
Germany	<p>Informationsverbund Asyl and ZDWF</p> <p>German case law (GLAW)</p> <p>Case law collection II (Freie Universitaet Berlin, Fachbereich Rechtswissenschaften)</p> <p>Press Releases from German Higher Courts</p> <p>Links to German courts with a website</p> <p>Press Releases from the Federal Administrative Court</p> <p>And Federal Constitutional Court</p>	<p>www.asyl.net/homeNS.html</p> <p>www.uni-wuerzburg.de/rechtsphilosophie/glaw/index.html</p> <p>http://www.userpage.fu-berlin.de/~fbjura/netlaw/links/entscheidungen.html</p> <p>http://www.jura.uni-sb.de/Entscheidungen/Bundesgerichte/</p> <p>http://www.jura.uni-sb.de/internet/gericht.html</p> <p>www.bverwg.de</p> <p>www.bundesverfassungsgericht.de</p>
Ireland	British and Irish Legal Information Institute	www.bailii.org
Italy	Italian Constitutional Court	www.cortecostituzionale.it

New Zealand	New Zealand Refugee Law	www.refugee.org.nz
Switzerland	Swiss Asylum Appeals Board	www.ark-cra.ch
United Kingdom	British and Irish Legal Information Institute (Cases and Legislation) House of Lords	www.bailii.org http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm
United States	Board of Immigration Appeals Precedent Decisions Immigration and Naturalization Service Center for Gender and Refugee Studies Findlaw (comprehensive legal search machine)	http://www.usdoj.gov/eoir/efoia/bia/biindx.htm www.ins.usdoj.gov/graphics/index.htm www.uchastings.edu/cgrs www.findlaw.com
UN Committee Against Torture (CAT) and other UN treaty bodies	On the homepage of UNHCHR University of Minnesota Human Rights Library	www.unhchr.ch http://www1.umn.edu/humanrts/cat/decisions/cat-decisions.html
Other Website of interest	ASYLUMLAW.ORG (Country Information, Case law etc.) The University of Michigan Law School Refugee Caselaw Site (cases from the highest	www.asylumlaw.org

	national courts of Australia, Austria, Canada, Germany, New Zealand, Switzerland, the United Kingdom, and the United States)	www.refugeecaselaw.org
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