REFUGEE AND ASYLUM LAW: Assessing the Scope for Judicial Protection

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Refugee and Asylum Law: Assessing the Scope for Judicial Protection

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Introduction

Pieter van Dijk*, Conference Chairman

Dear Colleagues, Ladies and Gentlemen,

It is my privilege and honour, as your conference chairman, to welcome all of you to the Netherlands and to this second conference of the Association. A special welcome to Mr. Gerard de Boer, who represents the Dutch Deputy Minister of Justice on this conference where judges and other refugee law experts from all over the world discuss a theme that is so closely related to the responsibilities and daily concerns of the Deputy Minister. We are grateful for your willingness, on behalf of the Deputy Minister, to officially open the conference by sharing some of our concerns and, hopefully, by expressing some policy views, especially in the light of the Dutch Presidency of the European Union.

In the interpretation and application of international and national refugee and asylum law courts have a vital role to play; national courts and, presently to a much more limited extend, international courts, especially the European and the Inter-American Court of Human Rights and the Court of Justice of the European Communities.

In a world system of sovereign states, international refugee and asylum law has as its main function to fill the gaps of the national legal systems on this issue, but also, and in the process of the development of national law even primarily, to promote greater uniformity among the national systems and to offer a guarantee against erosion of domestic protection. A clear example are Articles 1(A) and 33 of the Geneva Convention on the Status of Refugees. Most national legal systems will have developed their own rules concerning the definition of refugee and concerning the prohihition of refoulement, but the Refugee Convention has functioned both as the legal basis of the international obligation for the Contracting States to provide for these rules and as a guidance for the legislator, and offers a guarantee of maintenance of the international minimum standard in this respect.

That is not to say that the rules and procedures concerning refugee and asylum law have to be identical for all legal systems. They will have to be integrated within the respective legal systems, they will have to be attuned to the specific legal, political and economical situation of the country concerned, and they may be influenced by regional conventions such as the European and the American Convention. However, the system of international collective protection of refugees and asylum seekers entails that these refugees and asylum seekers are entitled to equal rights and equal protection wherever they seek refuge, if only because the

* Judge in the European Court of Human Rights and member of the Council of State of the Netherlands

country of refuge is very often not their own free choice. That is why international conventions have to lay down those rights and have to regulate procedures for protection.

It is clear, however, that greater uniformity among the national legal systems can be achieved - or rather improved - only if greater uniformity or similarity of substantive legal provisions is accompanied by greater uniformity or similarity of procedural legal provisions and by greater uniformity of interpretation. The Schengen Implementation Convention and the Dublin Convention are examples of international legal instruments which partly aim at such an harmonizing effect. However, these instruments still are a far cry from guaranteeing a full-fledged system of protection based on equality. What is urgently needed for that purpose are international procedures guaranteeing a uniform interpretation of the refugee definition, of the cessation clauses and the exclusion clauses, and of the prohibition of refoulement, and also ensuring that a single State cannot unilaterally create loop-holes in the collective system of protection.

In the European Union, the Ministers of Justice and/or of the Interior regularly meet to discuss and adopt joint positions relating to immigration issues. This strictly inter-governmental procedure entails the risk - and the facts show that this risk is not imaginary - that the outcome will often be a fixing of the lowest standard as a common standard. Moreover, this kind of coordination lacks democratic participation, both on the part of the European Parliament and on that of the national parliaments, and is not subject to judicial review by the Court of Justice of the European Communities.
Indeed, the tail piece of an effective promotion of uniformity of refugee and asylum law is international judicial review. Here, the international legal system still shows its principle shortcomings. The European Court of Human Rights' jurisdiction is limited to the European Convention. The Convention, however, does not contain specific provisions concerning refugees and the right to asylum. As a consequence, the European Court can exercise judicial review in this field in a rather indirect and marginal way only. For the Inter-American Court the situation is somewhat better in view of the express provisions in the seventh and eighth paragraphs of Article 22 of the American Convention, but the factual effects have not been spectacular so far. The Court of Justice of the European Communities, at the present moment, has no jurisdiction in relation to the 'third pillar' of the European Union concerning cooperation in the fields of justice and internal affairs. Moreover, the Court has not been assigned any role in the Schengen and Dublin Agreements. Under the pressure of the Dutch Parliament the Dutch Government has made some efforts to supplement the Schengen Implementation Convention in this respect, but without avail. Especially since the decision in one Contracting State concerning an application for asylum may have direct implications for the possibility to file such an application in any of the other Contracting States, an international guarantee for uniform procedures and a uniform interpretation of the standards and criteria is of great importance, and the Court of Justice of the European Communities would have been the appropriate institution for providing such a guarantee.

Now that international rules and international institutional arrangements for the promotion of greater uniformity of refugee and asylum law are still inadequate, it is the more important that domestic bodies entrusted with the task to interpret and apply refugee and asylum law take initiatives for a spontaneous coordination and cooperation. That is one of the reasons

why, in my opinion, the establishment and activities of the International Association of Refugee Law Judges are of great importance. More than international agreements may regular contacts between the workers in the field contribute to harmonization. Such contacts enable judges in the different Contracting States to familiarize themselves with the law and practice in the other States and with the consequences that a certain legislation or jurisprudence may have for the asylum law and practice in other States and, consequently and ultimately, for the asylum seekers. Such contacts provide opportunities for discussing common problems and for seeking common solutions. And, finally, such contacts may create brotherly and sisterly ties among colleagues within and between countries which will continue after the meetings and provide a network of information on a regular and direct basis and a foundation of moral support in difficult times.

For all these reasons I consider your meeting of great importance for the enhancement of domestic and international protection of refugees and asylum seekers, and I feel privileged to preside your meeting and take part in your discussions, and to invite you, Mr. De Boer, to open the conference on behalf of the Deputy Minister.

Opening Address

Mrs E.M.A. Schmitz*
Mr G. De Boer has spoken on behalf of mrs E.M.A. Schmitz

Ladies and Gentlemen,

I am honoured to address this second conference of the International Association of Refugee Law Judges.
I should like to compliment you on this initiative.
In particular I should like to thank the initiators and those who have helped organise the conference, as well as all those present who, jointly, have made this gathering such an important event.
It may be that in organising this second conference you have helped establish a tradition.

This conference has much to be said for it.
It underlines the fact that the cross-border aspects of the asylum issue affect not just government agencies but also other bodies involved in the application of government policy and rules.

Asylum a mix of national and international aspects

For some time now, it has no longer been possible to assess asylum policy and its implementation in terms of national policy and national criteria alone.
The asylum issue is a mix of national and international rules and therefore requires those involved in the asylum procedure to have a good understanding of the entire spectrum.

With regard to international aspects I am of course thinking in the first place of the Geneva Convention on the Status of Refugees and the Protocol of New York.
Equally as important, however, are the range and application of the Schengen Agreement which, as far as the asylum provisions are concerned, is expected to be replaced this year by the Dublin Convention on the responsibility for dealing with asylum requests.
This makes it clear: the treaty parties are committed to the application of these instruments.

In addition there are a number of instruments which, although not formally binding, nevertheless have a major bearing on the way nations behave in this area.
I am thinking for example of the Recommendations of the Excom and to an even greater extent - as far as the member states of the European Union are concerned - of the results in the asylum field within the so-called 'Third Pillar' of the European Treaty, that is to say the intergovernmental cooperation of the Member States in this field.

* The State Secretary of Justice of the Netherlands

Where the Third Pillar activities are concerned there is one point I would make, namely that greater progress would be welcome.
The results of these formal cooperation within the European Union since the adoption of the Maastricht Treaty have not been particularly impressive.
At the same time we should not forget that it does at least provide a valuable forum for consultation and also that there is a high measure of political support for these results among the Member States: the majority of the Recommendations have been translated into law and policy in virtually all countries.
This can also serve as example for the Associated Countries.

In appropriate cases, the policy and the way in which it is applied in one country are of relevance for assessing a request in another country: I am referring here for example to the concept of 'safe country' and 'safe third country', but also to individual countries' deportation policy.

All this reveals that the situation in other countries - including recipient countries - can be relevant in assessing asylum applications.
Government policies and the way they are applied in the various countries are becoming ever more closely interrelated.

The aim is wherever possible to coordinate policy and procedures in the countries concerned and to lay down clear criteria as to which government is responsible for handling asylum requests.
This will help promote greater equality in the handling and assessment of applications in the various countries.

In general it is fair to say that it is not a matter of arriving at a harmonised policy cost what it may.
Close practical cooperation means that two-way understanding of the similarities and differences in the various Member States in the field of asylum and migration will be greatly enhanced.
This applies to both the decision as to which state is responsible for handling an asylum application and to the actual way in which that request is handled.

International consultations

The Dutch government has been engaged for many years in consultations in a wide range of forums and organisations. Examples include the Excom under the UNHCR programme, the Council of Europe, the European Union and - in an instrumental sense - the implementation of the Schengen Agreement with respect to the asylum section.

The same applies to the non-governmental organisations (NGOs). Here I have in mind the regular consultations conducted by the UNHCR with a wide range of organisations and the activities under the umbrella of the European Council for Refugees and Exiles (ECRE).
I regard not just the international exchange of experience but also greater knowledge of the situation in other countries as highly valuable for the judiciary.

This enables the judiciary to take relevant facts in other countries into account when assessing cases that have been referred to it.
Quite apart from this, a general exchange of experience is always to be welcomed.
These international contacts and this coordination are all the more important as there is no supernational jurisprudential body in the asylum field, in contrast for example to the situation with respect to the European Convention on Human Rights and Fundamental Freedoms.
I am therefore pleased to endorse the usefulness of this gathering and am glad to see that the programme contains a wide-ranging, informative spectrum of relevant topics.

Incorporating the subject of asylum and immigration in the First Pillar, with powers for the Court of Justice in this field

In this regard I would note that the discussions about the revision of the Maastricht Treaty in the Intergovernmental Conference concerning the future of the European Union include the future place of and powers in the field of asylum and immigration.
This is something in which I have an even greater personal interest now that the Netherlands has the Presidency of the Union for six months from the 1st January.
The question is whether asylum is a topic that can be left to the national administrations or whether there is reason to provide the Commission of the Union with regulatory powers in this area as well.
The issue also arises as to whether the Court of Justice should be invested with powers making it a unifying jurisprudential body in the asylum field, like the European Commission and the court of Human Rights in Strasbourg when it comes to the application of the European Convention on Human Rights.

In brief, should this be Community matter or not.

The discussions on this subject are still under way as part of the Intergovernmental Conference.
The results are still unclear at this stage. I would simply note that within the Union, there is a discernable tendency to communitarize elements of the Third Pillar in the First Pillar.
This covers more than just asylum and immigration.

The Dutch government supports this development under certain conditions.
This includes in our view:

- the European Commission should initially have a shared right of initiative and after some time an exclusive right. For this option, codecision by the European Parliament is necessary;
- the possibility of introducing majority voting in due course, thus avoiding decisions from being reduced to the most cautious or restrictive standpoint. Under this arrangement the policy instruments would be the Regulation and Directive, the fixed First Pillar instruments;
- and, most importantly, the court of Justice would be given powers in this field, in which respect we would favour an arrangement under which the present national asylum-procedures are not further prolonged.

But we must remain realistic. If the Intergovernmental Conference leads to a positive outcome and is signed - I hope in a Treaty of Amsterdam - this will not be an end to the matter but just the beginning, in which regard the necessary ratification procedures in the Member States will not even be the major problem.

Structured dialogue

Within the activities of the Third Pillar I should also like to note the cooperation with the nations of Central and Eastern Europe, or the cooperation in what is known as the Structured Dialogue.
In particular this concerns the Associated States that are seeking to accede to the European Union and for which the Union is opening up the possibility of accession.
The Netherlands will give high priority to this cooperation, especially in the asylum field.

Institutional aspects of the constitutional state

This also concerns cooperation in the Structured Dialogue. In this context The Netherlands wishes to emphasize the importance of the institutional aspects of the constitutional state.
I am thinking here in particular of procedural law aspects, such as access to the courts, the position of the Public Prosecutions Department and the Judiciary and the effectiveness with which decisions are implemented.
It is our intention to foster an open dialogue on this subject between representatives from both the Member States of Union and the Associated States in which policy-makers and representatives from the public prosecutions departments and the judiciary are able to take part.

It is not our intention to concentrate solely on the situation in the Associated States: the constitutional state is not a matter for complacency but demands attention, effort, commitment and preservation.
These are aspects that apply equally to the Member States of the Union.

Position of the judiciary

The judiciary occupies a central role in the constitutional state and therefore also has a key part to play in the asylum procedures.
In my view a conference such as this provides recognition of the fact that the quality of decisions and the ability to implement them benefit from the broadest possible orientation towards all aspects - including international ones - that can play a role in the procedures and workings of the courts.

To Conclude

I wish you a successful conference and await with interest the results and possible recommendations, which I am sure will be of great benefit.

The Independence of the Judiciary in Asylum Cases

Hon. Mr. Justice Mark R. MacGuigan, P.C.*

1 The Origins of Judicial Independence in England

As with so many things in matters governmental, the world is indebted to England for the first recognition of judicial independence. As early as 1328 the Statute of Northampton declared that no royal command should disturb the course of the common law and that the judges should ignore such a command, if issued[1]. Another early expression of the principle is found in *De Laudibus Legum Anglie* by Sir John Fortescue, written about 1470, in which he asserted that a justice appointed by the king 'shall swear among other things that he will do justice without favour, to all men pleading before him, friends and foes alike, that he will not delay to do so even though the king should command him by his letters or by word of mouth to the contrary.'[2]

In the early seventeenth century, in his continuing endeavour to limit the claims of James I, Sir Edward Coke C.J. maintained that 'the King cannot change any part of the common law, nor create any offence by his proclamation, without Parliament, which was not an offence before.'[3]

Although these theories were generally espoused, it was only with the socalled Glorious Revolution of 1688, as a reaction to the Stuart removal of judges for political reasons, that the appointment of judges for life, subject only to good behaviour, which we now see as the basic guarantee of judicial independence, came to be accepted. This was legislatively enshrined in the Act of Settlement in 1701. However, with the publication of *De L'Esprit des Lois* in 1748 by Charles Louis de Secondat, Baron Montesquieu, judicial independence assumed theoretical form as part of the doctrine of the separation of powers.

2 Judicial Independence as Rooted in the Separation of Powers

The principle of judicial independence is now generally regarded as an integral part of the doctrine of the separation of powers. The international authority Shimon Shtreet put it this way[4]:

* Federal Court of Appeal, Canada.

1. Lederman, 'The Independence of the Judiciary' (1956), 34 *Can Bar Rev.* 769, 778.
2. Ed. and trans. S.B. Chrimes, Cambridge, Cambridge University Press, 1942, 127-131.
3. Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke (1552-1634)*, Boston and Toronto, Little, Brown and Company, 1956, 321.
4. 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in *Judicial Independence: The Contemporary Debate*, ed. Shtreet and Deschênes, Martinus Nijhoff Publishers, Dordrecht, 1985, 590, 595.

> The concept of judicial independence is deeply rooted in the doctrine of the separation of powers. Although it has not been strictly implemented in any country, this doctrine has, in essence, been maintained in democratic-libertarian systems of government in varying degrees of adherence. As Dr. Petren wrote, the maintenance of the independence of the judiciary is 'part of the Montesquieu theory of division of power. The tri-partition of the public decision makers into the executive, the legislative, and the judiciary is based on the idea that each of these three acting parts should have a certain independence in relation to each other.'

In a recent constitutional decision of the Supreme Court of Canada, *Cooper v. Canada (Canadian Human Rights Commission)*, no. 24135, decided 21 November 1996, Lamer C.J.C. attributed judicial independence directly to the principle of the separation of powers which he termed a 'first principle' of the Canadian Constitution. Even though 'historical evidence suggests that judicial independence is a distinct governmental virtue of great importance worthy of cultivation in its own right,'[5] it is in my opinion no doubt correct to link it with the separation of powers as a matter of intellectual justification.

It must also be true, as Dickson C.J.C. pointed out in *The Queen v. Beauregard*, [1986] 2 S.C.R. 56, 71 that:

> In Canada, the constitutional foundation for the principle of judicial independence is derived from many sources. Because the sources for the principle are both varied and powerful, the principle itself is probably more integral and important in our constitutional system than it is in the United Kingdom.

The two sources Dickson C.J.C. mentioned for judicial review of the constitutionality of legislation in Canada which distinguish it from the U.K. are the existence both of a federal system and of the *Canadian Charter of Rights and Freedoms* as the newest part of the Canadian Constitution. Another distinguishing source is the judicature part of the *Constitution Act, 1867*, which supports judicial authority and independence. A common source, however, is the implicit recognition of judicial independence in the preambular words to the *Constitution Act, 1867* that Canada should have 'a Constitution similar in Principle to that of the United Kingdom'. Dickson C.J.C. commented that 'Since judicial independence has been for centuries an important principle of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the Constitutional language of the preamble' (72). Moreover, the *Constitution Act, 1867* continued the courts previously in existence in the federating provinces, and so continued the fundamental principles of those courts like judicial independence.

The quote is from Dr. Gustaf Petren, 'The Independence of the Judiciary' in *Report of the Symposium on the Independence of Judges and Lawyers*, Helsinki, 1980, 95.

5. W.R. Lederman, 'The Independence of the Judiciary' (1956), 34 Can. Bar Rev. 1139, 1158.

Dickson C.J.C. did not explicitly link judicial independence to the separation of powers, but I believe such a conclusion is implicit in his way of treating the former principle. In particular, he referred to the courts' separateness from the legislature and executive (73):

> The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be *completely separate in authority and function* [my emphasis] from *all* other participants in the justice system (...). Although particular care must be taken to preserve the independence of the judiciary from the executive branch (because the executive is so often a litigant before the courts), the principle of judicial independence must also be maintained against all other potential intrusions, including any from the legislative branch.

I read him therefore as in agreement with the view recently adopted by Lamer C.J.C. that judicial independence flows from the separation of powers[6].

That would seem also to be a correct interpretation of *Valente v. The Queen*, [1985] 2 S.C.R. 673, where the Supreme Court had to decide whether provincial court criminal judges in Ontario were independent. Le Dain J. distinguished between impartiality and independence, with the former referring to a judge's state of mind towards the issues. The word 'independence,' on the other hand, embodies the traditional constitutional value of judicial independence. Le Dain J. added (685):

> As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.

3 The Meaning of the Separation of Powers

The doctrine of the separation of powers is forever linked with the name of Montesquieu[7].

It is true that in his *Two Treatises of Government* six decades earlier John Locke had set forth the essential elements of the doctrine of the separation of powers, but not in an explicit fashion. He showed an understanding of a division between legislation, execution, and judgment[8], but for the most part he emphasized the traditional twofold division between legislative and executive power (which he divided into executive authority over internal and external affairs, the latter of which executed the law of nature)[9].

6. *Beauregard* was not the first case in which Dickson C.J.C. spoke of the constitutional role of the separation of powers. He had also done so a year earlier in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, 469-70. L'Heureux-Dubé J. has done so subsequently in *R. v. Power*, [1994] 1 S.C.R. 601, 620-1, but neither case focussed on judicial independence.
7. Aristotle distinguished three elements or powers in the government of a state: the deliberative element, the element of the magistracies and the judicial element, in *Politics iv, xiv*, 4, trans. with notes by Ernest Barker, Oxford, Clarendon Press, 1948. However, the deliberative element was more executive than legislative, the magistracies had only a few executive functions, and the judicial element was composed of lay courts.
8. *Two Treatises of Government*, ed. P. Laslett, Cambridge, 1960, *X*, pars., 124-6.
9. *Ibid. XII*, para. 146.

Montesquieu focussed on the Constitution of England, because he correctly believed that it was the only one in Europe which had liberty as its direct aim. In the words of Professor W.B. Gwyn, he 'did not adopt Locke's terminology but decided to call the conduct of foreign-affairs 'executive power' and the execution of domestic law 'judicial power'. (...) Montesquieu, like most writers of the time, was inclined to think of the executive branch of government as being concerned nearly entirely with foreign affairs.'[10]

Montesquieu established the tripartite division of both government functions and of branches of government into legislative, executive and judicial. Each agency should for the most part exercise only its own functions. In particular, the judicial power should not be located in the House of Lords where many English writers had placed it. In his own words[11]:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty (...). Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

It is not entirely clear how purely Montesquieu saw the separation of personnel between the branches of government, as would be required by a pure separation doctrine. Professor M.J.C. Vile defines a pure doctrine of the separation of powers as follows[12]:

> It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of those three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose those three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.

Montesquieu does nor seem to go all the way with a pure theory of separation of powers. However, in contradistinction to the English practice of his day, in which the executive was, as now, drawn from Parliament (although at that time tbe King still personally exercised considerable power), he believed that if executive power is in the hands of 'a certain

10. W.B. Gwyn, *The Meaning of the Separation of Powers*, Tulane University, New Orleans, 1965, 101-103.
11. As quoted by M.J.C. Vile, *Constitutionalism and the Separation of Powers*, Oxford, Clarendon Press, 1967, 90.
12. *Ibid.*, 13.

number of persons selected from the legislative body, there would then be an end of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would always be able to possess, a share in both.'[13] On this basis a concentration of power in the king's ministers, as is characteristic of the British system of government, would be dangerous.

France is one of the few countries that has experimented from time to time with the pure separation doctrine, and may be said still to maintain it with respect to the judiciary, which lacks the power to review not only legislation but also decision of administrative tribunals.

I have mentioned Montesquieu's adoption of the system of checks and balances between the legislative and executive powers. The executive ought to have a veto over legislation (and so would have a share in the legislative process) and of calling and terminating the meetings of the legislature. The legislature in turn should have the power of impeaching, not the person who executes the law (presumably he had in mind the king) but those upon whose advise unwise policies were adopted (perhaps the cabinet).

The judiciary had for Montesquieu no part in this system of checks and balances, perhaps because he had such a limited view of the judiciary. On the one hand, he recognized that judges must be professionals learned in the law, who must strictly follow the letter of the law. On the other hand, however, he identified the judicial power with juries, not judges. Gwyn put it this way[14]:

> The judicial power of deciding civil and criminal cases was considered by Montesquieu to be the most frightening governmental function. Legislative power is concerned with making general rules of conduct; executive power carries out the laws; but only the judicial power determines how the laws affect particular persons in particular circumstances. Although he did not say so explicitly, Montesquieu seems to have believed that normally the executive could not harm a person's life, liberty, or property until after a judicial decision. In writing of the judicial function in England, he identified the judiciary with the petty juries. This oversimplication, which completely ignored the role of judges in jury trials, was probably intended to emphasize that aspect of the English judicial system which most allay fears of judicial oppression. As the judicial power was vested not in any standing body of men but rather in transitory juries drawn from the body of the people, it was in a sense 'invisible et nulle'. Men might fear the judicial office in such a system but they would not fear the office holders.

Judges were for Montesquieu no more than the mouthpieces of the law, mere passive beings with no powers to speak on their own.

Sir William Blackstone was for the most part an echo of Montesquieu, but to conform to actual British practice he advocated only a partial separation of persons and functions be-

13. *Ibid.*, 92.
14. *Supra* n. 10, 103.

tween the legislature and the executive along with the complete separation of the judiciary[15]:

> In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated from the legislative and from the executive power.

As in Montesquieu himself, the independence of the judiciary is absolute. It is not subject to control by the other branches and it has no power over them.

From Montesquieu on, the doctrine of the separation of powers was no longer exclusively English. In Vile's phrase it had become a universal criterion of a constitutional government[16]. It passed, not only to Revolutionary France, as I have mentioned, but, more important, to Revolutionary America. As Vile put it, 'in the America of 1787 the doctrine of the separation of powers was modified, tempered, buttressed even, by the theory of checks and balances drawn from the older conception of English history, but it remained itself firmly in the centre of men's thoughts as the essential basis of a free system of government.'[17] As unmodified by checks and balances, as Jefferson would have had it, it was more purely democratic, since the whole of sovereignty was then considered to rest in the legislature directly elected by the people. But at least from the time of the great decision of Chief Justice Marshall in *Marbury v. Madison* in 1803, 1 Cranch 137, in which the U.S. Supreme Court for the first time dared to declare an act of Congress unconstitutional, the new concept of the separation of powers was modified by the older concept of checks and balances, and the contemporary partial form of separation of powers had emerged. One might, perhaps, go so far as to say that in this contemporary sense the principal consequence of the tripartite doctrine is to establish the judiciary as the supreme organ of the state. Given the partial union of the legislature and the executive in the parliamentary system of government, that is even more true in those countries of the Commonwealth that have adopted federalism and bills or charters of rights, like Canada and India, than it is in the United States. In my opinion, the United Kingdom will never resolve its dilemma as to whether or not it embraces the separation of powers until it adopts a bill of rights with the consequence of judicial review of the constitutionality of legislation[18]. In other words, in my view judicial review is of the essence of the separation of powers in a parliamentary system, and judicial review of course necessarily requires judicial independence.

4 Do Administrative Tribunals Partake of Judicial Independence?

The presumption of this paper is that administrative tribunals partake of judicial independence. To my mind, the question is one of degree.

15. *Commentaries on the Laws of England*, London, 1765, *i*, 269.
16. *Supra* n. 11, 97.
17. *Ibid.*, 120–1.
18. I believe I detect similar thinking in Laws J., 'Law and Democracy', [1995] P.L. 72, 90–2, where he is led to assert the primacy of higher order law over legislative sovereignty.

In *Valente* the Supreme Court of Canada concluded that among the essential conditions of judicial independence are security of tenure, financial security and the institutional independence of a tribunal with respect to matters of administration bearing directly on the exercise of its judicial functions[19]. In *C.P. Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, Lamer C.J.C. writing for the majority of the Court[20] held that 'the principles for judicial independence outlined in *Valente* are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties' (49). However, he went on immediately to add, basing himself on *Valente*, that 'a strict application of these principles is not always warranted' (49). In summary, he stated (51):

> Therefore, while administrative tribunals are subject to the *Valente* principles, the test for institutional independence must be applied in the light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.
>
> In some cases, a high level of independence will be required. For example, where the decisions of a tribunal affect the security of the person of a party (such as the Immigration Adjudicators in *Mohammed, supra*) a more strict application of the *Valente* principles may be warranted.

Since *Mohammed v. Canada (Minister of Employment and Immigration*, [1989] 2 F.C. 363 (F.C.A.), was a case involving the deportation of a person who was roughly comparable to a refugee, it is reasonable to conclude from the Chief Justice's remarks that refugee proceedings require a more strict fulfilment of the guarantees of independence. (In the result in *Mohammed*, the Federal Court of Appeal found that these guarantees existed).

In the Court's recent decision in *2747-3147 Quebec Inc. v. Quebec (Regie des permis d'alcool)*, no. 24309, decided 21 November 1996, Gonthier J. quoted the first paragraph of the above citation from Lamer C.J.C. in *Matsqui Indian Band*, and repeated that a certain degree of flexibility is appropriate as to independence where administrative agencies are concerned. In that case the Court found that such independence was established by appointment of the directors for a term of not more than five years, where the directors can be dismissed only for specific reasons, where the Minister's administrative controls did not influence the decision-making process, and where the directors swore an oath requiring them to perform the du-

19. That all is not well in Canada, at least with respect to the financial security of provincial court judges, is indicated by the fact that on 3-4 December 1996 the Supreme Court of Canada heard cases from three provinces (Prince Edward Island, Manitoba and Alberta) where the provincial governments have attempted to reduce their judges' salaries.
20. Lamer C.J.C. wrote only for himself and one other judge, but Sopinka J., writing for three colleagues, agreed with him on this point (465):
    As the Chief Justice has noted, the essential conditions of institutional independence set out by Le Dain J. in *Valente* (...) in the judicial context need not be applied with the same strictness of the case of administrative tribunals. Conditions of institutional independence must take into account their *context*.

ties of their office honestly and fairly. The court specifically commented that 'fixed-term appointments, which are common, are acceptable. However, the removal of adjudicators must not simply be at the pleasure of the executive' (par. 67).

This is, of course, a non-existent problem in the many countries in which refugee matters are handled in the first instance by judges of general jurisdiction. It is, on the other hand, very much a problem in countries like the United States and New Zealand where refugee judges of first instance appear to have no guarantees of term of office.

5 Does Tribunal Independence Include a Guarantee of Jurisdiction over Subject Matter[21]?

The Universal Declaration on the Independence of Justice, adopted in Montreal in 1983, sets out in detailed form the meaning of judicial independence[22], but, for a simple popular definition, it would be hard to better the words of Sir Ninian Stephen[23]:

> My definition of an independent judiciary is a judiciary which dispenses justice according to law without regard to the policies and inclinations of the government of the day.

Such freedom from being influenced is the very paradigm of judicial independence. As we have seen, this freedom readily extends to such consideration as security of tenure, financial security and adequate administrative control.

But does it extend further? The Universal Declaration provides in s. 2.06 that[24]:

2.06
- a) No ad hoc tribunals shall be established;
- b) Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts;
- c) Some derogations may be admitted in times of grave public emergency ...
- d) In such times of emergency:
  - I. Civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts, expanded where necessary by additional competent civilian judges:
  - II. Detention of persons administratively without charge shall be subject to review by ordinary courts by way of habeas corpus or similar procedures ...
- e) the jurisdiction of military tribunals shall be confined to military offences committed by military personnel (...).

21. In Canada it is clear from *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 that there is a significant procedural requirement in judicial review of administrative action stemming from section 7 of the *Canadian Charter of Rights and Freedoms*, as well as from s. 2 (*e*) of the *Canadian Bill of Rights*. However, this is not something that goes to the independence of judges or tribunals.
22. The Universal Declaration is printed in *supra* n. 4, c. 39, 447-461.
23. 'Judicial Independence - A Fragile Bastion' in *supra* n. 4, 529, 531.
24. *Supra* n. 21, 450.

This provision obviously refers to criminal prosecutions, and is probably constitutionally guaranteed in many countries, as it is in Canada by s. 11 of the *Canadian Charter of Rights and Freedoms*.

There is, however, a less clear provision with respect to jurisdiction in s. 2.05[25]:

2.05 The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature.

Is this intended as a guarantee of judicial jurisdiction in non-criminal cases? If so, how should 'all issues of a judicial nature be understood'? In referring to the fundamental substantive principles relating to the constitutional position of the judiciary, Shtreet stated[26]:

> The second principle prohibits the diversion of cases from the ordinary courts to disposal by tribunals which do not enjoy the same safeguards. Ordinarily this principle applies to criminal cases when they have not been decriminalized. (...)
> The Universal Declaration (2.05) provides that the judiciary 'shall have jurisdiction, directly or by way of review over all issues of judicial nature.' The Canadian jurisprudence based on section 96 of the (British North America Act, now the Constitution Act 1867), represents similar principles. I refer to the case law which excluded the provinces from authorizing administrative tribunals to exercise primary judicial powers similar to those of the Superior Courts, thereby, in fact, bypassing the constitutionally prescribed jurisdiction of the superior courts.

But, with respect, it is hard to draw any general lesson from the Canadian experience. First, the Canadian standard of what is judicial has been used only for the purpose of distinguishing federal from provincial jurisdiction (the federal government having constitutional jurisdiction over the appointment of superior court judges), and not to protect current judicial powers from legislative encroachment. Second, there was an already-made jurisdictional test at hand, in the historical jurisdiction of superior court judges in the United Kingdom in 1867, the year of our Confederation. Such time-and-place-limited description of law-applying by superior courts in England is no help at all in defining a judicial function in politico/legal theory.

To my mind the difficulty of prescribing the future from historical data was well expressed by Lord Simonds in the Judicial Committee of the Privy Council in *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited*, [1949] A.C. 134, 149-51:

> Here at once a striking departure from the traditional conceptions of a court may be seen in the function of the appellate board. (...) It is in the light of this new conception of industrial relations that the question to be determined by the board must be viewed, and, *even if the issue so raised can be regarded as a justiciable one, it finds no analogy in those issues which were familiar to the courts of 1867* (...). It is legitimate, therefore, to ask whe-

25. *Ibid.*
26. *Supra* n. 4, 616.

ther, if trade unions had in 1867 been recognized by the law, if collective bargaining had then been the accepted postulate of industrial peace, if, in a word the economic and social outlook had been the same in 1867 as it became in 1944, it would not have been expedient to establish just such a specialized tribunal as is provided by s. 4 of the Act. [Emphasis added].

It would be unwise, to say the least, to confine the future to the past.

We have had in Canada in the last two years a political and legal controversy over Bill C-22, passed by the House of Commons but rejected by the Senate. It provided that a number of contracts entered into by the Crown with respect to the Pearson Airport in Toronto have no legal effect, that no one is entitled to any compensation from Her Majesty for the breach and that no legal action lies against Her Majesty. Professor Patrick J. Monahan has recently argued that 'to deprive citizens of access to the courts for the determination of their rights, even if this is accomplished through legislation, must be inconsistent with the rule of law,'[27] since in bis view the implied principles of the Constitution like the rule of law are limits on the sovereignty of parliament and of the provincial legislatures.

What is perhaps a similar position has recently been taken extra-judicially in England by Lord Woolf of Barnes in defence of the rule of law. With respect to the highly unlikely possibility that Parliament would remove or substantially impair judicial review of administrative action. Lord Woolf stated[28]:

[I]f Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent. Some judges might choose to do so by saying that it was an unrebuttable presumption that Parliament could never intend such a result. I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept. They are no more than are necessary to enable the rule of law to be preserved.

Sir John Laws has distinguished the political sovereignty which Parliament possesses from constitutional or 'ultimate sovereignty [which] rests, in every civilised constitution, not with those who wield governmental power, but in the conditions under which they are permitted to do so.'[29] These conditions consist in 'a framework of fundamental principles, which include the imperative of democracy itself and those other rights, prime among them freedom of thought and expression.'[30] It is the judiciary that is the guarantor of this framework. Laws J. put it this way: 'judicial power in the last resort rests in the guarantee that this frame-

27. 'Is the Pearson Airport Legislation Unconstitutional? The Rule of Law as a Limit on Contract Repudiation by Government' (1995), 33 *Osg. Hall L.J.* 411, 427.
28. 'Droit Public - English Style', [1995] P.L. 57, 69.
29. *Supra* n. 18, 92.
30. *Ibid.*

work will be vindicated.'[31] Canada is happily spared from this problem by the existence of our *Charter.*

Whether or not Professor Monahan's views are right in a Canadian context is not a matter on which I have presently to pronounce. But it is critical to note that his argument extends only to a total denial of access to the courts, or, by extension, to an administrative agency. His contention was that 'it is the denial of court access, rather than the decision to repudiate the contract, which is contrary to the rule of law'[32], and no authority he cited went beyond the implication that anything less than a complete denial of access could offend the rule. Indeed, in the *Cooper* case, decided since Monahan's article was published, La Forest J. for the majority in the Supreme Court stated that 'no administrative tribunal has an independent source of jurisdiction pursuant to s. 52(1) of the *Constitution Act, 1982*' (par. 45), the provision allowing a tribunal to rule that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Rather, the Court ruled, 'the essential question is one of statutory interpretation - has the legislature, in this case Parliament, granted the administrative tribunal through its enabling statute the power to determine questions of law?' (par. 45). This does not, of course, resolve the issue before us, but it does perhaps suggest that the court will make the statutory mandate the measure of such an issue rather than weigh the validity of that mandate.

> No position has been put forward, therefore, to suggest that the frequent backing and filling which legislatures engage in with respect to the jurisdiction of courts and administrative boards raises any issue as to the rule of law or the independence of the judiciary. In circumstances short of the extreme, no case has been made for a guarantee to courts or tribunals of any inherent jurisdiction over subject matter to which they have merely grown accustomed.

6 Conclusion

Judicial independence is intellectually dependent on the notion of the tripartite separation of powers into legislature, executive and judicial. In parliamentary systems that concept is not taken purely, as neither the functions nor the persons are totally separated among the trinity of powers. Following the American model, the separation of powers is linked with a notion of checks and balances, which bestows ultimate jurisdiction on the judiciary as the arbiters of the constitution.

The independence of tribunals, functioning within the executive branch, is a sort of hand-me-down form of judicial independence, and is interpreted according to less strict rules than judicial independence, although always with security of tenure during the course of a term of office, and with guarantees of financial security and administrative control over judicial operations.

31. *Ibid.*
32. *Supra* n. 26, 434.

The independence of administrative tribunals cannot, any more than that of courts, be taken to include a guarantee of jurisdiction over accustomed or traditional subject matter, unless, perhaps if their whole function were being removed. Refugee tribunals dealing with matters of asylum are in the same position as other administrative tribunals in this respect. Legislative removal of a part or aspect of their jurisdiction would not be forbidden on the basis of the principle of tribunal independence. It might, of course, run afoul of other provisions in a particular constitution.

The Practical Effects of Schengen in Asylum Cases

Thomas Spijkerboer*

In this paper, I will deal with practical issues arising out of the application of the Schengen Implementation Agreement (SIA) in asylum cases. I will give an exhaustive overview of Dutch case law published in 1995 and 1996. Reference to foreign jurisprudence is not exhaustive. It is to be expected that the asylum chapter of the Schengen Implementation Agreement will soon be replaced by the Dublin Convention[1]. The Dutch Presidency of the European Union is working with the premise that the Dublin Convention may enter into force in the first half of 1997[2]. As for our purposes these treaties are identical, this does not raise any substantive issues. In the following, I will 'translate' the SIA articles I refer to into Dublin articles.

The Schengen system has substantial effects for asylum practice; in The Netherlands, about 10% of all asylum applications are declared inadmissible on the ground that another state is responsible on the basis of the Schengen system[3]. At the centre of the Schengen-system is the principle that one, and only one of the Schengen-states will examine an asylum application. The guarantee that one state will do so is laid down in Article 29 paragraph 1 SIA. That only one state will examine an application is stipulated in Article 29 paragraph 3 SIA. Articles 35 and 30 give the criteria according to which this one state is determined. Responsibility for examining an application encompasses responsibility for the expulsion of rejected cases. Applications are examined according to national law (Article 32 SIA).

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1. This will happen as soon as the Dublin Convention enters into force, as stipulated in the Protocol of Bonn of 26 April 1994, *Tractatenblad* [Treaty Journal] 1994, 185.
2. A.A.J. Sorel, Theorie en praktijk van de Schengen Uitvoeringsovereenkomst; het perspectief van Justitie [Theory and practice of the Schengen Implementation Agreement; The perspective of the Ministry of Justice], in: P.R. Giuseppin and W.A.M. Jansen (eds), *Het akkoord van Schengen en vreemdelingen* [The Schengen Agreement and foreigners], Nederlands Centrum Buitenlanders / Opleidingen Sociaal Recht, Utrecht, 1997 p. 9-17.

1 SCHENGEN-EVASION

1.1 Schengen-evasion by applicants

If an applicant is dissatisfied with the effect of the Schengen-system in his or her case, can the effect be prevented?
In the Netherlands, the asylum procedure is not only about admission as a refugee. When someone applies for asylum, s/he will fill out two forms. One is to apply for admission as a refugee in the sense of the Geneva Convention; the other is for the grant of a residence permit on humanitarian grounds. Apart from this, the applicant may be granted a toleration status if s/he is from a country to which s/he may be returned without violating the law, but in respect of which the authorities find forced return irresponsible in the light of the general situation there[4]. Virtually all European countries have such asylum-related residence permits, be they called B- or C-statuses, exceptional leave to remain, *Duldung* or whatever. These non-Geneva-Convention-asylum-statuses create a possibility for applicants to evade the Schengen-system, because the Schengen-system is only about asylum applications, which Article 1 SIA defines as an application 'with a view to obtaining recognition as a refugee in accordance with the Geneva Convention (...) and as such obtaining the right of residence' (comp. Article 1 Dublin Convention). Applications for other things, be they for construction permits, welfare allowances or residence permits are outside the scope of Schengen.

The President of the County Court Den Bosch was faced with the following case. An application had been declared inadmissible because Belgium was the responsible country. Belgium had accepted the claim on the basis of Article 30 paragraph 1 sub e SIA (unauthorised external border crossing; comp. Article 6 Dublin Convention). During the court hearing, the lawyer (rumour has it: with a big smile on his face) on behalf of his client withdrew the application for admission as a refugee; there remained an application for a residence permit on humanitarian grounds, responsibility for which cannot be transferred to another country. The court decided that indeed, the Schengen Agreement had ceased to apply, with the result that Belgium was not responsible for the (now inexistent) application for admission as a refugee. But this did not help the applicant. First, the court stated, the non-refugee status applications were a Dutch responsibility in any case, even when the applicant had not withdrawn the refugee status application. The applicant had, in the court's view, not substantiated the claim to a residence permit on humanitarian grounds, and consequently had

3. T.M.A. Claessens, Schengen: Toekomstige ontwikkelingen [Schengen: Future developments], in: Giuseppin and Jansen, above note 2, p. 72-83.
4. This status, the *voorwaardelijke vergunning tot verblijf*, is created by Article 9 of the Aliens Act. The criteria for granted it are laid down in Article 12b, first paragraph of the Aliens Act. If someone has had a toleration status for three years, a permanent residence permit (*vergunning tot verblijf zonder beperkingen*) will be granted, Article 13a Aliens Act.

no residence rights in the Netherlands. Also, the applicant could be removed to Belgium on the basis of Benelux law[5].
In a later decision in an identical case, the same court thought it possible that, even though the application for admission as a refugee had been withdrawn, the Schengen Agreement remained applicable, on the basis of the following reasoning. The applicant had submitted an application in the sense of Article 1 SIA. Belgium had accepted responsibility, and the application had been declared non-admissible by the Netherlands. The Belgian responsibility can only end by removal of the applicant to a place outside the Schengen territory after the application has been processed, as Article 34 paragraph 1 and 30 paragraph 1 sub g SIA make clear (comp. Article 10 paragraphs 3 and 4 Dublin Convention). Therefore, the obligation of Belgium to take the applicant back on the basis of Article 31, paragraphs 2 and 3 SIA (comp. Article 10 paragraph 1 under a Dublin Convention) was still existent[6]. So on the point of the applicability of the Schengen Agreement, the court took a different view. For the rest the decision is the same: the Netherlands should process the application for a residence permit on humanitarian grounds. It had turned down this application, with which the court agreed[7].
The Legal Unity Chamber in Aliens Cases[8] decided this case in the second way[9]. The responsibility of the responsible State (in this case France) only ends with expulsion (or the grant of a residence permit by a non-responsible State, Article 33 paragraph 2 SIA; the court does not mention a third situation in which France can cease to be responsible: when a non-responsible State starts to process an application, Article 30 paragraph 2 SIA). The residence permit on humanitarian grounds has to be processed by the Netherlands. The toleration status does not have to be dealt with, the court decides. This status only can be granted when expulsion *to the country of origin* would be irresponsible, and return to the country of origin (Bosnia in this case) is not at stake, but return to France.

1.2 Schengen-evasion by States

If a State is not pleased by the effect of the Schengen-system in a particular case, can the effect be prevented by not applying the Schengen Convention?

In the light of the resistance of NGO's to the Schengen-system, it was to be expected that asylum seekers would look for ways to evade its applicability. It is significant that now, states also try to evade the Schengen-system, and that asylum seekers insist on its application.

5. Pres. Rb. Den Haag, z.p. Den Bosch 6 October 1995, *Jurisprudentie bijlage Vreemdelingen Bulletin* [Jurisprudence annex Foreigners Bulletin], hereafter JuB 1995-20, 16. The same view was taken by Pres. Rb. den Haag 9 April 1996, JuB 1996-8, 6.
6. This is consistent with the Dublin Convention, which in Article 10 paragraph 4 explicitly gives withdrawal and rejection of an application (by the responsible country) the same result.
7. Pres. Rb. Den Haag, z.p. Den Bosch 2 February 1996, JuB 1996-8, 8. The same view was taken hy Pres. Rb. Den Haag, z.p. Zwolle 25 April 1996, JuB 1996-10, 15. Substantively, Pres. Rb. Den Haag 31 May 1996, JuB 1996-11, 6 also takes this view.
8. A marvel of judicial inventiveness which I will leave unexplained for now.
9. Rb. Den Haag (Legal Unity Chamber) 24 October 1996, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law], hereafter RV 1996, 10.

The Schengen-system, minimal as it may be, gives applicants three clear entitlements. First, an applicant has the right to have the application processed in one country, as Article 29 paragraph 1 SIA states (comp. Article 3 paragraph 1 Dublin Convention).
Second, Article 30 guarantees that the responsible country is identified before an application is declared non-admissible by a non-responsible country (comp. Articles 4-8 Dublin Convention). In the course of the parliamentary history of the Dutch legislation that implements the Schengen Implementation Agreement, it has been stated unequivocally that, for the relevant provision to be applied, it is necessary that the responsible country has been identified and that it has accepted responsibility[10]. In the Spanish Asylum Act, these two requirements are laid down in the law itself, namely in Article 5 paragraph[11].
And third, there is Article 29 paragraph 4 SIA, which gives a non-responsible State an unqualified right to process an application nonetheless (comp. Article 3 paragraph 4 Dublin Convention). In many European jurisdictions (and, as we will see later, in the Dutch), nonuse of this discretionary power can be tested by courts on the basis of some version of an irrationality test, the equality principle, and the like.
In some countries, there are safe third country-systems, applicable in principle to Schengen- or Dublin states, that do not offer these minimal guarantees. The Dutch safe third country legislation (see annex 2) may oblige the administration to identify the third country concerned, but it does not oblige that country to do something with an application, nor does it provide for the possibility of exceptions. The German safe third country legislation also does not allow for exceptions, it does not require that the third country does anything with an application, and it even does not require that the safe third country be identified[12]. Consequently, it is more attractive for states to apply safe third country legislation when returning applicants to Schengen- (or Dublin-) countries than the Schengen Agreement.

In the two cases I know of, Dutch case law has robustly rejected this 'Schengen-evasion' by states. In line with an earlier decision, the court essentially decides that the Dutch Schengen implementation legislation (see annex 1) is a *lex specialis* of the safe third country legislation, and therefore has precedence[13]. On the basis of the parliamentary history, the court decides that the Dutch safe third country legislation in general does require consent of the safe third country to take the applicant back (and therefore identification of that country), as well as some guarantee that the application will be processed. The court is of the opinion that the Schengen system also contains these guarantees, and therefore on those points application of the Dutch safe third country principle is equal to the applicant. But on two other points, ap-

10. T.P. Spijkerboer and B.P. Vermeulen, *Vluchtelingenrecht* [Refugee Law], Nederlands Centrum Buitenlanders, Utrecht, 1995 [hereafter Spijkerboer/Vermeulen], p. 410.
11. Jos Sluijsmans, *De inwerkingstelling van de Schengen Uitvoeringsovereenkomst, Nederlandse jurisprudentie en het Verdrag van Dublin* [The entry into force of the Schengen Implementation Agreement, Dutch case law and the Dublin Convention], Masters Thesis, Faculty of Law, University of Nijmegen, November 1996, p. 60-61.
12. See Reinhard Marx and Katharina Lumpp, The German Constitutional Court's Decision of 14 May 1996 on the Concept of 'Safe Third Countries' - A Basis for Burden Sharing in Europe?, in: *International Journal of Refugee Law* 1996, p. 419-439.
13. Rb. Den Haag 15 October 1996, RV 1996, 15; earlier Pres. Rb. Den Haag 14 March 1996, JuB 1996-9, 13.

plication of the Dutch safe third country system instead of Schengen would deprive the applicant of guarantees. First, the applicant cannot invoke Article 29 paragraph 4 SIA. Second, s/he cannot invoke the 'unless'-clause of Article 15b paragraph 1 sub a Aliens Act, which specifies one situation in which the Netherlands will process an application which has already been processed in another State (see under 5.3).

In Germany, the problem does not occur as one regulation on safe third countries applies to both Schengen-states and other safe third countries.

Summing up, we can conclude that Schengen is a 'closed system'. Once an applicant has been caught in its nets, the applicability of the Schengen system can only end in the ways specified by the Agreement itself, not by inventive procedural moves. But this works the other way round as well: once someone has made an application in the sense of Article 1 SIA, the applicant has three entitlements: the application shall be processed; removal to another Schengen-country will only happen after that country has been identified and has accepted a claim; and there is the discretionary power of states under Article 29 paragraph 4 SIA. States cannot frustrate these rights by inventive procedural moves.

2 HUMANITARIAN EXCEPTIONS: ARTICLE 29 PARAGRAPH 4 SIA

Are there circumstances under which a State should refrain from applying the Schengen-system for humanitarian reasons?

Article 29 paragraph 4 SIA gives every State a discretionary power to process an application for which it is not responsible (comp. Article 3 paragraph 4 Dublin Convention). This provision ensures that the Schengen Convention does not infringe the right of asylum - that is: on the sovereign right of every State to grant asylum to whoever it wants to do so[14]. The discretionary power to attract responsibility for an application is not substantively qualified - Article 29 paragraph 4 SIA stipulates that this may happen 'for special reasons concerning national law in particular', Article 3 paragraph 4 Dublin Convention only requires that the asylum seeker agrees with the attraction of responsibility[15].
Are there situations in which a State must use this discretionary power? A rather varied case law has come up on this point. The starting point is that, although applicants cannot invoke an obligation of the State to use this discretionary power, its non-use may be a violation of the 'general principles of good governance' (*algemene beginselen van behoorlijk bestuur*)[16]. In

14. See on this François Crepeau, *Droit d'asile. De l'hospitalité aux contrôles migratoires*, [Asylum law. From hospitality to migration control], Editions Bruylant/Editions de l'Université de Bruxelles, Brussels, 1995, p. 183-186; Atle Grahl-Madsen, *The Status of Refugees in International Law*, Volume II, Sijthoff, Leiden, 1972 , p. 22 et seq.
15. In the Schengen system the consent of the applicant is required on the basis of the Decision of the Schengen Executive Committee of 27 June 1994, under 2; the Dutch text was published in *Tractatenblad* [Treaty Journal] 1994, nr. 217, p. 17-45.
16. See in general P. de Haan, Th. G. Drupsteen, R. Fernhout, *Bestuursrecht in de sociale rechtsstaat, Deel 1: Ontwikkeling, Organisatie, Instrumentarium* [Administrative law in the social welfare state, Volume 1: Development, Organisation, Instruments], 4th edition, Kluwer, Deventer, 1996, p. 80-93.

particular, courts have decided that the non-use of this discretionary power may be unreasonable[17], or may be a violation of the equality principle (other decisions use the term arbitrariness in this respect). I will first deal with some general issues, and with general case positions, and deal specifically with matter of family unity in a separate paragraph.

Right from the start, the courts have unanimously stated that, in order to prevent arbitrariness, the administration should develop policy guidelines which make explicit when it will use this discretionary power[18]. The Secretary of State has by now developed a very summary policy. The discretionary power will be used restrictively, and exclusively in cases of a humanitarian nature that do not fall in the range of Article 36 SIA. Also, it may be used for reasons of procedural economy, when there are grounds to dismiss the case as manifestly unfounded[19]. However, when the courts honour the position of an applicant that the discretionary power of Article 29 paragraph 4 SIA should have been used, it is generally the irrationality test, and not the prohibition against arbitrariness that is applied.
In some cases, applicants have argued that the length of their stay in the Netherlands had raised an enforceable expectation that the Netherlands would attract responsibility for their claim. This line of argument, when not complemented by other factors, was rejected[20]. But combined with other factors, the length of the stay in the Netherlands may be decisive. Take the case of a Bosnian woman, who in 1992 had had a permission to travel to the Netherlands but did not use it, and came to the Netherlands at the end of March 1995. Only on 31 July had she reason to suspect that maybe her application would not be processed by the Netherlands, but by Germany. The woman, a Bosnian rape victim, was treated by a psychiatrist in the Netherlands. In the Netherlands, she had a brother in law and sister in law. A guardian of the camp in which she had been detained and raped was residing in Germany. The President decided that the legitimate expectations raised, and the personal circumstances of the woman, made it unreasonable not to use the discretionary power[21].
Another situation is the one where the Netherlands has a specific humanitarian policy that does not exist in other countries. One may think of the admission policy of single minor applicants (who get a residence right if in their country of origin no person or institution can be found that will take care of them[22]). Or, as was relevant in one case, the special policy on victims of trafficking in women[23]. An Albanian woman, whose application had been re-

17. Compare the British Wednesbury principles.
18. See i.a. Pres. Rb. Den Haag 2 August 1995, NAV 1995, p. 713-715; Pres. Rb. Den Haag 17 November 1995, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law], hereafter RV 1995, 16; Pres. Rb. Den Haag, z.p. Zwolle 6 December 1995, RV 1995, 17; Pres. Rb. Den Haag, z.p. Zwolle 7 December 1995, NAV 1996, p. 67-69.
19. *Vreemdelingencirculaire* [Aliens Circular] 1994, B7/8.1.1.
20. Pres. Rb. Den Haag 17 April 1996, 96/2760 n.p. (applicant was in the Netherlands for 9 months); Pres. Rb. Den Haag 31 May 1996, JuB 1996-11, 6 (contrary to Schengen Executive Committee Decision of 27 June 1994, note 15 above, point 12, the applicant had not been transferred to the responsible country within one month after acceptance of the claim).
21. Pres. Rb. Den Haag, z.p. Zwolle 7 December 1995, NAV 1996, p. 67-69.
22. *Vreemdelingencirculaire* [Aliens Circular] 1994, B7, 13; Spijkerboer/Vermeulen, p. 319.
23. *Vreemdelingencirculaire* [Aliens Circular] 1994, B17; A. Kuijer and J.D.M. Steenbergen, *Nederlands vreemdelingenrecht* [Dutch Immigration Law], third edition, Nederlands Centrum Buitenlanders, Utrecht 1996, p. 147.

jected in Belgium, had been forced into prostitution by fellow countrymen in Belgium. She was in psychiatric treatment in the Netherlands, and had a close male friend here (it remains unclear whether or not the relationship was sexual). Return to Belgium might mean return to forced prostitution, which would have a negative influence on the psychiatric treatment. Also, the psychiatrist found her mental health profited from the presence of the Dutch friend. Here the irrationality test led to success for the applicant[24]. In this case, it was not the specific Dutch admission policy for victims of trafficking in women that made the woman win, but more her psychological circumstances.
Likewise, a Bosnian diabetes patient won her case. In Bosnia, she had not been able to get sufficient insulin for about two years. This had led to serious medical problems, *inter alia* concerning her kidneys and eyes. In the Netherlands, she was undergoing intensive medical treatment. Although this treatment could have happened just as well in Germany (the responsible country), the house doctor had stated that in her unstable psychic condition transfer to Germany might harm her mental health, including a serious risk of suicide. This should lead the Dutch authorities to refrain from transfer, decided the President[25].
But not all things psychological have this effect. In the case of an Armenian couple, the responsible State (Portugal) had not accepted the Dutch claim within 3 months[26], but after almost 4. But this had not raised legitimate expectations, as the applicants had been informed on the very day they applied in the Netherlands that the Netherlands would seek to refer them to Portugal. The couple also was undergoing psychological treatment. However, the President decided that the problems did not relate to possible transfer to Portugal, but had their origin in their experiences in Armenia. They could seek help in Portugal for this as well[27].

German case law, like Dutch case law, holds that Article 29 paragraph 4 SIA does not grant applicants a subjective right. The norm given there is addressed to the state parties[28]. I have not found cases in which non-use of the discretionary power was scrutinised on the basis of general principles of administrative law.
In Spain, international law has direct effect. Consequently, a Spanish author has suggested that asylum applicants may appeal to Article 29 paragraph 4 SIA[29].

24. Pres. Rb. Den Haag 7 October 1996, JuB 1996-18, 13.
25. Pres. Rb. Den Haag, z.p. Zwolle 5 December 1995, *Gids Vreemdelingenrecht* [Guide Immigration Law], hereafter GV 18b-13. Technically speaking, the President rejected applicability of Article 29 paragraph 4 SIA. However, in the line that has developed in case law now, this case would have been solved in that way, which is why the decision is dealt with here.
26. As is obligatory according to Schengen Executive Committee Decision of 27 June 1994, note 15 above, point 12. After expiration of this term, the 'slow' country (i.e. Portugal) becomes responsible.
27. Pres. Rb. Den Haag 1 March 1996, GV 18b-14.
28. VG Gießen 25 January 1996, *Neue Zeitschrift für Verwaltungsrecht-Beilage* [New Journal for Administrative Law-Annex], hereafter NVwZ-Beilage 4/1996, p. 27-28, VG Schwerin 3 May 1996, 11 B 217/96 As, n.p.
29. C. Gortázar, *El derecho de asilo en España*, in: *La Inmigración, Derecho español e internacional* [Asylum law in Spain, in: Immigration, Spanish and international law], Bosch Casa Editorial S.A., Barcelona, 1995, p. 611, quoted in Sluijsmans 1996, note 11 above, p. 66.

3 FAMILY UNITY

Much case law concerns problems of family unity. Roughly, we can distinguish two situations. The first is that an applicant has relatives who already live in the Netherlands, while the applicant is to be transferred to another State. In this situation, the applicant *seeks reunion* with someone living in the Netherlands. The second is that relatives travel together, or travel separately hut more or less at the same movement, while different Schengen-states are responsible for their applications. Here, applicants *seek to avoid being split* by the Schengen mechanism.

At two places the Schengen Agreement expresses the principle of family unity. Article 35 SIA stipulates that, as the primary rule for establishing responsibility, the State which has admitted someone as a refugee is responsible for family members as well (comp. Article 4 Dublin Convention). But this implies two limitations that have turned out to be problematic in practice. First, if a family member has been given a residence right, hut not refugee status (e.g. a humanitarian status), Article 35 does not apply. Also, the term 'family' is defined as spouses and unmarried children under 18. What about extended families, children who are 18, unmarried partners, etcetera?
Article 36 SIA stipulates that the responsible State may ask another State to take over an application, 'on humanitarian grounds based on family or cultural reasons' (comp. Article 9 Dublin Convention). This might be a solution for cases that fall outside the scope of Article 35, but this possible solution is entirely a business between states. According to the Dutch State Secretary of Justice on 21 November 1996, discussions on this topic between the Schengen states have been without any result until now[30].

3.1 Applicants seeking reunion

The first type of cases, as said, concerns people seeking reunification with relatives. The situation is that a relative is living in the Netherlands, the applicant has applied for asylum there, but another country is responsible. Case law is developing on this point and has not yet crystallised. I think there is a tendency not to find the Netherlands responsible if the relative is the 'wrong' kind of relative in the sense of Article 35 SIA, i.e. if the relative is not a member of the nuclear family. Thus, the fact that the applicant has a brother or sister living in the Netherlands and applied there for that reason is insufficient to find it unreasonable that the administration has not attracted the responsibility for the application[31]. The fact that the applicant states that he has been reunified with his brother 'after many efforts to that effect' does not change that[32]. An appeal to unspecified 'family ties' is, of course, even less successful[33].

30. TK 1996-1997, Aanhangsel Handelingen p. 679-680; Sorel, above note 2.
31. Pres. Rb. Den Haag, z.p. Zwolle 25-10-95, JuB 95-17, 15; Pres. Rb. Den Haag, z.p. Zwolle 21-12-95, GV 18b-11, where the sister had been admitted as a refugee in the Netherlands; Pres. Rb. Den Haag 4-1-96, GV 18b-12.
32. Pres. Rb. Den Haag, z.p. Zwolle 5-12-95, 95/5242. In addition, France had accepted a claim concerning the brother, which made the argument that the Netherlands should attract responsibility even harder.
33. Pres. Rb. Den Haag 21-2-96, 96/883.

But the 'wrong' kind of relatives *plus* something else has more chances of success. The earliest example of this concerns a Bosnian couple, of whom one son had been killed in the war, another had fled to Hungary, and another had been admitted as a refugee in the Netherlands. The son in the Netherlands had very bad sight, was epileptic, in need of practical help and had psychological problems. The heart of the President melted for this compelling combination of facts: because admission of the parents on humanitarian grounds was not inconceivable, the Netherlands should attract responsibility[34]. Less compelling situations have less success: a son in the Dutch asylum procedure with mere psychological problems will not decisively strengthen the case of his parents[35]. But again a compelling case leading to success for the applicant, is that of a couple with two children in the Netherlands (with unclear residence position), of whom the woman undergoes psychological treatment. The psychologist states that it is good for her mental health if during the treatment she has the support of the children residing in the Netherlands[36].

Alternatively, the 'right' kind of relative with the 'wrong' kind of residence right (i.e. something else than admission as a refugee) generally does lead to an obligation of the Netherlands to assume responsibility, provided that one of the spouses is a Dutch responsibility already. Thus, a Somali applicant who, after France has accepted a claim about his case, discovers that his wife is already in the Netherlands where her case is still pending won his case. The President argued that Articles 35 and 36 SIA express an underlying principle that the applications of husbands and wives should be dealt with jointly, and that consequently France and the Netherlands had to discuss which country would process both applications[37]. Comparable is the case of a Sudanese woman and her 2-year old child, who left Sudan when security services began to trouble her as the result of the prior flight of her husband. She went to Europe, hoping to find her husband. When she had asked for asylum in Germany, she found out that her husband had an application pending in the Netherlands. This, with as an additional factor that her psychological situation 'leaves much to be desired' according to a social worker, made non-use of the discretionary power to attract responsibility for the woman's application unreasonable[38]. A seemingly comparable case was decided differently: a Georgian man with a German visa had applied for asylum in the Netherlands. Because he had been interviewed extensively about his flight motives, he thought his application was being processed by the Netherlands. His wife, children (of 4 and 6 years old), and his sister and her child came to the Netherlands as well, but with French visa. Thus, on the basis of Article 30 paragraph 1 under a SIA, Germany was responsible for the man and France for the others. The President decided that it would be contrary to the purpose of the Schengen Agreement if the Netherlands as a *third* country would be obliged to attract responsibility

34. Pres. Rb. Den Haag, z.p. Zwolle 4 October 1995, RV 1995, 14. Technically speaking, the President rejected applicability of Article 29 paragraph 4 SIA. However, in the line that has developed in case law now, this case would have been solved in that way, which is why the decision is dealt with here.
35. Pres. Rb. Den Haag, z.p. Zwolle 23-11-95, 95/4103.
36. Pres. Rb. Den Haag, z.p. Zwolle 5-7-96, 95/7895, mentioned in NAV 96, p. 672-673.
37. Pres. Rb. Den Haag 9-4-96, 96/2281, mentioned in NAV 96, 429; the same reasoning is used in Pres. Den Haag 5-6-96, 96/4443, mentioned NAV 96, 856 and Pres. Den Hag 6-9-96, JuB 1996-17, 10.
38. Pres. Rb. Den Haag, z.p. Zwolle 20 September 1996, JuB 1996-20, 8.

for the sole reason that the family had reunited in the Netherlands. Family unity was, according to the President, a matter for discussion between Germany and France on the basis of Articles 35 and 36 SIA[39].
Seen in this perspective (and let me once more stress that this is no more than an attempt to see a pattern in this diverse case law), some relationships are considered as equal to the 'right' kind of relationships, although formally they are outside the scope of Article 35 SIA[40]. Thus, a Sri Lankan woman cohabiting with a man who resides in the Netherlands on the basis of a residence permit on humanitarian grounds (so: formally the 'wrong' person with the 'wrong' residence right) can have her application processed in the Netherlands[41]. A Bosnian man, whose sister has been admitted in the Netherlands as a refugee, who lived together with this sister in Bosnia and came to the Netherlands to resume cohabitation, while additionally an aunt has been admitted as a refugee and a brother in law has a residence permit on humanitarian grounds, wins his case. The President here stresses the importance of Article 8 ECHR[42].

German case law has not (yet) tested application of the Schengen-system on the basis of general principles of administrative law. The case of a Pakistani family (man, woman, and two adult children) for which France was responsible, resembles some of the cases mentioned above but was decided differently. One adult son already was living in Germany as a 'legally recognised asylum seeker' (*rechtskraftig anerkannter Asylbewerber*) - which I take to mean that he had been admitted as a refugee. A psychiatrist had declared that the woman had psychiatric problems and that it was advisable that she would remain in the surroundings of her relatives, for example her son living in Germany. The court decided that Articles 29 paragraph 4 and 36 SIA do not give substantive rights to asylum seekers, are addressed to state parties only, and that the Schengen Implementation Agreement does not grant asylum applicants an individual right to have their application examined in a particular country. Because the Schengen Implementation Agreement does not grant any individual right, it was not necessary to decide whether Germany should have informed France that one son was living in Germany before France accepted the claim[43].
The fact that the applications of the husband and father of an Iranian applicant were being processed by the Netherlands was no reason to apply Article 35 SIA, because the husband had not been admitted as a refugee in the Netherlands. The German court went further though, and stated that even when the requirements of Article 35 SIA would have been fulfilled, it would be up to the discretion of the administration whether to examine the application, or to transfer the applicant to the Netherlands[44]. To me this *obiter dictum* seems du-

39. Pres. Rb. Den Haag, z.p. Zwolle 1 March 1996, 95/6883, n.p.
40. It seems reasonable to presume that the judiciary here is applying concepts from general Dutch family reunification policy, being (as far as relevant here) that marriage and the sex of partners is inessential (although relevant in some contexts); and that dependent members of an extended family may qualify for reunification under certain circumstances; see generally Kuijer and Steenbergen, note 23 above, p. 131-142.
41. Pres. Rb. Den Haag, z.p. Zwolle 6-12-95, RV 1995, 17.
42. Pres. Rb. Den Haag Den Haag 8-12-95, JuB 95-20, 17, NAV 96, 73-75.
43. VG Gießen 25 January 1996, NVwZ-Beilage 4/1996, p. 27-28.
44. VG Frankfurt a.M. 23 May 1996, *Informationsbrief Ausländerrecht* [Information Letter Immigration Law], hereafter InfAslR 9/96, p. 331-332.

bious. In the light of Article 8 ECHR it seems to me that Article 35 SIA has to be interpreted as the implementation of the right to family life in the Schengen Implementation Agreement, and consequently does give applicants an individual and enforceable right[45].

3.2 Applicants seeking to avoid being separated

A rather acute problem is raised by cases where families have fled almost simultaneously, but separate, which may lead to the situation that the Netherlands (or any other State) expels one spouse to country A, and the other to country B. This has an almost Kafkaesque or Konrádian feel to it: proper application of obscure bureaucratic rules may lead to results that are harsh and lack substantive rationale.
Case law started harshly. The first decision on this kind of case concerned a Georgian woman who was to be transferred to France, while her husband was still in the Netherlands but to be transferred to Germany. How this situation came about (apart from the fact that one had German, the other a French visa) is not clear from the decision. In line with the decision of 1 March 1996 (see above note 39), the President decided that it would be contrary to the purpose of the Schengen Agreement if the Netherlands as a *third* country would be obliged to attract responsibility for the sole reason that the family had reunited in the Netherlands. Family unity was, according to the President, a matter for discussion between Germany and France on the basis of Article 36 SIA[46].
The disorderly way in which people tend to flee war zones led to the following, rather improbable case. A Bosnian family applied for asylum in Germany. After their applications had been rejected, the man returned to Bosnia with three children. The woman, together with the other children, applied for asylum in Belgium. After rejection, she returned to Bosnia as well. In the fall of 1995, the man and three children again applied for asylum in Germany, then (whether with or without decision is not clear) returned to Bosnia, and came to the Netherlands with the entire family and applied for asylum. Germany accepted the claim for the man and three children, but rejected the others. During the court hearing, the Dutch administration declared that it was willing to ask Germany to take the others as well on the basis of Article 36 SIA, but the woman withheld the consent which is required for such a request. The President argued that in this situation, the separation was the responsibility of the woman - which to me seems the obvious thing to say. What is more troubling is that the President goes on to say that there is no issue under Article 8 ECHR, because if one of the spouses is admitted as a refugee in Germany or the Netherlands, Article 35 SIA will apply. First, it is not obvious that Article 35 is applicable if the admission as a refugee of, say, the man occurs *after* his wife has applied for asylum - although it can be argued that this must be so. But more problematic is that the President here overlooks the possibility that one of the spouses may be admitted on other grounds, in which instance Article 35 SIA does

45. Claessens, see note 3 above, also thinks that Article 35 has been written in order to protect the interests of the asylum seeker which in terms of Dutch law means that this Article contains an individual right which an applicant can invoke.
46. Pres. Rb. Den Haag 1 May 1996, 96/3070.

not solve the problem. So, although the decision in this particular case seems justified, the President seems not to have been aware of the broad bearing of the reasoning given here[47]. In later decisions, the courts seem to withdraw a bit from the initial line. In a case which was, for our purposes, identical to the one decided on 1 May 1996 (see note 46 above), the President said that, although the reasoning of that earlier decision was still considered the right one, it turned out that the administration had not yet evicted the couple concerned to Germany and France respectively, and that in other cases as well the administration had refrained from what is called 'separated transfer'. Therefore, the de facto policy of the State Secretary of Justice was unclear. Apparently because this might lead to arbitrariness, expulsion was forbidden[48].
In the case of a Roma family from Slovakia, the husband had applied for asylum twelve days after the woman and their four children. They had intended to flee together and ask for asylum together, and had not done so solely for 'material' (I presume financial) reasons. The Netherlands was responsible for the woman and the children, France for the man. The President here gives three reasons for prohibiting transfer of the man to France. The flight reasons of the woman are based on those of the man, so her application is dependent on that of the man. Separated procedures would be very detrimental for them, and would be unfavourable from the point of view of procedural economy. Also, separation for a prolonged period of the man and his young children would have negative effects[49].

4 CORRECT APPLICATION OF THE RELEVANT PROVISIONS

If an applicant thinks that the Schengen-system has been applied incorrectly, can this position be scrutinised by a court?

One German decision has to be dealt with first, as it goes to the root of the Schengen-system. The Administrative Court in Frankfurt decided that, when an application is submitted at the border (i.e. at Frankfurt airport) the Schengen Implementation Agreement does not apply because the applicant has not yet entered the territory of a state party to this agreement[50]. This is obviously mistaken, as Article 1 SIA defines the term 'application for asylum' as 'any application submitted in writing, orally or otherwise by an alien *at the external border* or within the territory of a Contacting Party'. Thus, the Agreement explicitly stipulates that an application submitted at, in this case, an airport before border control is subject to the Schengen system. The Dublin Convention also foresees and solves this issue, be it not by the definition of the term 'application for asylum' but in Article 3 paragraph 1, which states that states 'undertake to examine the application of any alien who applies *at the border* or in their territory'.

A rather curious stream of case law followed a case in which, I think, both the refugee lawyer and the President were looking for a way out of a situation in which an applicant had

47. Pres. Rb. Den Haag, z.p. Zwolle 14-6-96, JuB 96-20, 7.
48. Pres. Rb. Den Haag 6-9-96, JuB 1996-17,9.
49. Pres. Rb. Den Haag 11-9-96, JuB 96-16,14.
50. VG Frankfurt a.M. 23 May 1996, InfAuslR 9/96, p. 331-332.

been confused by the administration. The facts of this first case were the following. A Moldavian woman applied for asylum. She was informed immediately that France was responsible for her case, and that she would be transferred to France. She was then given an interview on her flight motives. Because she thought this interview was irrelevant for her, she hardly told anything of interest. The Dutch administration then decided that it would be easier to dismiss her application as manifestly unfounded than to transfer her to France. Substantively, the woman argued that the purpose of the interview had been unclear to her and that this had led to her poor flight story. Formally, she argued as follows. Article 1 SIA defines 'processing an application for asylum' as all procedures for examining and taking a decision *except* determining the responsible country (comp. Article 1 sub d Dublin Convention). The Dutch administration clearly had done more than just determine the responsible country. Therefore, the woman argued, it must be so that the Netherlands used the discretionary power of Article 29 paragraph 4 SIA. Now Article 30 paragraph 2 SIA stipulates that, if a country (i.e. the Netherlands) uses this discretionary power, the initially responsible country (i.e. France) is relieved of its obligations (comp. Article 3 paragraph 4 Dublin Convention). In conclusion, the refugee lawyer argued, the Netherlands was the responsible country and had not given the applicant a fair procedure. The President decided that the Schengen system implies that first the responsible country has to be determined, and only after that it has to be decided whether the claim will be realised or the discretionary power will be used. It has to be clear for the applicant which option is being pursued. As this had not been the case here, expulsion was prohibited[51].

Lawyers then argued as follows. If the administration asks an applicant more questions than is strictly necessary for determining the responsible country, then it is in fact examining the application in the sense of Article 1 SIA, and therefore is in fact using the discretionary power of Article 29 paragraph 4 SIA, with the result of Article 30 paragraph 2 SIA being as follows: the Netherlands is responsible. This reasoning, well defensible on the basis of the text of the Schengen Implementation Agreement, would lead to very impractical results for the administration. In every case, first the Schengen path would have to be followed, which can take weeks. Only after that could asylum seekers be interviewed about their flight motives. I presume that this is why that line of argument was rejected. In many decisions, the following line was taken. Indeed, if the Netherlands begins to process the application, then it becomes responsible for doing so. But the first stage of the asylum procedure (i.e. determining the responsible country) requires that the administration has information about the flight motives. This is necessary because part of the initial ('Schengen') phase of the procedure is a decision on whether or not to use the discretionary power of Article 29 paragraph 4 SIA. So, interviewing applicant about the flight motives does not lead to the conclusion that the Netherlands has started to process an examination. But, the decisions stress, it has to be clear to the asylum seeker what the purpose of an interview is[52]. The Dutch Immigration and Nationality Service has published an instruction which gives a clear procedure to

51. Pres. Rb. Den Haag 2 August 1995, NAV 1995, p. 713-715.
52. Pres. Rb. Den Haag 17 November 1995, RV 1995, 16; idem, JuB 1995-19, 16, GV 18b-7; idem, JuB 1995-19, 16, GV 18b-8; idem, JuB 1995-18, 16, GV 18b-9; Pres. Rb. Den Haag, z.p. Zwolle 30 November 1995, 95/6288, n.p.; Pres. Rb. Den Haag 4 December 1995, JuB 1996-1, 19; Pres. Rb. Den Haag, z.p.

prevent confusion of applicants[53]. Immediately after an application has been submitted, a short interview takes place on the identity, travel route and why the applicant has come to the Netherlands instead of to another country. When the administration finds another country is responsible for processing the claim, it communicates this to that country and to the applicant. The applicant is told at the same moment that also a full interview about the flight motives will take place, and that it has not yet been decided whether the application will be declared inadmissible because another Schengen country is responsible, or whether the Netherlands will use its discretionary power to attract responsibility. The interview will have two purposes. First, to enquire whether there are facts that should lead to use of the discretionary power; and second, to see if the flight motives are such that the application can be declared either inadmissible on other grounds, or manifestly unfounded. If during the interview it turns out that the fligbt motives are such that the claim is not manifestly unfounded, then the interviewer will contact a colleague who is empowered to take decisions on applications, to see whether the interview should be stopped in order not to endanger the Schengen claim. This procedure guarantees that the applicant is informed, and prevents an extensive interview on serious flight motives, which might imply responsibility on the ground of the argumentation sketched above.

In one case, the line of argument developed by the refugee lawyers was successful. A Georgian couple had said during their first interview that they had French visa, which made it clear that their case might be declared inadmissible on the basis of the Schengen-system. However, the administration expressed its intent to declare their application manifestly unfounded within 24 hours after its submission. Their lawyer gave an opinion opposing this, upon which they were extensively interviewed about their flight reasons. During this interview, the administration had not indicated in any way that they could be transferred to France. According to the President, this interview was not necessary in order to facilitate transfer to France. Yet, the application was declared inadmissible because France was responsible. Side-stepping the issue of whether or not the Netherlands had started to process the applications, the President decided that, on the basis of the principle of due care of the administration vis-a-vis individuals, 'after all this' it was unreasonable not to use the discretionary power of Article 29 paragraph 4 SIA[54]. So, in this case the problem was solved not by the way of improper application of the Schengen Implementation Agreement, but by unreasonable non-use of discretionary power (see above par. 2).

In a case in which an applicant had not said during the initial interview that he already applied for asylum in Belgium, the fact that a full interview on his flight motives had been conducted (during which the applicant did tell about Belgium) did not justify the conclusion

Zwolle 7 December 1995, NAV 1996, p. 67-69; Pres. Rb. Den Haag, z.p. Zwolle 21 December 1995, JuB 1996-7, 6; Pres. Rb. Den Haag 17 January 1996, JuB 1996-3, 15; Pres. Rb. Den Haag, z.p. Haarlem 2 February 1996, JuB 1996-4, 12; Pres. Rb. Den Haag, z.p. Zwolle 2 February 1996, 95/6439, n.p.; Pres. Rb. Den Haag 17 April 1996, 96/2760, n.p. This same principle is applied in the slightly different context of an administrative review procedure in Rb. Den Haag (Legal Unity Chamber) 19 December 1996, RV 1996, 13.

53. Werkinstructie of 27 September 1995, NAV 1995, p. 942-943, incorporated in *Vreemdelingencirculaire* [Aliens Circular] 1994, B7, 8.1.1.

54. Pres. Rb. Den Haag 17 November 1995, GV 18b-7.

that the Netherlands had used its discretionary power; Belgium had not, on the basis of Article 30 paragraph 2 SIA, been relieved of its responsibility[55].

In some other situations applicants have argued that the Schengen Implementation Agreement had been applied incorrectly. I will not deal with problems surrounding the introduction on the Schengen-system, where problems arise such as: could it be applied before it became effective[56]? Is a visa granted before it became effective, a basis for holding a country responsible for an application submitted after it became effective[57]? Can an asylum procedure in France that occurred before Schengen became effective, be a basis for deciding that France is responsible[58]?

The other issues are about claim procedures that have taken more time than is prescribed by the Schengen Implementation Agreement or the Executive Committee Decision of 27 June 1994[59]. Article 31 paragraph 3 SIA stipulates that a claim of a non-responsible country must be made with the responsible country within six months after the application was submitted. If this period of time has expired, the country where the application was submitted (i.e. the country that is 'late') shall be responsible. Point 12 of the Decision states that a State has to react to a request to take over an applicant within three months; if this term expires without a reaction, the State that was asked to take over the applicant (i.e. again the State that was 'late') is presumed to have consented with the transfer. A transfer has to take place one month after acceptance, or one month after a procedure with suspensive effect has been terminated, says point 12 of the Decision. Expiration of this period of time without actual transfer has no effect.
Applicants have invoked the argument that, because the term of Article 31 paragraph 3 SIA had expired, the 'sanction' (the Netherlands is responsible) had taken effect, or that because of undue delay it would be improper to effectuate a transfer; this argument was rejected. Case law holds that these terms are purely procedural rules between the states party to the Agreement, and do not contain guarantees for applicants. Therefore they have no direct effect and cannot be invoked by applicants[60]. Alternatively, simple passage of time does not give rise to the legitimate expectation that the Netherlands will not effectuate a claim which the applicant knows is pending[61]. Of course, if there are other factors this may be different. This is an issue under Article 29 paragraph 4 SIA (see par. 2 above).

Likewise, the Administrative Court in Frankfurt am Main investigated whether the Schengen Implementation Agreement was applied correctly without addressing the question whether it had the competence to do so, in a case in which it was of the opinion that the appli-

55. Pres. Rb. Den Haag, z.p. Den Bosch 30 January 1996, JuB 1996-4, 13.
56. No of course, Pres. Rb. Den Haag 24 March 1995 (sic!), JuB 1995-7, 9.
57. Yes, Pres. Rb. Den Haag, z.p. Zwolle 31 October 1995, JuB 95-18, 15.
58. Yes, Pres. Rb. Den Haag 20 February 1996, JuB 1996-8, 7. The applicant had argued that Article 28 of the Vienna Convention on the Law of Treaties prohibits retroactive effect of treaties.
59. See note 15 above.
60. Pres. Rb. Den Haag 21 February 1996, 96/883, n.p.; Pres. Rb. Den Haag 31 May 1996, JuB 1996-11, 6.
61. Pres. Rb. Den Haag 31 May 1996, JuB 1996-11, 6.

cation had been correct. The application of a Sudanese national had been rejected at Frankfurt airport. The applicant wanted to be admitted in order to submit an application in the Netherlands. The court argued that he had no documents enabling him to cross the border. The Netherlands was not responsible for his application on the basis of Article 30 paragraph 1 or 2 SIA, with the result that Germany was responsible on the basis of Article 30 paragraph 3 SIA. Consequently, it was correct that the German authorities had processed his claim[62]. The same line (investigating proper application without addressing the question as to the competence to do so) was taken in other decisions[63].
The fact that, in one case, Portugal had not reacted to a German claim within the prescribed three months (Executive Committee Decision of 27 June 1994[64], point 12) was unsuccessful because formal consent of the responsible state is not necessary[65]. Although this position endangers the principle that it has to be clear which state is responsible, it can be defended on the basis of the Executive Committee Decision, which stipulates that if, in this case, Portugal does not react within three months, it becomes the responsible country.

It remains to be seen what will happen if an applicant is to be transferred to a country which has accepted responsibility, while this acceptance was incorrect. For example: Germany accepts the responsibility for an applicant because someone else with the same name is its responsihility, and the applicant really wants the application processed in another country which is, if the rules are applied correctly, responsible. It seems hard to construct direct effect of the relevant rules (in jurisdictions where this is possible at all). More appropriately, Article 29 paragraph 4 SIA can be used if otherwise the result would be problematic. In some case, courts seemed inclined to go into such questions, and say that it was plausible that the acceptance of a claim by another country had good grounds[66].
In an *obiter dictum*, a German court stated that, if a family member of an applicant has been admitted to a Schengen-country as a refugee, there is no right of the applicant to be transferred to that country. In such a case, the administration has a discretionary power either to examine the application or to transfer the applicant[67]. As said above (par. 3.1), in the case of Article 35, I find this position untenable in the light of the principle of family unity. However, the situation may be different when responsibility is based not on Article 35 but on Article 30 SIA.

5 IS THE TRANSFER OF RESPONSIBILITY UNCONDITIONAL?

If a non-responsible State transfers the applicant to the responsible State, are there certain conditions the responsible State should fulfil? This question is at the heart of the discussion

62. VG Frankfurt a. M. 6 February 1996, NVwZ-Beilage 4/1996, p. 28-29.
63. VG Berlin 19 July 1995, NVwZ-Beilage 11/1995, p. 85-86; VG Ansberg 7 September 1995, NVwZ-Beilage 1/1996, p. 3-4; VG Schwerin 3 May 1996, 11 B 217/96 As, n.p.
64. See note 15 above.
65. VG Schwerin 3 May 1996, 11 B 217/96 As, n.p.
66. Pres. Rb. Den Haag, z.p. Zwolle 15 September 1995, JuB 1995-15, 19; Pres. Rb. Den Haag, z.p. Zwolle 7 December 1995, NAV 1996, p. 67-69.
67. VG Frankfurt a.M. 25 May 1996, InfAuslR 9/96, p. 331-332.

surrounding the Schengen-system. If, for example, the responsible State does process the application, but does not offer shelter or food to applicants - in other words: if asylum applicants have to live on the streets, is that sufficient? A number of asylum seekers left Germany as a result of the wave of nazi-attacks on asylum seekers. This was understandable, but can Schengen force them back? And what if the German police had looked the other way while reception centres were being burnt down?
These seem relatively easy questions compared to the next set of problems: should an applicant have access to a procedure in the responsible country? If that is the conclusion, then there would be a problem if Italy were to repeat the 'procedure' it applied to boats full of Albanians (catch them and ship them back). Should the responsible country determine whether the applicant is a refugee? If so, then countries could not apply safe third country legislation to applicants for which it is responsible under the Schengen-system. Should the procedure itself comply to certain standards? In one case, to which I will return below, an English court found one particular French asylum procedure improper. And: if we presume that someone is a refugee, should the responsible country then admit the applicant as such? Or is mere non-refoulement, e.g. toleration sufficient - although this may mean no family reunification, no work, no education, in short: nothing of the rights of the Refugee Convention is full.
And (third set of problems) how should we deal with the problem that in some countries doctrinal principles are applied which *a priori* exclude whole categories of people from refugee status (think of the German 'objective' doctrine, or the requirement that there be a central authority), while in other countries they may very well be refugees? Or that some countries do not return certain categories of applicants, while others do?

5.1 Living standard

In the Dutch doctrine of the country of first asylum, jurisprudence held that apart from protection from refoulement it was required that the applicant could live in the country of first asylum under circumstances that, by local standards, were normal. So, only when rights laid down in the Refugee Convention were violated flagrantly would this be a problem. This standard will vary from country to country. Reception facilities that may be acceptable in Ethiopia may be unacceptable in the Netherlands[68].
I have seen only one case in which this issue was at stake. It concerns a Bosnian woman who went to Portugal to ask for asylum in 1992. This turned out to be impossible, but she was granted a residence permit. She was given shelter and food, but no Medicare, pocket money, counsel or legal aid. At the end of 1993, all aid was ended. She could stay in her apartment, but had to start to pay the rent. Consequently she had to work, but she could not get a work permit so she had to work illegally. She went to the Netherlands and applied for asylum. The issue was framed as one about grounds for a residence permit on humanitarian grounds, and for this her situation in Portugal was not serious enough because her stay in Portugal was normal by local standards. I doubt this. Is it normal for people in Portugal to be both denied financial support *and* permission to work?

68. See more extensively Spijkerboer/Vermeulen p. 241-243.

But the issue is more properly formulated as one about the obligations of Portugal under the Schengen-system, apart from processing the application. I would like to argue that other standards, although minimal ones, apply as well[69]. There are primary and absolute norms that the responsible State should not violate, such as the right to life and integrity of the person (Articles 2-4 ECHR). In the footsteps of 113 of the Soering-decision[70] I would argue that flagrant violations by the responsible State of other human rights disqualify it as a country that executes its obligations under the Schengen Implementation Agreement in good faith. If removal of a person would be contrary to human rights standards (and it is so if in the other country there could be a violation of the right to life and integrity of the person, and if there could be flagrant violations of other rights), then that country does not fulfil the standard of 'minimum basic human standards' (ExCom Conclusion 22 (XXXII)) or 'basic human standards' (ExCom Conclusion 58 (XL)). Likewise, flagrant violation of the rights that the Refugee Convention grants to refugees would also disqualify a country.

In one decision, concerning not racist attacks but attacks by fellow-countrymen because of the political views of a Georgian asylum seeker in Germany, the reasoning was as follows. The German authorities had done what they could reasonably have done. They transferred the applicant to another reception centre. They tried to act against the perpetrators, and the fact that they were not successful in this is insufficient for the conclusion that the applicant did not have the protection that the German authorities owed him[71]. A comparable position was taken in the British *Mehari* decision: 'there were instances of asylum-seekers in Germany heing ill treated, sometimes seriously so. But no case was made to the effect that the German authorities might not or would not fulfil their Convention obligations.'[72] I would argue that this only should have been different if - to use a well-known phrase - the German authorities would have been unwilling or unable to offer protection.

The fact that only a toleration status will be granted is not seen as a treatment that is a below the acceptable level, and therefore does not stand in the way of transfer[73].

5.2 Access to procedure, status determination

It is clear from the text of the Schengen Implementation Agreement that the responsible country is obliged to process the application (Articles 29 paragraph 1, 32 SIA, comp. Articles 3 paragraphs 1-3, 10 paragraph 1 sub b Dublin Convention). Also, it is clear that the responsible state must be identified, and that in principle the responsible State has to admit the applicant to its territory during the procedure (Articles 33 paragraph 1, 34 paragraph 1 SIA; comp. Article 10 paragraph 1 Dublin Convention).

69. See more extensively Spijkerboer/Vermeulen p. 286-287.
70. European Court of Human Rights 7 July 1989, Series A, 161.
71. Pres. Rb. Den Haag, z.p. Zwolle 1 December 1995, 95/5981, n.p.
72. R. v. Secretary of State for the Home Department ex parte *Mehari et al*, [1994] Imm AR 151, at 170.
73. Pres. Rb. Den Haag, z.p. Zwolle 6 September 1995, JuB 1995-18, 14.

In Dutch case law, the guarantee of access to a procedure has been confirmed, as well as the guarantee in principle of re-admission to the territory of the responsible State[74]. As we saw, those guarantees were the reason why application of third country legislation to Schengen-states was found inadmissible.

A difficult question is whether the responsible State should determine refugee status, or whether it can apply a third country rule. Imagine a case in which an application is lodged in the Netherlands, Germany is the responsible State, and Germany applies its safe third country rule - has Germany in that case processed the application in such a way that it has fulfilled its treaty obligations? The text of the Schengen Implementation Agreement is crystal clear on this point. Application of safe third country legislation is a way of processing an asylum application (Article 29 paragraph 4 SIA, comp. Article 3 paragraph 5 Dublin Convention). Therefore, an obligation of the responsible State to determine refugee status cannot be based on the Schengen Implementation Agreement. It may be based on the prohibition of refoulement itself however. I will return to this doctrinal issue later, and will first give an overview of case law that may be relevant to this point.
This issue has been part of the lively debate in the Netherlands on Schengen. In no case has this been the central issue. However, in many decisions courts have stated that, 'as country X is the responsible country, it has been satisfactorily established that that country will decide the material issues of the application' or words to that effect[75]. Because this is such a contested issue, I would be surprised if these passages in decisions were 'innocent'. But of course, this is insufficient for a conclusion on what the judicial position will be on the question when it is the central issue in a case. Terms like 'material issues' that will be examined by the responsible country suggest that this country shall determine refugee status. But one might consider application of a substantive (as opposed to a purely formal) country of first asylum rule as a material examination as well. So, the terms used in case law until now are suggestive, but not unambiguous.
From British case law it is clear that a country to which an asylum seeker is removed on the basis of a safe third country rule (and the Schengen-system is a species of such a rule), is not obliged to determine refugee status but may in its turn remove the applicant to a fourth country. In *Mehari et al.* the general argument was made by the representatives of the applicants that it would be a breach of the UK's international obligations if an applicant is removed to a safe third country which, without determining refugee status, might then return the applicant to a fourth, or fifth, etc., country (not being the country of feared persecution). This was rejected, although it was added that '(n)o doubt in cases where there is something like a chain of states, through which the claimant has passed, between the country of feared persecution and the United Kingdom, the Secretary of State must give careful consideration to the extent to which each State, on the facts known to him, adheres to its Convention obligations; and there will be special factors for his assessment if one or more of

74. Pres. Rb. Den Haag 20 March 1995, JuB 1995-6, 13; Rb. Den Haag 15 October 1996, 96/2624.
75. E.g. Pres. Rb. Den Haag 3 July 1995, JuB 1995-11, 20; Pres. Rb. Den Haag 17 November 1995, RV 1995, 16; idem, GV 18b-7, JuB 1995-19, 16; idem, GV 18b-8, JuB 1995-19, 15; idem, GV 18b-9, JuB 1995-18, 16; Pres. Rb. Den Haag 17 April 1996, 96/2760, n.p.; Pres. Rb. Den Haag 11 September 1996, 96/8279.

the intervening countries is not a signatory to the Convention.'[76] This wording could imply that when the third country does not guarantee status determination, the burden of proof that the fourth etc., countries are safe rests with, in this case, the UK. When the UK has not designated the fourth etc. countries as safe third countries themselves, this may not be easy.

The issue was the central one in *Thavathevathasan*. There, the applicant had argued that for a third country (i.e. France) to be safe, the authorities must establish that it will give proper consideration to an application for asylum made there[77]. The Court of Appeal finds that the principal obligation in this respect is the prohibition of refoulement, and then, rather summarily, decides that '(b)y returning (the applicant) to France, the Home Secretary is not in breach of Article 33 (Refugee Convention)'[78].

The German Constitutional Court, in its decisions of 14 May 1996, addressed the issue whether safe third countries may refer applicants to fourth countries and so on. It decided that the legislator, before designating a country as a safe third country, must examine whether this third country in its turn has a safe third country rule. If so, this is no problem if the safe 'fourth' countries have a formal procedure in which Article 33 Refugee Convention and Article 3 ECHR are examined. If the 'fourth' country does not have such a formal procedure, the third country should not be designated as safe. However, whether the fourth country may apply a third country rule, and whether 'fifth' countries have a formal asylum procedure, is unclear at least. It should be noted that this examination, according to the Constitutional Court, has to be executed by the legislative and is not subject to judicial examination in individual cases[79]. As Marx and Lumpp observe, it seems arbitrary to draw the line there. Is it really no problem if Germany removes an applicant to a third country, which removes to a fourth country, which removes to a fifth country which returns the applicant to the country of origin without examining the claim?

States party to the Refugee Convention are obliged not to return a refugee to the country of origin an any manner whatsoever. When an alien invokes the protection of this provision, states have to treat the applicant as if s/he were a refugee, until further notice - e.g. until it has been decided that this person is not a refugee. States can fulfil their obligations under Article 33 Refugee Convention in two ways[80].

76. R. v. Secretary of State for the Home Department ex parte *Mehari et al*, [1994] Imm AR 151, at 165.
77. *Thavathevathasan* v Secretary of State for the Home Department, [1994] Imm AR 249, at 258.
78. Idem, at 260. The same conclusion was reached in *Martinas* v. Special Adjudicator and the Secretary of State for the Home Department, [1995] Imm AR, 190; and R. v. Special Adjudicator ex parte *Srikantharajah*, [1996] Imm AR 326.
79. Marx and Lumpp, note 12 above, at 428-430, and Reinhard Marx, *Urteile des BVerfG vom 14. Mai 1996 mit Erläuterungen* [Decisions of the Federal Constitutional Court of 14 May 1996 with commentary], Luchterhand, Neuwied, 1996, p. 62-63.
80. I follow the reasoning developed in Spijkerboer/Vermeulen, p. 273-300, and B.P. Vermeulen, Enkele vragen bij de asielparagraaf van de Schengen Uitvoeringsovereenkomst [Some questions about the asylum paragraph of the Schengen Implementation Agreement], in: Giuseppin and Jansen, above note 2, p. 99-111.

1. A state can determine refugee status. If the person turns out not a refugee, s/he can be returned to other countries, including the country of origin, as the state wishes.
2. A state is free not to determine refugee status, but this has a price. The price is that the state has denied itself the possibility of treating the applicant as if s/he were not a refugee. In other words: the state must treat the applicant in such a way that, if the person is a refugee, the state is not guilty of refoulement, either direct or indirect. Therefore, an applicant may be returned to a third state without status determination in only two situations.
   a. If in the third country the applicant will be allowed to reside under acceptable circumstances; that is: if the third country will protect against refoulement by allowing the applicant to remain, then it is clear that expulsion of the applicant to the third country will not lead to refoulement. Therefore, in those circumstances expulsion to the third country is unproblematic.
   b. If the third country does not guarantee that the applicant can reside there, expulsion still may be correct. We can distinguish two situations here.
      i. If the third country is not a party to the Refugee Convention, it is not beyond dispute that it is bound by the prohibition of refoulement. As, in this situation, the third state also has not given a guarantee that the applicant can stay there, such a country is then not safe. Expulsion entails a risk of indirect refoulement and would be contrary to the Refugee Convention.
      ii. If the third country is a party to the Refugee Convention, one may argue that this is sufficient. However, both the divergence of (substantive and procedural) asylum law and the application of various third country rules in potential third countries make a general trust in just any party to the Refugee Convention unwarranted. I would argue that trust in a third country is only justified, if that country will determine the applicant's status in a fair procedure. Application of a third country rule by the third country would in principle not be acceptable; possible transfer of the applicant to a fourth country would, in my opinion, only be acceptable if it is clear which country is going to be the fourth country, and whether the fourth country will determine refugee status in a fair procedure.

Summing up: an applicant can only be transferred to a third country without status determination if

- in that country residence will be allowed under acceptable circumstances; or
- it is *ensured* that status will be determined in a fair procedure in a country that is party to the Refugee Convention. Because this has to be ensured, this requirement in effect means that the third country must determine refugee status in order to be considered safe[81].

The Canadian government has rejected the idea of becoming a party to a parallel Dublin Convention, according to which non-EU states would participate in the 'one country only'

81. See for a parallel argument Guy S. Goodwin-Gill, *The Refugee in International Law*, Second Edition, Oxford 1996, p. 340-343.

system. It did so precisely because of the third country system. It stated that '(t)here must be a guarantee that claims to refugee status receive a substantive determination. (...) In the light of the legal parameters set out above and given the potentially grave consequences of denying an asylum seeker access to a substantive determination, Canada must take utmost care that responsibility-sharing results in a similar degree of access to that which its own refugee status determination system offers. (...) Article 3(5) [of the Dublin Convention] however opens the possibility that an asylum seeker returned to another Contracting State from Canada under the parallel accord might be transferred further to a State which might not so *demonstrably* offer similar legal standards and safeguards (...) It is expected that Canadian Courts would take a very critical view of such an open-ended devolution of national responsibility, irrespective of the adequacy of Article 3(5) in the European context. (...) Under the [EU Resolution on safe third countries], the identification of a possible host third country and the transfer of an asylum seeker thereto *precedes* the assignment of responsibility for examining the application. Furthermore, even after this determination takes place under the Dublin Convention, the country found responsible retains the right, pursuant to its national laws and under Article 3(5) to send the applicant to a host third country. Admittedly, (...) a host third country must be one in which the asylum applicant's life or freedom must not be threatened and where he or she must be given effective protection against *refoulement.* This, however, does not guarantee any given degree of access to a substantive determination of the asylum claim.'[82] Also, the Preliminary Draft Agreement between Canada and the United States for Co-operation in Examination of Refugee Status Claims[83] stipulates that the country responsible for examining the claim will determine refugee status, except if there is a treaty with a third country that guarantees that status determination will be carried out in that third country. It is significant that the Canadian government does not want to be part of the Dublin Convention on account of the safe third country rule. Also, it is significant that North American state practice on this point is much closer to giving effective guarantees against refoulement via 'safe' third countries.

My proposed approach goes against case law in the United Kingdom and Germany. This implies that, in my opinion, transfer of applicants to those countries can only occur if these countries guarantee that they will determine refugee status. If this guarantee is not given, they are not to be considered safe because they may apply third country rules that may lead to refoulement[84].

5.3 Diverging concepts of refugee character

Article 29 paragraph 4 SIA stipulates that a State may attract responsibility for an application 'for special reasons concerning national law in particular' (comp. Article 3 paragraph 4 Du-

82. Canadian Government's comments on the Preliminary Draft Convention parallel to the Dublin Convention, May 1993, quoted in Crepeau, note 14 above, p. 280, note 469.
83. I use the draft of 24 October 1995.
84. Vermeulen and Zwaan argue that Germany is not 'safe', B.P. Vermeulen and K. M. Zwaan, *Is Duitsland wel een veilig Schengenland? Kanttekeningen bij het arrest van het Bundesverfassungsgericht inzake de sichere Drittstaat-regeling* [Is Germany a safe Schengen-country? Remarks on the decision of the Bundesverfassungsgericht on the *sichere Drittstaat*-regulation], NAV 1997, p. 144-152.

blin Convention, which does not contain the words quoted here). In Dutch domestic legislation, this has been implemented by the rule that transfer to the responsible State will not take place if the application 'is based on relevant facts that cannot have been relevant for the decision of the authorities of that country' (article 15b paragraph 1 under a Aliens Act, see annex 1). This sentence has been incorporated specifically in order to address the issue of divergent concepts of refugee character.

For this exception to be applicable, it is necessary that the asylum procedure in the responsible country has been completed[85]. In case law, this has been interpreted in such a way that it is required that there is a decision which allows the responsible State to expel the applicant to the country of origin, while there is no possibility of appeal with suspensive effect[86]. It is unclear how far this requirement goes. There are two decisions on applicants who did not use a possibility of appeal. In one case, the *Verwaltungsgericht* Osnabrück had turned down the applicant's appeal. He could have appealed to the *Oberverwaltungsgericht*, but hadn't done so[87]. The reason for this was that the German lawyer of the applicant had not considered it worthwhile to file an appeal. The applicant was a Serbian conscientious objector, and as a result of the so-called 'objective' doctrine had no realistic chance of winning an appeal. The President decided that, as the applicant had not used this possibility of appeal, the facts he referred to could have played a role in Germany. Consequently, his appeal to the 'unless-clause' of Article 15b Aliens Act was rejected[88]. The second case concerned a Zairian couple whose *Folgeantrag* had been declared manifestly unfounded. An appeal against this decision has no suspensive effect, but suspensive effect can be obtained by asking the *Verwaltungsgericht* for an *einstweilige Anordnung*, which as I understand it is an interim injunction. Because the applicants had not used this possibility, the facts they referred to could have played a role in Germany, and their case was dismissed[89].

Especially in the case of the Serbian conscientious objector, this approach is problematic. It is hard to deny that the applicant's appeal had a very dubious chance of success, as the so-called 'objective' doctrine makes it virtually impossible for conscientious objectors to be recognised as refugees[90]. It is equally clear that, particularly as a result of the decision of the Legal Unity Chamber of 12 April 1995, conscientious objectors do have fair chances of being recognised as refugees in the Netherlands[91]. What the decision doesn't solve is which appeals an applicant has to file. Does the applicant has to go all the way to the Constitutional Court? How futile must an appeal possibility be, before one can conclude that the applicant did not have to use the possibility? This is a very problematic aspect of the Dutch 'unless-clause'.

85. Spijkerboer/Vermeulen, p. 411.
86. Pres. Rb. Den Haag, z.p. Zwolle 31 October 1995, RV 1995, 15; Pres. Rb. Den Haag, z.p. Zwolle 26 July 1996, 96/2596, n.p.; Pres. Rb. Den Haag, z.p. Zwolle 2 August 1996, 96/4624, n.p.
87. Pres. Rb. Den Haag, z.p. Zwolle 22 December 1995, 95/5248, n.p.
88. Pres. Rb. Den Haag, z.p. Zwolle 13 February 1996, 95/5248, n.p.
89. Pres. Rb. Den Haag, z.p. Zwolle 2 August 1996, 96/5075.
90. See Reinhard Marx, The Criteria for the Determination of Refugee Status in the Federal Republic of Germany, in: *International Journal of Refugee Law* 1992, p. 151-170.
91. Rb. Den Haag (Legal Unity Chamber) 12 April 1995, RV 1995, 7, AB 1995, 592. Because of the importance of this decision, a translation of the central passage is given as annex 3.

A problem that has been solved in a very practical way is that case law requires that the final decision of the responsible country be produced, because otherwise the court cannot apply the clause. In the first decision on this point, the refugee lawyer was, for rather down to earth reasons, unable to get the German court decision. As a consequence, the case was decided negatively for the applicant[92]. This was, in my opinion, an unfortunate decision because the representative of the State could have produced the decision quite simply: Germany had accepted the Schengen-claim concerning the applicant. One telephone call from the Dutch authorities to the Germans, and one fax in return, would have solved the problem. In a later case, the representative of the State suhmitted the German decision when the refugee lawyer indicated that it was impossible to get it at short notice[93].

'Relevant facts' in the sense of the 'unless-clause' are most notably divergent notions of refugee character. This was the main reason why the clause was introduced[94]. I know of two case in which all other hurdles were taken (the final decision in the responsible country was produced, procedural possibilities had heen exhausted), and the substantive issue was decided. The first one concerned an Afghani family, whose applications had been rejected in Germany. From the court decision in their case it turned out that they had not been considered as refugees because there is no central authority in Afghanistan. The Dutch interpretation of the refugee concept is different, and does not *a priori* require a central authority[95]. This was one of the reasons why the President decided the Netherlands had to process the application, even though Germany had already done so[96].
The second case concerned a Turkish Kurd who had participated in a demonstration on the territory of the Turkish consulate in München and had been condemned to a fine of 1.000 DMark for trespassing on Turkish property by a German court. It was probable that the Turkish authorities knew that the applicant had done this, as the German public prosecutor had notified the Turkish consul that the case against the applicant had been dropped because of its insignificance. The *Bayerische Verwaltungsgericht* Ansbach in a decision of 24 February 1994 decided that, although the applicant might be prosecuted on the basis of Article 8 of the Turkish Anti-Terrorism Act, and the Turkish authorities probably suspected him of ties with the PKK, prosecution would occur only on account of the criminal component of his activities, not on account of the political component. This particularly sophist application of the so-called 'objective' doctrine would not hold water in Dutch jurisprudence. The Dutch Minister of Foreign Affairs, in a report on Turkish asylum cases of 2 July 1996, indicated that Kurds with (suspected) ties to Kurdish organisations may be in trouble if they are prosecuted. Although this case was decided on the point of other divergences than those

92. Pres. Rb. Den Haag, z.p. Zwolle 31 October 1995, RV 1995, 15.
93. This becomes clear from Pres. Rb. Den Haag, z.p. Zwolle 26 July 1996, 96/2596, mentioned in NAV 1996, 783-784.
94. Spijkerboer/Vermeulen, p. 411-412.
95. This requirement was introduced by ABRvS 6 November 1995, RV 1995, 4; but the presently competent court has rejected this approach in Rb. Den Haag (Legal Unity Chamber) 11 July 1996, GV 18a-16, 18a-17 and 18a-18. Additionally, the Council of State is reconsidering its position in the light of the EU Joint Position on the definition of the term refugee, ABRvS 7 November 1996, mentioned in NAV 1996, 964.
96. Pres. Rb. Den Haag, z.p. Zwolle 26 July 1996, 96/2596, n.p.

concerning the refugee concept (see below), it is illustrative of the problems that divergent refugee concepts may lead to[97].

In the meanwhile, it is curious that Dutch law solves this issue only when the procedure in the responsible country has been finished. It is clear why this rule was introduced. If the probable outcome of an asylum procedure in the responsible country would have to be predicted in the framework of a Schengen case, then (a) Dutch jurists would have to become experts in the intricacies of asylum law in all relevant countries, which would be very hard at least and (b) the main purpose of the Schengen system, one procedure only, would be frustrated. But on the other hand, if we think of the rationale of the 'unless-clause' it does not make sense that this requirement is introduced. It is illogical that Dutch law places total trust in a procedure of which it does not yet know the outcome, while it makes it possible to supervise the outcome of a procedure that has occurred already. More in particular this is curious in situations in which beforehand it is clear that the applicant has no reasonable chance in the responsible country on account of doctrinal differences, while the country where s/he applied has a less restrictive doctrine. It is, for example, clear that refugees from countries without a central authority (Somalia, Liberia, Afghanistan) have no possibility of recognition in Germany and France, while in other countries they are far from precluded from recognition. Also, the responsible country is supposed to expel rejected applicants. If the system works, the unless-clause should never apply because rejected applicants are not supposed to roam freely through Europe. In a way, the 'unless-clause' presumes a malfunctioning system *and* rewards behaviour that is presumed to be improper, namely filing multiple asylum applications.

A related issue is possible divergent interpretations of Article 3 ECHR. Appeals to this are always dismissed in Dutch case law. The Legal Unity Chamber decided that an appeal to this provision will be examined in the responsible country (NB: again a phrase which presumes that the responsible country will take a substantive decision on the application). As that country also is a party to the ECHR, the applicant will not be returned to the country of origin if that would be contrary to Article 3[98].

One German decision goes against Dutch case law and even against Dutch legislation. It argues that good arguments are available to say that it is out of the question that Germany should address substantive issues when another Schengen-state has already done so, because the principle at the basis of the Schengen-system is that only one state is responsible[99]. It may be that German legislation excludes the possibility that Germany examines an application that has been processed by another Schengen-state. However, Article 29 paragraph 4 SIA explicitly keeps this option open, while, as I will argue, in some situations the prohibition of refoulement will also make it necessary to do so.

97. Pres. Rb. Den Haag, z.p. Zwolle 2 August 1996, 96/4624, n.p.
98. Rb. Den Haag (Legal Unity Chamber) 24 October 1996, RV 1996, 10. Substantially the same line is taken in Rb. Den Haag (Legal Unity Chamber) 19 December 1996, RV 1996, 13.
99. VG Arnsberg 7 September 1995, NVwZ-Beilage 1/1996, p. 3-5.

One might say that the 'unless-clause' shows how nice the Dutch legal system is to this particular kind of 'abusers' (i.e. people who file a second application), but that nothing in international law contains an obligation to do anything like this. This is the position taken by Hailbronner. Hailbronner argues that there is an international law 'core refugee concept'. These 'core refugees' may not be returned to their country of origin. But, says Hailbronner, we all know that recognition as a refugee has not only to do with international law, but also with international relations, humanitarian traditions and conjunctural political fashions. And indeed, this could explain why the United States used to recognise many people from communist countries, why the recognition rate of Iraqi applicants rose dramatically immediately after the invasion of Kuwait, and why countries sometimes have high recognition rates for (some categories of) applicants from former colonies (Vietnamese and Assyrian Christians in France, for example). According to Hailbronner a country which would have recognised a non-core refugee does not violate the prohibition of refoulement by referring the applicant to a country which will return this person to the country of origin. Therefore, the Schengen-system does not lead to refoulement[100].

The problem with Hailbronner's reasoning is that it leads to a purely empirical refugee concept which has lost any normative power. Let me give an example. An applicant is considered a refugee in all European countries except one. The applicant submits the application in one of the 'liberal' countries, which decides that the one 'restrictive' country is responsible. The responsible country decides the applicant is not a refugee and expulsion to the country of origin follows. No problem, Hailbronner would say, because this person was not a refugee in the sense of international law, but only in the sense of the national laws of the 'liberal' countries.

Hailbronner does not give criteria for determining who qualifies as what I have labelled here a core refugee. Consequently, it depends on State practice who is. In the end, Hailbronner's argument leads to the conclusion that, if one State party to the Refugee Convention does not consider someone as a refugee, this person is not a refugee in the sense of Article 33 of the Refugee Convention, even though other states might have decided otherwise. In other words: states party to the Refugee Convention never violate the Convention. If this were a correct reasoning, we might as well abolish the Refugee Convention. If states give someone asylum, fine. If they don't, that's fine as well. Hailbronner's reasoning considers refugee law as being *only* about the sovereign right of states to grant *or not to grant* asylum. He ignores the fact that the prohibition of refoulement incorporates a minimal qualification of this. Also, as a result of his reasoning, indirect refoulement becomes a concept that in those situations has no meaning, cannot occur.

Hailbronner's reasoning is valid for appeals to Article 3 ECHR. There is a minimum norm, given by the European Court of Human Rights, which states may not violate. The Court gives not *the uniform* interpretation (like the EC Court of Justice does in cases in its jurisdiction), but *a minimal* interpretation. States have a margin of appreciation however. That is:

100. Kay Hailbronner, Perspectives of a Harmonization of the Law of Asylum After the Maastricht Summit, in: *Common Market Law Review* 1992, p. 917-939, at 925-926.

they may adhere to a national interpretation of that same norm which expands the protection that the norm gives. However, the margin of appreciation is specific to the European Convention on Human Rights. If we would follow Hailbronner's view in the sphere of the Refugee Convention, the result would not be a minimal norm with a margin of appreciation for states, but a situation in which the appreciation of states decides what the minimal norm is. This would mean treating the Refugee Convention as if it were customary international law - which it is not. Hailbronner's idea could be sound if there was a clear international minimum-interpretation of the refugee definition, which in my view would require international judicial supervision.

There is yet another way of arguing that the issue I'm dealing with here is not a problem really. One could say that, when country A transfers an applicant to country B which is also a party to the Refugee Convention, violation of the prohibition of refoulement is the responsibility of country B and not of country A. This reasoning has a very commonsense feel to it. Imagine I go on a holiday to Greece. It is forbidden to export ancient art from Greece without special permission. In Athens I buy a little statue, and the shopkeeper says to me that he does not know if this is an ancient statue, but that if it is I can't export it. He says that I should establish contact with the Ministry of Culture to settle the issue. But I don't do that and smuggle the statue (that later turns out to be ancient) out of the country. Question: has the shopkeeper violated Greek law? Answer: of course not, I did, and the shopkeeper behaved in an exemplary way. In the same way, we might say that the non-responsible country transferring an applicant to the responsible country has notified the responsible country that the applicant is one of those persons you should be really careful with because of the prohibition of refoulement. It cannot do more.
First, it is simply not true that the non-responsible country can't do more. As was argued earlier, it could determine refugee status. Second, the prohibition of refoulement is a cornerstone of the European legal order. Human rights are fundaments of international law. Refugee law is, literally, the emergency exit for serious human rights violations. European history in this century, including yesterday's newspaper, gives cause to take this emergency exit very seriously, to cherish it. The reasoning I sketched here in fact says that indirect refoulement is not forbidden as long as the State doing the wrong thing is a party to the Refugee Convention. Especially in the light of the number of states party to the Convention nowadays, this would effectively mean abolishing the prohibition of indirect refoulement.
Last the point I find decisive. We all know that if an application is decided by civil servant A and judge B, the result may be different than if civil servant Y and/or judge Z had been involved. This does not become any different if A and B are French and Y and Z Spanish. That's life. But here, the situation is different. Because refugee law is not harmonised, different decisions in different countries are not a matter of 'that's life'. This inequality is incorporated into the system and has predictable consequences for concrete categories of people. For definable groups (conscientious objectors, people from countries without central authorities, civil war victims) the tiny little rules designating the responsible country may mark the difference between asylum and exposure to threats to life and freedom, not by the fortuity of life, but because European states have not harmonised their refugee law. So if we accept the Schengen-system as it is, we accept indirect refoulement for specific people that we can point out. That seems to me to be too high a price.

So we are faced with a difficult choice. Either the Schengen system works smoothly: one, and only one State is responsible, but then we are sure that indirect refoulement is part of this system. Or we set the doors open for multiple applications, of which in general I think we can agree that this is highly undesirable. The problem can be solved by harmonisation. Harmonisation is not achieved by the Joint Position. Apart from the fact that the Joint Position is an accumulation of minimalist interpretations of the refugee definition, it is not binding. Competence of an international court would achieve harmonisation. Not all of a sudden, and surely there would be criticism of the level at which harmonisation would take place. But such competence would have several advantages. First, the free fall of refugee law that we witness now would be stopped. It is visible that all European countries are scared to be more generous than their neighbours. Additionally, each European country thinks it is very generous. So, restrictive interpretations are followed by the neighbours, upon which another neighbour ... upon which the other neighbours ... Some call this 'harmonisation at the lowest level'. This might very well be too optimistic, as the wish to be more restrictive than the neighbours implies an ongoing downward process. Second, the serious danger which the prohibition of refoulement, including indirect refoulement, presently faces would be averted. Third, the problem of 'messy' cases, i.e. cases in which someone, be it a civil servant or a judge, will have the irrepressible urge to prevent application of the Schengen system for compassionate reasons, will be reduced if not solved altogether.

5.4 Diverging humanitarian policies

If the Netherlands wants to transfer the applicant to the responsible state, but the responsible state has a more restrictive humanitarian policy than the Netherlands, is transfer then justified? This issue concerns what I will label toleration policies, by which I mean collective policies implying temporary non-expulsion on account of the general situation in the country of origin. In the Netherlands, this takes the form of the toleration status (see par. 1.1 above).

Initially, there was diverging case law on this point. The position of Den Haag was that it follows from Article 32 SIA, according to which an application is processed in accordance with national law (comp. Article 3 paragraph 3 Dublin Convention), that diverging toleration policies do not stand in the way of application of the Schengen-system[101]. The responsible country processes the application according to national law, and if that is less attractive to this particular applicant, that is bad luck for the applicant. However, Zwolle opted for the opposite position. At least until now, diverging toleration policies stand in the way of expulsion to a country of first asylum in the sense of Article 15c paragraph 1 sub c Aliens Act. This concept of country of first asylum is different from both the Schengen-system and the safe third country rule. In several decisions, the court in Zwolle decided that it would be unreasonable if diverging toleration policies would stand in the way of transfer on the ba-

101. Pres. Rb. Den Haag 20 October 1995, 95/9487, n.p.; Pres. Rb. Den Haag 17 November 1995, JuB 1995-19,15, GV 18b-8; Pres. Rb. Den Haag 17 January 1996, JuB 1996-3, 15; Pres. Rb. Den Haag 27 March 1996, 96/1819, n.p.

sis of the country of first asylum-rule, but not on the basis of the Schengen system[102]. The Hague then decided that, as this divergence of Dutch case law was unacceptable, it would follow the Zwolle position until further notice[103]. Zwolle then, not wishing to fall behind in gallantry, put its position in less robust terms. Transfer to the responsible country was now prohibited in the case of diverging toleration policies because this *might* be a relevant issue[104].

The Legal Unity Chamber decided the issue in a decision of 19 December 1996[105]. It argued, first, that the 'unless-clause' from Article 15b paragraph 1 sub 1 Aliens Act does not apply to toleration policy and is only applicable to the examination of the application to be admitted as a refugee. Second, the discretionary power of Article 29 paragraph 4 SIA is dealt with. This is a discretionary power that, as such, does not compel the administration to use it. The State Secretary has a restrictive policy on this point, and according to this policy diverging toleration policies do not lead to use of the discretionary power[106]. The court finds this policy not unreasonable, neither in general nor in this particular case. Finally, the applicants had appealed to the equality principle: ethnic Albanians from Kosovo for whom the Netherlands were responsible would receive a toleration status, while others would face forcible return to their country of origin. On this point the court argues it is not unreasonable that the administration finds the fact that another country is responsible for the application a fact that makes a case different from a case in which the Netherlands is the responsible country. In other words: the distinction the administration makes is not unreasonable.

I think the legal reasoning of the court here consistent, and I cannot think of an equally consistent way of arguing the opposite position. Yet, the decision leaves me with mixed feelings. On the one hand, it has a distinctly unreasonable 'feel' to it. Toleration policies involve a lot of people. Thousands and thousands of people are tolerated in one country, and expelled in another, which is a crucial difference for the people concerned. The decision of the court makes the European asylum system for people who have to depend on these toleration policies into a lottery. I think there is some lawyer's gut feeling that the application of the law should not result in a lottery.

But on the other hand, there may be reasons to welcome the decision. That reason is not that, in the words of the representative of the state in this case, otherwise the Netherlands would become 'the country of last hope'. All countries have the notable tendency to think that all asylum seekers want to come to their country because this country is known for its long-standing humanitarian tradition; has such a favourable asylum policy; is known for its freedom; is the fatherland of democracy; or some such thing. All countries are correct: for in relation to almost all countries, one can think of some groups which are treated better there than in other countries. But because all countries are right in a limited sense, the

102. Pres. Rb. Den Haag, z.p. Zwolle 27 March 1996, 94/4317, n.p.; Pres. Rb. Den Haag, z.p. Zwolle 26 July 2996, 96/2596, n.p., mentioned in NAV 1996, p. 673.
103. Pres. Rb. Den Haag 5 June 1996, JuB 1996-18, 17.
104. Pres. Rb. Den Haag, z.p. Zwolle 2 August 1996, NAV 1996, p. 748-750.
105. Rb. Den Haag (Legal Unity Chamber) 19 December 1996, 96/9092, RV 1996, 13.
106. *Vreemdelingencirculaire* [Aliens Circular] 1994, B7, 8.1.1.

proud paranoia that holds that, without further measures, everybody will like us as much as we like ourselves is unfounded.
A reason to welcome the decision might be that it is hard to conceive how toleration policies might be harmonised. Because of the discretionary nature of these policies, it is hard to see how an international court could contribute to this in a major way. Realistically, we can expect harmonisation only from competence of one single European institution on this point - and it is clear that this will not happen in the foreseeable future. The lack of a realistic prospect of harmonisation might lead to 'spontaneous' harmonisation by states if the court would have decided otherwise. Such spontaneous harmonisation would very likely be the, familiar, race to the bottom. So maybe the Legal Unity Chamber, by sanctioning the lottery of diverse toleration policies, at least avoids contributing to harmonisation at the lowest conceivable level. Maybe the court's option does not have an unreasonable 'feel' to it if we conceive of its choice as one between either randomly attributed prizes, or nothing at all.

6 CONCLUSION

A European approach to refugee issues is necessary. The one chance only-system incorporated in the Schengen Implementation Agreement and the Dublin Convention is an important part of this. In its present form however, this system threatens to undermine the protection that states owe to refugees. This serious threat could be averted if asylum law and policy are harmonised. Notably, this would have to cover the refugee definition, the asylum procedure, and the principle of family unity. For this, competence of an international court seems essential. Without such competence harmonisation cannot be achieved, and even such competence alone would be a significant step.
I have not reached any definite conclusion as to which, or what kind of, body should become this international court. The EC Court of Justice seems the obvious choice, as it gives uniform interpretations, and competence of this institution would fit with the EU-framework of the Dublin Convention. On the other hand, in the light of the symbolic importance of the right for asylum for national sovereignty, the European Court for Human Rights may be the more preferable option. In this way, a common minimum interpretation would be ensured, while states would keep their own margin of appreciation. Also (in a way parallel to what may be the case in respect to divergent humanitarian policies, see par. 5.4 above) it may be positive for asylum seekers if states keep a margin of appreciation. A criticism of both possibilities could hold that they are Eurocentric. The Refugee Convention is a global instrument, and therefore a supervisory body has to be global as well. This could be realised by drafting a Protocol to the Refugee Convention, which would enable the Human Rights Committee that supervises application of the International Covenant on Civil and Political Rights to examine individual complaints[107].

One might think that this is a political issue, with which the judiciary should not interfere. I would dare to disagree with such a view. Trying to steer clear from this issue implies a choi-

107. See the Optional Protocol to the International Covenant on Civil and Political Rights, adopted by UN General Assembly resolution 2200 A (XXI) of 16 December 1996.

ce on the issue that has clear consequences, and is therefore no less a political position than other positions are.

Some European states do advocate competence of the Court of Justice. Some are very much opposed. They think the system will work better and more smoothly without a court, while in some countries the words Brussels, Luxembourg and Strasbourg inspire panic regardless of rational arguments. In order to make a court competent, a unanimous decision is required. Presently, I think this will be very hard to acquire. If national judiciaries choose the option of letting the Schengen-system work smoothly (i.e. with minimal scrutiny), the opponents of competence of a court may very well not change their minds. That would be a possibility, but it would not be an apolitical position.
The other option is not, I think, to strike down the Schengen-system entirely by always addressing the substantive refugee issues. Not only would that be close to judicial revolt, but what is more: the Schengen-system is, in itself, too valuable for that. But it is important to scrutinise the application of the Schengen-system in cases in which applicants would suffer from it, in the sense of being faced with indirect refoulement or the tearing apart of families. This would give states more impetus to confer competence on a court that could solve these problems. It is imperative that these problems are solved, because otherwise European asylum law would accept systemic violation of international refugee law as a routine part of its practice.

ANNEX 1 The Dutch Schengen implementation legislation

Article 15b Aliens Act
Paragraph 1
An application for admission as a refugee will be turned down as non-admissible if:
a. another State, party to the Geneva Convention concerning the status of refugees, according to a treaty or a decision of an international organisation that is binding upon the Netherlands, is responsible for processing the application, unless it (the application, TS) is based on relevant facts that cannot have played a role in the decision of the authorities of that country;
(...)

ANNEX 2 The Dutch safe third country legislation

Article 15 Aliens Act
(...)
Paragraph 4
Before an alien is given the opportunity to submit an application for admission as a refugee in the Netherlands, our Minister will investigate whether the alien, after leaving the country of origin, has remained in a safe third country while our Minister is entitled on the basis of this Act to expulsion thereto. In that case the alien cannot submit an application as referred to in Paragraph 1 (i.e. for admission as a refugee, TS). Our Minister will give written notice to the alien that this is the case.

Paragraph 5

Safe third countries as referred to in the above paragraph are:

a. states that are party to the Treaty for establishing the European Community or the Agreement on the European Economic Area;
b. other states to be designated by decree, where observance of the Geneva Convention relating to the Status of Refugees of 28 July 1951, and of the Rome European Convention on Human Rights of 14 November 1950, or of the first mentioned Convention and the New York International Covenant on Civil and Political Rights of 16 December 1966 is assured.

(...)

Article 51a Aliens Decree

As safe third countries as referred to in Article 15, fifth paragraph, under b of the Act are designated:

- Poland
- the Czech Republic
- Switzerland

ANNEX 3 6 of the decision of the County Court Den Haag (Legal Unity Chamber) of 12 April 1995

Citation: Rb. Den Haag (Rechtseenheidskamer) 12 April 1995, RV 1995, 7, AB 1995, 592.

6. Applications for admission as a refugee relating to desertion or draft evasion can, according to the court, in the light of the case law of the Judicial Department of the Council of State and paragraphs 168-172 of the UNHCR Handbook, be separated into three categories.

A draft evader or deserter is a refugee if:

A. on account of race, religion, nationality, membership in a particular social group or political opinion, he has a well founded fear of disproportionate or discriminatory punishment or execution of the punishment because of draft evasion or desertion; or if on account of (one of) the aforementioned reasons he has a well founded fear of discriminatory treatment other than disproportionate or discriminatory punishment or execution of the punishment;
B. he has been brought to his refusal because he has serious, insurmountable conscientious objections on account of his religious or other deeply felt convictions which prescribe his draft evasion or desertion; and in his country of origin there is no possibility to conduct a non-military service instead of military service;
C. he has been brought to his draft evasion or desertion because he wishes not to be involved in a (kind of) military action that has been condemned by the international community as contrary to basic rules of human conduct, or that is contrary to the fundamental norms that apply in armed conflict. And also if he has decided to evade the draft or desert because he has a well founded fear of becoming involved in a conflict against his own people or family.

Persecution for Reasons of Religion

Roger Errera*

Under Art. 1-A (2) of the 1951 Convention relating to the Status of Refugees a well-founded fear of being persecuted for reasons of religion is one of the grounds on which refugee status may be granted. A similar clause existed in the 1946 Constitution of the International Refugee Organization[1]. Another necessary starting point for any discussion of the law and practice relating to religious persecution is the contents of international human rights instruments relating to freedom of religion. Under Article 9 of the European Convention on Human Rights:

'1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others.'

Under Art. 18 of the International Convenant on civil and political rights:

'1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect safety, order, health, or morals or the fundamental rights and freedoms of others.'

Art. 18. (4) relates to the rights of parents in the field of education. One should always keep in mind that freedom of religion is both an individual and a collective freedom (the Covenant rightly uses the words 'in community with others'), a freedom relating both to the public and the private sphere, and a freedom that cannot be limited to individual and private acts of worship. It has links with education, the training of ministers and the free choice of

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1. Annex 1, Part I, Section A-1 c). Text in Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Clarendon Press, Oxford, 1996, p. 381.

organization. Other consequences of the very nature of freedom of religion must be mentioned here:

- It may, at times, be closely related to belonging to a minority (sometimes a national one). If the members of the latter claim that they are being persecuted as such, another ground is not far, that of 'membership of a particular social group'.
- Certain beliefs sometimes lead to actions relating to the obligations of citizens, e.g. conscientious objection to military service, which is an offense in a number of countries. A claim of religious persecution on such a ground is bound to raise difficult problems.

As is the case for other grounds mentioned in Art. 1-A (2) of the Geneva Convention religious persecution may come not from state anthorities, but from varied social group, more or less condoned by the state.

In this paper I will examine the following issues:

1 Judicial assessment of the situation: Facts which do not reach the threshold of persecution.
2 Religious persecution directed against members of certain religions communities.
3 Concientions objectors and draft evaders in times of civil war or internal stife. The case of the Yugoslav wars.
4 Adjudicating on other cases of religious persecution.

1 JUDICIAL ASSESSMENT OF THE SITUATION: FACTS WHICH DO NOT REACH THE THRESHOLD OF PERSECUTION

The first question to be answered is: Do the alleged facts amount to persecution within the meaning of the Geneva Convention? The answer is a negative one when the facts, as such, cannot be construed as amounting to persecution.

The case-law of the French *Commission des recours des réfugiés* provides appropriate examples. Refugee status was refused in the following cases:

- Applicant mentioning his community's difficulties, but not precise and detailed elements justifying fear: *Bibo*, Jannuary 26, 1984[2].
- Applicant invoking the impossibility to practice freely and publicly his belief but not alleging persecution within the meaning of the Convention: *Echaide Goicoechea*, December 3, 1954[3].
- Restrictions to religions practice not amounting to persecution: *Mohamed Aly*, March 4, 1985[4]; *Phan*, same date[4].
- Pressures and vexations (at school and in the exercice of profession). The applicant, an Iraqi Shiite, claimed to have fled Iraq to avoid fighting his Iranian co-religionist during the Iran - Iraq war. These facts, assuming them to be established, are insufficient: *Abass*, June 18, 1984[4].

2. Summary in F. Tiberghien, *La protection des réfugiés en France*, 2nd. ed., Economica and Presses universitaires d'Aix-Marseille, 1988, p. 335.
3. *id., ibid.*
4. *id., ibid.*

- Romanian Adventist claiming persecution under Ceaucescu and professional obstacles after 1989: *Chivu*, June 28, 1995[5].
- Chinese Catholic claiming to have left China because of religious persecution against catholics, but before the CRR, declaring to have 'sympathy' for that religion and not claiming any personal persecution: *Lin*, September 28, 1987.
- A Christian Israeli claimed a well founded fear of persecution because of the harassment the will suffer due to his religious objections to military service and the discrimination he suffers as a Christian, unable to marry a Jew or a Muslim. His claim was rejected in Britain: Israel's requirement of military service does not constitute persecution against a Christian citizen who opposes such service on religious grounds. The fact that Israel prohibits interreligious marriage does not constitute persecution: *P.M.v. Secretary of State for the Home Department*[6].

According to the CRR's case-law the mere fact of belonging to a minority religion or denomination does not, *by itself*, allow the granting of refugee status: See *Singh Gurcharan*, June 27, 1986, for a Sikh[7]; *Zadbi Misel*, December 10, 1990, for a Christian Turk; *Xi*, May 3, 1988, for a Chinese Jehovah Witness; *Mubashar*, March 21, 1987, for a Pakistani belonging to the Ahmadyya Community; *Gangat*, March 10, 1987, for an Indian Muslim[8]8; *Hartun*, March 2, 1987, for an Irani Christian[8].

2 RELIGIOUS PERSECUTION DIRECTED AGAINST MEMBERS OF CERTAIN RELIGIONS COMMUNITIES

2.1 Religious persecution and the apparent 'neutrality' of the law

In certain situations members of minority denominations claiming religious persecution meet the following objection: the domestic law applied to them is the same for all. It is 'neutral'. How can they, then, claim to be persecuted? Two judicial attitudes and policies are conceivable here:

a. According to the first one, the generality and the neutrality of the law have to be taken at their face value. If the same prohibition, for example, applies to all religions, then the claim fails. R. Plender mentions a number of cases in which such an attitude was adopted. In the *Billas* case, a Jehovah's Witness had been punished for proselytizing. The Canadian tribunal found against him, since the rule applied to all denominations[9]. In Britain the Immigration Appeals Tribunal followed the same course in the *Atibo* case, whe-

5. Commission des recours des réfugiés, *Contentieux des réfugiés. Jurisprudence du Conseil de l'Etat et de la Commission des recours des réfugiés, année 1995*, p. 82.
6. Reported in *I.J.R.L.*, vol. 3, n 2, p. 128, n 0066.
7. Summary in F. Tiberghien, *op. cit.*, p. 335.
8. *id.*, p. 336.
9. *Billas v. M.E.I.*, I.A.B. - 79 - 116, 7 July 1980, C.L.I.C. n 27-10, mentioned by R. Plender, *International Migration Law*, 2nd ed., Dordrecht, Boston, London, Kluwer, 1988, p. 420; See also *Kwiatowsky V. M.E.I.* (1983), 2 SCR . 856, quoted by R. Plender, pp. 452, n. 204 and 450, n. 182.

re the applicant, a Mozambican member of an evangelic church, was punished for proselytism[10].

b. Another judicial attitude consists in going beyond a superficial neutrality in the law and having a close brush with the situation of the plaintiffs and the general context. This was what an American court did in the *Canas-Segovia* case: Two Salvadorian brothers, both Jehovah Witnesses had applied for asylum in the US. Conscientious objection is not recognized in Salvador. They refused military service. The court took into account the fact that, in view of their beliefs, the refusal of service could lead to very harsh and disproportionetely severe treatment[11].

The German BundesVerfassungsgericht adopted a similar course in a case relating to four Pakistanis belonging to the Ahmadiyya community, reversing a judgment of the administrative appeals court which had held that provisions in the Pakistan criminal code which restricted freedom of religion of Admadiyyas were aimed at maintaining peace in Pakistani Society, and left sufficient scope for the exercise of the Ahmadiyya religion in private[12].

I suggest that the second attitude is, within the limits of each case, a better tool for adjudicating refugee status issues. It gives its full meaning to the crucial words of art 1-A (2) of the Geneva Convention: 'well founded'. 'Neutral' laws have always been in abundance on the book of all tyrannies - and elsewhere too, at times.

2.2 Illustrations: Jehovah's Witness, Pakistani Ahmadis and Turkish Yezidis

a. *The case of Jehovah's Witnesses.*

The Jehovah's Witnesses may deserve a special mention. Their members have been persecuted under the Nazi and Communist regimes. They continue to be persecuted in a number of countries, in Africa and elsewhere: in certain Eastern European countries the degree of religious freedom allowed to them is minimal, and may later on raise issues in relation to Art. 9 ECHR before the European Court of Human Rights.
The cases in which refugee status was granted by the French CRR contain graphic examples of arrests, beatings, tortures or forced labor[13].

10. *Atibo v. Immigration Officer*, London (Heathrow) Airport, [1978] Imm. A.R. 93.
11. Canas-Segovia v. INS, 902 F. 2d 717, reported in *I.J.R.L.*, vol. 2, n 3, July 1990, p. 454, n 0050, note by S. Timberlake. The UNHCR has submitted an *amicus curiae* brief to the US Court of Appeals for the 9th Circuit. The text of the brief, mentioned by G. Goodwin-Gill, *op. cit.*, p. 55, n. 92, has been published in the *I.J.R.L.*, 1990, 341.
12. See 2 BV R, cases 1300/89, 1986/89, 202/89 and 2021/89, reported in *I.J.R.L.* vol. 5, n 1, 1993, p. 116, n 0136.
13. See *Masembo*, March 15, 1988; *Kiwo*, March 17, 1988, both relating to Zaïre, where the Jehovah's Witnesses are banned; *Quissanca*, November 29, 1988 and *Nsamu*, October 9, 1987 (Angola); reported in *Documentation - Réfugiés*, n 55, 6-15, November 1988, with a note by F. Tiberghien; see also *Noandou*, November 23, 1989 (Cameroun).

b. *Persecutions against Pakistanis belonging to the Ahmadiyya Community.*

This religious community is banned in Pakistan. Following its general case-law the French CRR held in 1986 that were belonging to it was not, *per se*, enough to grant refugee status to its members[14].

Deciding, in the late 80's, cases relating to facts that took place after the change of regime in Pakistan, it granted refugee status to a number of applicants who could establish serious personal persecution: see *Ahmad*, June 16, 1989; *Ahmed*, June 1, 1989[15].

The political change had had no impact on the fate of this religious community.

c. *Turkish Yezidis.*

A German decision is of particular interest here. It related to a Turkish asylum seeker, of Kurdish origin and a member of the Yezidi religious group, who had been persecuted on account of his religion. According to the summary of the legal reasoning, 'The court found that religious persecution occurs when acts are aimed at robbling a person of his or her religious identity, or when such acts destray the minimum religions existence, which includes the possibility to practice one's religion and express one's religious convictions.'[16].

3 CONCIENTIOUS OBJECTORS AND DRAFT EVADERS IN TIMES OF CIVIL WAR OR INTERNAL STIFE. THE CASE OF THE YUGOSLAV WARS

Refusal of military service is a rather frequent phenomenon in a number of countries. It is sometimes based on strong religions or moral beliefs, sometimes on other motivations. According to the UNHCR *Handbook.*

> 'A person is clearly not a refugee if his only reason for desertion or draft - evasion is his dislike of military service or fear of combat.' He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.
>
> 'A deserter or draft evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion nationality, membership of a particular social group or political opinion.'[17]

The dominant case-law tends to follow the rationale of these guidelines. Tribunals and courts keep in mind the following elements:

14. *Mubashar*, March 21, 1986, reported in Tiberghien, *op. cit.*, p. 334.
15. Reported in *Documentation - Réfugiés*, n 103, March 5-14, 1990; see also *Riaz*, May 29, 1989.
16. Higher Administrative Court, Baden-Württemberg, 1990. A 12 S 533/89, reported in *I.J.R.L.* vol. 3, n 3, 1992, p. 337, n 0080. In a decision of the same year the Federal Administrative Court held that the findings of fact by the higher administrative court did not warrant the conclusion that *indirect* group persecution in eastern Turkey existed: B Verw G 9 C 17. 89 reported in *ibid.*, p. 338, n 0081.
17. UNHCR *Handbook*, 168 and 169 (Emphasis added).

- *The first one relates to international law:* Conscientious objection to military service is not recognized as a right by any international human rights instrument[18]. But all of them recognize freedom of conscience (see Art. 9 ECHR and Art. 18 of the ICCPR, *supra*, p. 1). Besides, the law relating to war and internal conflicts is contained in the four 1949 Geneva Conventions and the two 1977 Additional Protocols. The use of certain weapons is contrary to international law.

- *The second element is the following one:* Even in normal times, military service may be used, in certain countries, to subject members of religions minorities to discriminatory or harsh treatment. Guy Goodwin-Gill is right to invite attention to, *inter alia*, 'the scope and manner of implementation of military service laws (...) The selective conscription of particular group within society, and the bases of such distinctions.'[19]

- *A third element* is that, in situations of civil war or internal conflict in countries on the verge of disintegration and made up of a variety of religious and national groups, refusal of or evasion from military service may be motivated by
  - genuine conscientions objection, moral or religions
  - political reasons
  - the fact that refusal by persons belonging to a religious minority will be dealt with much more severely.

Ex-Yugoslavia might be, in Europe, an apt illustration. Judicial authorities have to adjudicate on a variety of situations:
- Situation 1 is the simplest one: A mere refusal of military service which is not based on any of the grounds listed in Art. 1-A (2) of the Convention. Refugee status is denied[20].
- Situation 2 leads to the same outcome, but on a different basis: A refusal of military service is based on conscientious grounds. But it is not established that it would possibly lead to persecution within the meaning of the Convention[21].
- Situation 3 obtains in cases of persecutions during, *inter alia*, military service based on political and religious grounds[22].

18. Article 4 of the European Human Rights Convention prohibits slavery, servitude, forced or compulsary labour. Under Art. 4-3-b) the term 'forced or compulsary labour' shall not include 'any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsary military service.'
19. Goodwin-Gill, *op. cit.*, p. 59.
20. See, e.g., French CRR *Gasparian*, September 28, 1994, in Commission des recours des réfugiés, *Contentieux des réfugiés. Jurisprudence du Conseil d'Etat et de la Commission des recours des réfugiés, année 1994*, p. 104 (Armenian refusing to serve in the Karabakh war). See also *Kha*, February 21, 1986 and *Mouia*, March 21, 1986, in F. Tiberghien, *op. cit.*, p. 350; *Djakounda*, June 17, 1993 (Nigéria), in *Commission ...*, *op. cit.*, 1993, p. 112.
21. See CRR, *Lopez-Pereira*, April 14, 1976, in *Supplément à la jurisprudence de la Commission des recours des réfugiés*, n.d., n.p., p. 23.
22. See *id.*, *Wetula*, April 3, 1979: Persecutions, during studies and military service, based on applicant's political and religious opinions.

The Yugoslav wars and the French Commission des recours des réfugiés (CRR)

During the recent years the CRR has had to adjudicate on cases relating to citizens of the former Republics of ex-Yugoslavia who refused military service or left the army in the course of conflict and who subsequently asked for refugee status in France. The CRR affirmed the following principle: In the present situation in ex-Yugoslavia, the fear, expressed by a citizen of one of the States created after the break-up of the country, to go back to one of these States after his desertion from one of the military forces in presence or his refusal to answer a call-up by military authorities allows the inclusion of that person into the scope of Art. 1-A 2) of 'the Geneva Convention as long as it is established that his attitude has been motivated by political reasons or reasons of conscience.'[23]

Appeals against initial refusal of refugee status by OFPRA has been up-held in the following cases:

- Member of Rumanian minority in Voïvodina opposed to the policy of ethnic and cultural hegemony applied in Voïvodina by Serbian authorities of ex-Yugoslavia and unwilling to participate, as a soldier of the federal army to actions contrary to his personal position[24].
- Applicant of Montenegrin origin, born in Croatia, where he has always lived with his parents, called up in the Croatian militia in october 1991. In view of his origin and of his family links with Montenegro, he refused to serve against his compatriots and left Croatia. Upon his return he would certainly be conscripted into the federal army and his parents, in Zagreb, would be exposed to reprisals. Refusal to serve held to be motivated by reasons of conscience[25].
- The applicant, a Croatian of Russiuan origin and of Uniate denomination, lived near Vukovar, in Serbian occuped Krajina. While in Zagreb, he refused to serve in the army: he did not want to risk to fight his brother, serving in the 'federal' Yugoslav army, and his compatriots. His parents were in a refugee camp in Croatia and were refused equality of rights in Croatia because of their origin. His reasons of conscience were held to be within the scope of the Convention[26].
- The applicant, a Yugoslav citizen of Albanian origin, and a Roman Catholic, lived in Montenegro. He refused the 'slavisation' of his name and was sacked. He was sacked again when he refused to serve against Slovenia. He refused the call-up to the war in Croatia, then fled abroad. Same solution[27] other cases were decided along similar lines by the CRR in 1995, as shown by the *Marcic*[28] and *Sekulic*[29] cases. Refugee status was

23. *Sporea*, January 29, 1993, in Commission..., *Contentieux des réfugiés, op. cit.* 1993, p. 35.
24. *Sporea*, see *supra* n. 23.
25. *Dabetic*, January 29, 1993, *id.*, *ibid.*
26. *Miric*, March 2, 1993, *id.*, p. 114.
27. *Hardi*, same date, *id.*, *ibid.*
28. December 22, 1995, in Commission ..., *Contentieux des réfugiés* ..., 1995, p. 92: Applicant of Serbian origin, living in Croatia, refusing Croatian call-up to fight in Serbian-occupied Krajina, where put of his family resided. He could not live in Serbia, where he was suspected of being a Croat(!).
29. July 20, 1995, *id.*, p. 93: S. a Bosnian whose father was a Serb, was persecuted by Bosnian authorities for that reason. He was regarded as a 'traitor' by both sides in the war in Bosnia, and refused to join the Army.

also granted when reasons of conscience coexisted with political motivations[30]. Accordingly, OFPRA's refusals have been up-held whenever the applicants refusal could not be linked with one of the grounds already mentioned[31].

Other courts have adopted a similar attitude towards the situations vising from the Yugoslav conflicts. Deciding a case relating to a family of Muslim Bosnians (and unrelated to draft evasion or conscientious objections) the German Administrative court in Würzburg held that 'In a civil war context, political persuasion is entirely established when the behaviour of the state forces (here the Bosnian Serbs) aims at the physical extermination and destruction of the ethnic, cultural and religious identity of a put of the population.'[32]

4 ADJUDICATING ON OTHER CASES OF RELIGIOUS PERSECUTION

In most cases religious persecution is associated with the individual's belonging to a religious minority. As said earlier, mere belonging to such a group is not, *per se*, a sufficient ground for recognition as a refugee, at least in the case-law of the CRR.

The recent case-law of the latter gives graphic examples of the contents of such persecutions and of their general context. As to the contents, the ways and means are familiar enough: professionnal discrimination and loss of employment; physical attacks; frequent arrests and harsh treatment, sometimes torture in fail; persecution of other members of the family, etc.

As to the general context, the CRR has granted refugee status to applicants establishing personal persecution deriving to their membership to such group as

- The Assyro-Chaldeans of Iraq[33]
- Christians in Turkey[34]
- Bahais in Iran[35].

30. See *Guozdenovic*, March 1, 1995, *id.*, p. 93, and *Licina*, November 17, 1995, *id.*, p. 94. For a comment of the CRR's case-law, see F. Tiberghien, 'La crise yougoslave devant la Commission des recours', *Documentation - Réfugiés*, n 223, 17-30, August 1993, and Goodwin-Gill, *op. cit.*, p. 55, n 91.
31. See in particular *Tanasic*, June 13, 1995, Commission ..., *Contentieux des réfugiés* ..., 1995, p. 92; *Djukic*, January 29, 1993, *id.*, p. 36; *Vranjanin*, January 27, 1993, *id.*, p. 113, and *Lukic*, May 27, 1993, *id.*, p. 116.
32. Administrative Court, Würzburg, W 9 K 92. 30416, reported in *I.J.R.L.* vol. 6, n 4, 1994, p. 664, n 0208. The quotation is an extract from the summary of the legal reasoning of the decision On refugee law issues relating to the break-up of States see V. Mikulka, 'Legal Problems arising from the dissolution of States in relation to the refugee thessamenon', in *The Problem of the Refugee in the Light of Contemporary International law Issues*, V. Gowlland-Debbas, ed., Martinus Nijhoff, The Hague, Boston, London, 1996, p. 35, and A. Pellet, 'Commentaires sur: les problèmes déroulant de la création et de la dissolution des Etats et les flux de réfugiés', *id.*, p. 51.
33. See *Khamou*, July 5, 1993, in Commission ..., *Contentieux des réfugiés* ..., 1993, p. 99; *Johne*, June 29, 1993, *ibid*; *Hanna*, July 9, 1984; *Moshi*, November 19, 1984.
34. *Bayrakcioglu*, July 10, 1987; *Cobanoglu*, November 19, 1987; *Acikgoz*, November 7, 1986, *Serttasoglu*, October 17, 1986, reported in F. Tiberghien, *op. cit.*, p. 337.
35. *Safaie*, December 12, 1987; See also, *Abdholhosseini*, January 23, 1995, in Commission..., *Contentieux des réfugiés...*, *op. cit.*, 1995, p. 80.

Exclusion Clauses

Closer Attention Paid to the Exclusion Clauses

Mr Dennis McNamara*
Mr Michael Petersen has spoken on behalf of mr Dennis McNamara

1. For a number of reasons the international community is taking a longer, harder look at who should be protected and assisted as refugees than at any time in the past. Partly, this no doubt reflects the hardening climate towards refugees generally: there is an increased eagerness to weed out the undeserving.
However, to present the positive side, it also reflects a new emphasis on justice: on recognizing the role of justice in peace and reconciliation; particularly in ensuring that the perpetrators of war crimes are brought to justice.
2. Globally, the pressure on asylum has increased. Despite the fact that refugee numbers have declined, refugee pressures have not eased. This is to some extent a matter of perceptions, especially public perceptions at times of economic hardship for many. The pressure also reflects frustration and dismay at long-standing situations - Afghanistan, Liberia and Somalia - which generate refugees, with no resolution in sight - and those situations of mass exodus which have taken place amidst mass killings, epidemics, food emergencies and political disruption.
3. This decade has witnessed shocking genocides - in Rwanda; in former Yugoslavia; and in northern Iraq - and this, too, has compelled us to take a harder look at whom the international community should protect and assist. In just a couple of years, two international criminal tribunals have been established to bring the perpetrators of war crimes to justice.
Their progress has not been smooth: they have been underfunded; there are administrative problems, and in the case of the former Yugoslavia, there remains profound political ambiguity. The War Crimes Tribunal indicts war criminals and Western troops look the other way when they drive past.
4. The lessons of these tribunals will be drawn for years to come. Meanwhile, the General Assembly has acted in record time on draft statutes for an International Criminal Court.
The Preparatory Committee met in two sessions in 1996, and there is some hope of setting the seal on a Convention in 1998. These developments have all meant that asylum applicants come under closer scrutiny.

THE AMBIT OF REFUGEE PROTECTION

5. The international regime of refugee protection has always made provision for withholding protection from some claimants who would otherwise qualify for it. Claimants who have a well-founded fear of persecution but, because of the gravity of their actions, are

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deemed undeserving of international protection, are not entitled to enjoy the benefits of refugee recognition - including the right not to be sent or returned to where they fear persecution.

6. UNHCR's Statute, the 1951 Refugee Convention and its Protocol, and the 1969 OAU Convention all oblige UNHCR and States Parties to deny the benefits of refugee status to certain persons. There is some irony in the fact that international conventions for the protection of refugees - particularly their protection from *refoulement* - spell out situations in which protection can be dispensed with. Clearly, such exceptions to human rights provisions are to be interpreted and applied narrowly, especially where the consequences are probable persecution, and maybe even death. Because the exclusion clauses are applicable to persons with a recognised need for international protection, their invocation represents the most severe sanction.

7. The Constitution of UNHCR's precursor, the International Refugee Organisation, which came into force fifty years ago, referred to *genuine* refugees, and to *bona fide* refugees, possibly sounding the clarion call of various politicians today against 'bogus' refugees. The Constitution demands that no international assistance should be given to 'traitors, quislings and war criminals', and nothing should be done to prevent in any way their surrender and punishment. Persons who assisted the enemy in persecuting civil populations of UN member states, and ordinary criminals extraditable by treaty were among other categories deemed not to be of the Organization's concern.

CURRENT EXCLUSION PROVISIONS

8. UNHCR's Statute, a few years later, covers similar ground in a more politically neutral manner. It specifies that the competence of the High Commissioner shall not extent to a person in respect of whom there are serious reasons for considering has committed a crime covered by the provisions of extradition treaties, or by Article VI of the London Charter of the International Military Tribunal, or prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the UN.

9. The following year, the Refugee Convention elaborated these exclusion clauses with greater precision. Article 1(F) of the 1951 Convention states that the provisions of that Convention 'shall not apply to any person with respect to whom there are serious reasons for considering' that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

10. Article 1(5) of the OAU Refugee Convention contains identical language. In addition, it excludes from refugee status any person who 'has been guilty of acts contrary to the purposes and principles of the Organization of African Unity'.

11. States, and UNHCR, are *obliged* to deny refugee status and its benefits to such persons. Early drafts of the refugee convention created no such obligation, but merely provided an option to withhold refugee protection and assistance to such persons. At the insistence of the French delegate, however, the text was changed - precisely to preclude any govern-

ment giving refugee protection to war criminals. The first heading of exclusion in the Refugee Convention - that is, crimes against peace, war crimes and crimes against humanity - are all crimes included in the statute of the proposed permanent international criminal court. I would like to examine some of the dilemmas which have arisen at the juncture of refugee protection, and this category of international crime.

PROBLEMS OF APPLICATION

12. Refugee protection, UNHCR's increased operationality in conflict zones, and renewed international activism against those guilty of crime against humanity, in particular, have brought us face to face with some acute practical problems.
13. For UNHCR, the dilemma presents itself most acutely when UNHCR-funded camps harbour suspected war criminals or 'genocidaire' as was always believed to be the case in the Rwandese camps in Eastern Zaire and in Tanzania. The sheer numbers of persons involved and their precarious conditions made international involvement obligatory. List upon list of alleged perpetrators circulated freely, but provides no basis for exclusion. An indictment by the International Criminal Tribunal has been accepted by UNHCR as the 'serious grounds' needed for considering someone should be excluded. But these criminals were not, as far as we know, in camps.
The camps certainly harboured suspected genocidaire as well. Here, massive practical and security problems have militated against effective action. The camp populations were in the grip of their leadership, and the one attempt made to remove a suspected *genocidaire* from Benaco camp in Tanzania led to mayhem. Moreover, the majority in the camps were innocent; one could not simply dismantle the camps and leave all the inhabitants to their fate. One of the key questions to emerge from the Rwandese experience is how to separate the deserving from the criminal elements. This remains the responsibility of the host government. However, the host government may be neither able nor willing, as was also the case with the Khmer Rouge, who were to become interlocutors of the international community - the indispensable co-signatories to a politically peaceful settlement.
14. Even where a host government is willing, it may not have the means to implement safely the separation and removal of war criminals from camps. In such cases, it is incumbent on the international community to assist. We cannot insist that war criminals and perpetrators of genocide be condemned and punished and then leave it up to local authorities, which may or may not have the capacity to act. This concerns international crimes, for which there is an agreed international jurisdiction and responsibility.

LIABILITY

15. The category of crimes against peace, war crimes, and crimes against humanity also raises difficult issues of liability. In particular, adjudicators are called on to assess whether or not persons are excluded by virtue of their positions, action or inaction, or links - for instance, former senior officials of repressive regimes accused of genocide or gross human rights violations; or persons associated with groups committing crimes and advocating violence.
16. The exclusion clauses do not envisage the automatic exclusion of persons purely on the basis of their position. The fact of membership of a particular government, or membership *per se* of an organization which advocates or practices violence is not necessarily decisive or

sufficient to exclude a person from refugee protection. Key elements, in UNHCR's analysis, still remain a conscious intention on the part of the individual, a personal involvement in some aspect of the crime, and an element of choice on the part of the individual. In the words of the Nuremberg Tribunal, 'The criterion for criminal responsibility in this area lies in 'moral freedom', in the perpetrator's ability to choose with respect to the act of which he is accused.'

17. An individual examination of each case is needed, precisely to ascertain whether or not the person knew of the acts committed or planned: tried to stop or opposed the acts; or deliberately removed him or herself from the process. No moral choice may have been possible where an individual could oppose or disengage from the process only at grave danger to his or her life, or the lives of family members. The seriousness of the consequences of exclusion for an individual underlines the importance of subjecting the role of the individual to careful scrutiny and analysis - and not being unduly swayed by the fact that acts of an abhorrent and outrageous nature have taken place.

SERIOUS NON-POLITICAL CRIMES

18. The Refugee Convention also provides for the exclusion of persons who may have committed a serious non-political crime outside the country of refuge prior to being admitted to that country as a refugee. This provision can be broken down into distinct questions, including what constitutes a serious crime and whether the crime in question is non-political. The intention of this provision is to reconcile conflicting aims - on the one hand, rendering justice to a refugee even if he or she has committed a crime, and, on the other, the need to protect the community of the country of asylum from the danger posed by criminal elements fleeing justice.

19. Both the IRO Constitution and the UNHCR Statute excluded extraditable criminals, but this language was not retained in the Refugee Convention. A 'serious' crime refers to a capital crime or a very grave punishable act. It is risky to attempt generalised definitions of which crimes are covered, and which are not. The seriousness of the crime can be deduced from several factors, including the nature of the act, the extent of its effects, and the motives of the perpetrator. The primary issue is whether the criminal character of the refugee outweighs his or her need for international protection as a 'bona fide' refugee. During the drafting of the Refugee Convention, the President of the Conference of Plenipotentiaries explained:

> 'When a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the extent to which his fear of persecution was well-founded.'

20. For exclusion pursuant to the Refugee Convention, the crime must also be non-political, which implies that other motives - such as personal gain - predominate. Increasingly, extradition treaties specify that certain crimes, notably acts of terrorism, are to be regarded as non-political for the purpose of those treaties. However, they typically also contain protective clauses in respect of refugees. The political motives underlying a crime must also, for our purposes, not be inconsistent with the principles of the United Nations.

21. The Refugee Convention excludes persons who have been guilty of acts contrary to the purposes and principles of the United Nations. The scope of this provision, which reflects the limitation in the UDHR on the right to seek and enjoy asylum from persecution, is not

entirely clear. While the General Assembly has condemned terrorism as a violation of the purposes and principles of the United Nations: on the other hand, the Conference of Plenipotentiaries had in mind persons in a position of power in a member State. Implicit in this notion is also the view that persecutors should not become refugees. The drafters suggested that the acts in question were human rights violations short of crimes against humanity. Perhaps fortunately this particular exclusion clause is rarely used.

22. A recent GA Resolution emphasised that the 1951 Convention does not provide a basis for the protection of perpetrators of terrorist acts, which UNHCR fully endorses. However, it goes beyond condemning terrorist acts to including 'knowingly financing, planning and inciting' such acts as also being contrary to the purposes and principles of the UN. The notion of terrorism is not yet fully defined in international law, which makes the reach of this Resolution unclear. (In the United States, for example, the FBI has classified the Animal Liberation Front as a 'domestic terrorist organization'). UNHCR has underlined its concern at any unwarranted linkages between refugees and terrorists, which could have serious negative implications for refugee protection.

ENSURING INDIVIDUAL PROTECTION

23. For both practical reasons and reasons of principle, the applicability of the exclusion clauses should be considered only once it is determined (individually or *prima facie*) that the criteria for refugee status are satisfied. This is particularly because cases of exclusion are often inherently complex, requiring an evaluation of the nature of any crime and the applicant's role in it, on the one hand, including any mitigating factors, and the persecution feared, on the other.

24. The exclusion clauses should not be used to determine the admissibility of an application or claim for refugee status. Any preliminary or automatic exclusion, regrettably being applied in some jurisdictions, have the effect of denying such individual an assessment of the claim for refugee status.

25. The applicant's own confession, the credihle and unrebutted testimonies of other persons, or other trustworthy and verifiable information may suffice to establish 'serious reasons for considering' that the applicant should be excluded. However, ordinary rules of fairness and natural justice require that an applicant be given the opportunity to rebut or refute any accusations. An applicant who is able to do so should not be excluded from the benefits of refugee status. With the establishment of the two International Criminal Tribunals, a rebuttable presumption of exclusion is warranted in respect of any asylum-seeker indicted by them.

IMPLICATIONS FOR FAMILY MEMBERS

26. The exclusion of an applicant can have implications for family members. The principle of family unity is supposed to operate in favour of dependents, and not against them. Where the head of family is excluded, family members need to establish their own claims to refugee status. Such claims are valid even where the fear of persecution is a result of the relationship to the perpetrator of excludable acts. Family members are excluded if they have no independent claims, or, of course, if there are serious reasons for considering that they, too, have knowingly participated in excludable crimes or acts.

27. Children under eighteen can and have been excluded in a small number of cases. States Parties to the 1989 Convention on the Rights of the Child have agreed to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law, and this minimum should be taken into account in connection with exclusion.

DEVELOPING AREAS OF LAW: HUMAN RIGHTS PROTECTION

28. The scope of international protection and of international liability is not static. International law continues to develop the definition of a war crime, for example, as to whether war crimes can be committed in civil wars or only in the context of international conflict; and in respect of rape as a crime against humanity. The establishment of international criminal tribunals is likely to promote this development further.
29. At the same time, international human rights law provides increasing protection against human rights abuses, beyond the protection provided by the refugee instruments. A person falling within the exclusion clauses retains basic human rights, including the right not to be returned to any place where he or she would face a substantial risk of torture. The return of a person to face a death penalty may be prohibited, as may return to a serious danger of inhuman or degrading treatment or punishment, or execution. In some circumstances, the country of asylum must be encouraged to try the asylum-seeker for the alleged crime. For example, the *Convention against Torture* allows for universal jurisdiction over perpetrators of torture, making it an obligation for State parties to try offenders who are present on their territory. Another ground for jurisdiction is provided by Security Council Resolution 978 (1995) (pertaining to Rwanda), which urges States to arrest and detain and, where appropriate, prosecute persons within their territory, against whom there is sufficient evidence that they were responsible for genocide or other grave human rights violations.
30. The exclusion of persons from international protection as refugees is a rapidly evolving area of particular importance in a number of current refugee contexts. It needs to be vigorously yet carefully pursued, to separate those who should properly face justice without jeopardising the vast majority of deserving refugees by association.
31. As in most sensitive and complex areas of refugee protection, the understanding and support of the judiciary in this process is an important safeguard, which can also assist the proper development of refugee law in a highly-politicised context.

Exclusion Clauses

Guidelines on Their Application

Mr Michael Petersen*

I INTRODUCTION

1. The Statute of the United Nations High Commissioner for Refugees (the UNHCR Statute), the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) contain provisions for excluding from the benefits of refugee status certain persons who would otherwise qualify as refugees. These provisions are commonly referred to as 'exclusion clauses'[1].

2. Events in the last few years have resulted in increasing use of the exclusion clauses by governments and by UNHCR, and requests for clarification or review of UNHCR's position on exclusion. This Note provides a detailed analysis and review of the exclusion clauses, taking into account the practice of states, UNHCR and other relevant actors, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status (the Handbook)*, case law, the *travaux préparatoires* of the relevant international instruments, and the opinions of commentators. It is hoped the information provided in this Note will facilitate the proper application of the exclusion clauses through a thorough treatment of the main issues. Obviously, each case must be considered in light of its own peculiarities, bearing in mind the information provided below.

II THE EXCLUSION CLAUSES IN THE INTERNATIONAL REFUGEE INSTRUMENTS

3. Paragraph 7(d) of the UNHCR Statute provides that the competence of the High Commissioner shall not extend to a person:

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1. The grounds for exclusion are enumerated *exhaustively* in the international refugee instruments. While these grounds are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect. The exclusion clauses referred to and discussed in this Note are those in Article 1 F (a-c) of the 1951 Convention. It should be noted that Articles 1D and E also exclude certain persons from the scope of the Convention. Article 1 D provides that the Convention shall not apply to persons receiving protection or assistance from organs or agencies of the United Nations other than UNHCR. They may be covered, however, in the event that such protection or assistance has ceased 'for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations.' Under Article 1 E, the Convention does not apply 'to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.'
In addition, while this in not an exclusion clause, Article 33(2) provides that the benefit of the non-refoulement provision 'may not...be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights[2].

4. Article 1(F) of the 1951 Convention likewise states that the provisions of that Convention 'shall not apply to any person with respect to whom there are serious reasons for considering' that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

5. Article 1(5) of the OAU Convention contains identical language. In addition, it excludes from refugee status any person who 'has been guilty of acts contrary to the purposes and principles of the Organization of African Unity'.

6. The logic of these exclusion clauses is that certain acts are so grave as to render the perpetrators undeserving of international protection as refugees. Thus, their primary purposes are to deprive the perpetrators of heinous acts, and serious common crimes, of such protection; and to safeguard the receiving country from criminals who present a danger to the country's security. These underlying purposes, notably the determination of an individual as *undeserving* of protection, must be borne in mind in interpreting the applicability of the exclusion clauses.

7. While a State's decision to exclude removes the individual from the protection of the Convention, that State is not compelled to follow a particular course of action upon making such a determination (unless other provisions of international law call for the extradition or prosecution of the individual). States retain the sovereign right to grant other status and conditions of residence to those who have been excluded. Moreover, the individual may still be protected against *refoulement* by the application of other international instruments, notably Article 3 of the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[3] and Article 22(8) of the 1969 *American Convention on Human Rights*[4].

2. The provisions of the London Charter are discussed below under 'War Crimes'. Art.14 of the Universal Declaration of Human Rights states:
(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes o from acts contrary to the purposes and principles of the United Nations.

3. Article 3:
(1) 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.
(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
(92 States party as at 12 March 1996).

4. Article 22(8):
In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

(i) General Application

8. As with any exceptions to provisions of human rights law, the exclusion clauses need to be interpreted restrictively. As emphasized in paragraph 149 of the *Handbook*, a restrictive interpretation and application is also warranted in view of the serious possible consequences of exclusion for the applicant. The exclusion clauses should be used with utmost caution being, in effect, the most extreme sanction provided for by the relevant international refugee instruments.

9. In principle, the applicability of the exclusion clauses should be considered only after the adjudicator is satisfied that the individual fulfills the criteria for refugee status. This is chiefly because cases of exclusion are often inherently complex, requiring an evaluation of the nature of the crime and the applicant's role in it (including any mitigating factors) on the one hand, and the gravity of the persecution feared, on the other. An assessment of the case requires that these elements be weighed against one another (often referred to as the 'proportionality test'). This can only be undertaken by officials fully familiar with the case and the nature of the persecution feared by the applicant.

10. The exclusion clauses should therefore not be used to determine the admissibility of an application or claim for refugee status[5]. A preliminary or automatic exclusion would have the effect of depriving such individuals of an assessment of their claim for refugee status. By their very nature, the exclusion clauses relate to acts of an extremely serious nature. As such, the refugee claim and any related exclusion aspects should in every case be examined by officials trained in refugee law.

11. The applicant's own confessions, the credible and unrehutted testimonies of other persons, or other trustworthy and verifiable information may suffice to establish 'serious reasons for considering' that the applicant should be excluded. However, ordinary rules of fairness and natural justice require that an applicant be given the opportunity to rebut or refute any accusations. An applicant who casts reasonable doubts on the 'serious reasons for considering...' his or her guilt should not be excluded from the benefits of refugee status.

12. The exclusion of an applicant can have implications for family members. Paragraph 185 of the *Handbook* states that the principle of family unity generally operates in favour of dependents, and not against them. In cases where the head of a family is granted refugee status, his or her dependents are normally granted ('derivative') refugee status in accordance with this principle. If a refugee is excluded, derivative refugee status should also be denied to dependents. Dependents and other family memhers can, however, still establish their own claims to refugee status. Such claims are valid even where the fear of persecution is a result of the relationship to the perpetrator of excludable acts. Family members with valid refugee claims are excludable only if there are serious reasons for considering that they, too, have knowingly participated in excludable acts.

5. In the extreme case of an asylum-seeker who is indicted by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, or by a future International Criminal Court, a rebuttable presumption of exclusion is warranted. Persons thus indicted may also be protected against return to their country of origin or to another country under the provisions of the Convention Against Torture or other international human rights instruments.

13. Where family members have been recognised as refugees, the excluded applicant/head of family cannot then rely on the principle of family unity to secure protection or assistance as a refugee.
14. Children under eighteen can and have been excluded in special cases. Under the 1989 *Convention on the Rights of the Child*, however, States Parties shall seek to establish a minimum age below which children shall be presumed not to have the capacity to to infringe penal law[6]. Where this has been established, a child below the minimum age can not be considered by the state concerned as having committed an excludable offence. Where exclusion is invoked in respect of a child under the age of eighteen, caution should be exercised in its implementation.

(ii) Responsibility of States for Status Determination

15. Under the 1951 Convention and the OAU Convention, the competence to decide whether a refugee claimant falls under the exclusion clauses lies with the state in whose territory the applicant seeks recognition as a refugee[7]. That state must have 'serious reasons for considering' that the applicant has committed any of the crimes or acts described in the exclusion clauses; it is implicit that those grounds must be well-founded, even though there is no requirement that the applicant be formally charged or convicted, or that his/her criminality be established 'beyond reasonable doubt' by a judicial procedure. It is possible that some countries will regard available information as sufficient for purposes of exclusion, while others will not[8].

(iii) UNHCR Responsibility

16. Decisions on applications for recognition of refugee status made by States are not binding on UNHCR; nor are decisions made by UNHCR binding upon States. As a matter of policy, UNHCR does not normally determine refugee status in countries that are party to the 1951 Convention or 1967 Protocol. However, determination of refugee status by States and determination by UNHCR under its mandate are not mutually exclusive. In some countries, UNHCR takes part in the national status determination procedures. There are also cases where the procedures and criteria applied in the national procedures are such that UNHCR undertakes determinations to ensure that the principles of international protection are observed. The possibility of conflict between decisions made by States and decisions made by UNHCR can, therefore, arise.
17. The UNHCR Statute provides that the competence of the High Commissioner shall not extend to certain persons on similar (but not identical) grounds. This determination therefore falls to UNHCR. The wording of the Statute in this respect is less clear than the Conven-

6. Art. 40 (3)(a).
7. UNHCR has a responsibility, under Article 35 of the 1951 Convention, to assist states that may require assistance in their exclusion determinations, and to supervise their practice in this regard.
8. Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 67 (New York, 1953).

tion wording[9]: as the same categories are envisaged, UNHCR legal officers are encouraged to be guided by the Convention formulae in determining cases of exclusion.

18. The exclusion clauses will be discussed under the three categories provided in the 1951 Convention:

(i) crimes against peace, war crimes and crimes against humanity; (ii) serious non- political crimes; and (iii) acts contrary to the purposes and principles of the United Nations.

III THE CATEGORIES: ARTICLE 1 F(A) - CRIMES AGAINST PEACE, WAR CRIMES AND CRIMES AGAINST HUMANITY

(i) General

19. Article 1F(a) refers to persons with respect to whom there are serious reasons to believe that they have committed 'a crime against peace, a war crime, or a crime against humanity, as defined in *the international instruments drawn up to make provision in respect of such crimes*'. Several instruments exist today which define or elaborate on the notion of 'crimes against peace, war crimes and crimes against humanity'. Some of these instruments are listed in Annex VI of the *Handbook*. One of the most comprehensive is the 1945 Charter of the International Military Tribunal (the London Charter), Article 6 of which is reproduced in the *Handbook*. Other wellknown relevant international instruments which may be used to interpret this exclusion clause are:

- the 1984 *Convention on the Prevention and Punishment of the Crime of Genocide* (the *Genocide Convention)*;
- the four 1949 *Geneva Conventions for the Protection of Victims of War*;
- the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*[10];
- the 1973 *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*[11];
- the 1977 *Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)*;
- the *1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (the Convention against Torture)*;
- the *1985 Inter-American Convention to Prevent and Punish Torture*; and
- the *1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.*

20. Relevant non-binding but authoritative sources are the 1950 *Report of the International Law Commission (the* ILC) to the General Assembly, and the *Draft Code of Crimes against the*

9. Statute, para. 7(d): '... the competence of the High Commissioner ... shall not extend to a person in respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.'
10. While *apartheid* was generally cited and considered as a crime against humanity, the Convention itself had very limited applicability, and is now less significant in light of developments in South Africa.
11. GA Res. 3074 (XXVIII), 3 Dec. 1973.

Peace and Security of Mankind, which was provisionally adopted by the ILC in 1991[12].

21. More recently, the phrase 'crimes against peace, war crimes and crimes against humanity' has been defined or clarified by the following international instruments:

- The *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (the Statute of the International Criminal Tribunal for former Yugoslavia);
- The *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994* (the Statute of the International Criminal Tribunal for Rwanda); and
- The ILC's *Draft Statute for an International Criminal Court*, adopted by the ILC in 1994. (These documents are available from the Division of International Protection's General Legal Advice Section on request).

22. It is interesting to note that all the three crimes under this exclusion clause are included in the draft Statute for the proposed permanent international criminal court. The proposed court would have within its jurisdiction genocide, crimes against humanity, war crimes[13] and crimes against peace[14].

These crimes were extensively debated in April 1996 by the Preparatory Committee on the Establishment of an International Criminal Court[15].

23. The individual scope and legal status of the above documents and instruments differs. Thus, treaties and Security Council decisions are legally binding, while General Assembly resolutions, ILC reports or drafts are not. While treaties and conventions formally bind only the signatory states, they may reflect customary international law, and may encompass norms deemed *jus cogens* (universal, peremptory norms of international law). All these, however, are relevant sources for interpreting international law in general.

24. It should be noted when using this section of the Note that some crimes may fall under more than one category. This overlap is particularly noticeable between war crimes and crimes against humanity: genocide, for example, is both.

(ii) Crimes Against Peace

25. This category is defined by the London Charter as
'planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances or participation in a common plan or conspiracy for any of the foregoing.'

12. Originally the *1954 ILC Draft Code of Offenses against the Peace and Security of Mankind. Report of the International Law Commission on the work of its forty-seventh session 2 May-21 July 1995* (GAOR, Supp. No. 10, Doc. A/50/10) (New York, 1995).
13. The ILC draft Statute refers to this category as 'serious violations of the laws and customs applicable in armed conflict.'
14. The ILC draft Statute refers to this category as 'aggression'.
15. The Committee is meeting with a view to finalizing a Convention for an International Criminal Court, to be considered by a conference of plenipotentiaries, possibly in 1998.

'Aggression' was defined by UN General Assembly as

> 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations.'[16]

The ILC's Draft Code of Crimes against the Peace and Security of Mankind retains this definition[17].

26. Crimes against peace are a well-defined category, and can be committed in the context of the planning or waging of aggressive wars or armed conflicts. Armed conflicts are only waged by states or state-like entities in the normal course of events, and this provision can therefore only be applied in the cases of individuals representing a state or state-like entity (see further *Liability*, below).

27. There are few precedents for exclusion of individuals under this category, and UNHCR is not aware of any jurisprudence dealing with crimes against peace as an exclusionary provision.

(iii) War Crimes

28. A war crime involves the violation of international humanitarian law or the laws of armed conflict. Article 6(b) of the London Charter includes within this category murder or ill-treatment of civilian populations, murder or ill-treatment of prisoners of war, the killing of hostages, or any wanton destruction of cities, towns or villages or devastation that is not justified by military necessity.

29. Other acts identified as war crimes are the 'grave breaches' specified in the *1949 Geneva Conventions* and *Additional Protocol I*, namely wilful killing, torture or other inhuman treatment (including biological experiments), and wilfully causing great suffering or serious injury to body or health[18]. The 1993 Statute of the International Tribunal for former Yugoslavia defines as war crimes wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; and ta-

16. G.A.Res. 3312 (XXIX), 1974.
17. Draft Code, Art. 15. The specific acts of aggression subsequently enumerated in the draft article remain the subject of discussion.
18. Article 22 of the ILC's Draft Code of Crimes against the Peace and Security of Mankind lists 'serious war crimes' as any of the following acts: (a) acts of inhumanity, cruelty or barbarity against the life, dignity or physical or mental integrity of persons; (b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory; (c) use of unlawful weapons; (d) employing methods or means of warfare which are intended or may be expected to cause widespread, longterm and severe damage to the natural environment; (e) large-scale destruction of civil property; and (f) willful attacks on property of exceptional religious, historical or cultural value. Following discussions at the ILC's last session, this category may be changed from 'serious war crimes' to the more commonly used 'war crimes'.

king civilians as hostages[19]. Additional Protocol 1 also includes attacks on, or indiscriminate attack affecting the civilian population or those known to be *hors de combat*, population transfers; practices of *apartheid* and other inhuman and degrading practices involving outrages on personal dignity based on racial discrimination; and attacking non-defended localities and demilitarized zones.

30. War crimes were originally defined only in the context of an international armed conflict. However, it is now generally accepted that war crimes may be committed in internal, as well as in international, armed conflicts. The International Criminal Tribunal for Former Yugoslavia has confirmed the recent views of commentators that war crimes are not limited or defined by the nature of the conflict in which they occur[20]. It should also be recalled that war crimes can be committed against military as well as civilian persons.

(iv) Crimes against humanity

31. The London Charter was the first international instrument to use the term 'crimes against humanity' as a distinct category of international crimes. Article 6(c) of the Charter defined crimes against humanity as follows:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

32. Crimes against humanity are distinct from war crimes, although in time of armed conflict a single act could constitute both. While there is no universally accepted definition of crimes against humanity, they generally refer to any fundamentally inhumane treatment of the population, often grounded in political, racial, religious or other bias. The Statute of the International Tribunal for Former Yugoslavia defines its responsibility for crimes against humanity 'when committed in armed conflict, whether international or internal in character, and directed against any civilian population as encompassing: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts'[21]. The statute of the International Tribunal on Rwanda refers to crimes 'committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.'[22]

19. Article 2, *Grave breaches of the Geneva Conventions of 1949*.
20. In the case of *Dusko Tadic*, the defence argued, unsuccessfully, that the accused could not be tried for violations of the laws or customs of war under the Statute of the International Criminal Tribunal for former Yugoslavia because such violations could only be committed in the context of an international conflict. The Tribunal held, however, that the laws or customs of war, commonly referred to as war crimes, include prohibitions of acts committed both in international and internal armed conflicts. See *Dusko Tadic*, Case No. IT-94-I-T (Dec. of 10 August 1995 on the Jurisdiction of the International Criminal Tribunal for former Yugoslavia).
21. Statute of the International Tribunal for Former Yugoslavia, Article 5.
22. Article 3.

33. Genocide, a crime against humanity, is defined as:
'... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.'[23]

34. Crimes against humanity should be distinguished from isolated offenses or common crimes. The acts in question must be part of a policy of persecution or discrimination, targeted against the civilian population, and carried out in a widespread or systematic fashion. An inhumane act committed against an individual may constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts with the same political, racial, religious or cultural motive. Crimes against humanity may be identified from the nature of the acts in question, the extent of their effects, the motive of the perpetrator(s), or any combination of the above; they involve the essential values of human civilization and the dignity of man[24].

35. While they are defined in the London Charter as acts committed 'before or during [a] war', it is now accepted that crimes against humanity can be committed not only in the context of an international or an internal conflict[25], but also in peacetime or in a non-war context[26]. This development is confirmed by the ILC Draft Code, which includes as crimes against humanity acts unlinked to conflict, making this category the broadest of the headings under Article 1 F(a) of the 1951 Convention.

IV INDIVIDUAL LIABILITY

36. Crimes against humanity can be perpetrated by individuals without any connection to a state, as well as by persons acting on behalf of a state. In particular, individuals involved in paramilitary or armed revolutionary movements can be guilty of excludable acts under this heading[27]. An individual acting independently of the State can also be guilty of a crime against humanity, as has been recognised since the Nuremberg trials[28].

37. Often, the question of exclusion hinges on the extent to which the individual is liable. The adjudicator will need to assess whether or not certain persons are excluded by virtue of

23. Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide 1948.
24. Report of the International Law Commission, 41st Session, Doc. A/44/10(1989) at 151.
25. Art. 5, Statute of the International Tribunal for Former Yugoslavia.
26. See the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; G.A. Res.2391 (XXIII) 26 Nov. 1968, art. 1(b).
27. Under the Nuremberg Charter, individuals or members of organisations can be held responsible if they have participated 'in the formulation or execution of a common plan or conspiracy' to commit the crimes in question.
28. See Draft Code, Art. 21.

their positions, actions or inaction, or links to particular parties and entities, such as former senior officials of repressive regimes or governments accused of genocide or gross human rights violations, and persons who are associated with groups which commit crimes or advocate violence[29]. In excluding an individual,it is important that the degree of involvement is subject to careful analysis, and not swayed by the fact that acts of an abhorrent and outrageous nature have taken place.

38. The International Military Tribunal did not attribute collective responsibility in the cases of 'persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated' in the commission of the acts in question. According to the Nuremberg Tribunal, 'The criterion for criminal responsibility ... lies in moral freedom, in the perpetrator's ability to choose with respect to the act of which he is accused.'[30]

(i) Complicity

39. Article 2 of the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind sets out the limits of individual responsibility. This covers the positive acts of incitement, planning and assistance, but the only passive form of culpability envisaged is

> 'failure to take all necessary measures within one's power to prevent or repress the commission of such a crime *when the accused was the superior of the principal offender and knew or should have known that the subordinate was committing or was going to commit such a crime.*' (Art 2(c), emphasis added)

Complicity therefore entails, in almost every case, a positive act and a conscious intention. The elements of knowledge, and of personal involvement are reinforced in current jurisprudence[31].

(ii) Association: Senior Officials of Repressive Regimes

40. The exclusion clauses do not envisage the automatic exclusion of persons purely on the basis of their position. In certain cases, it has been argued that senior officials, by virtue of

29. The Case of Persecutors: There are circumstances in which evidence comes to light that individuals seeking refugee status where themselves guilty of acts of persecution before fleeing. Those who had themselves persecuted others were expressly excluded from the protection of the International Refugee Organization. Some countries also have similar exclusion provisions in their legislation. For example, the United States Government excludes 'persecutors' from refugee status under the U.S. Immigration and Nationality Act if such persons ordered, incited, assisted or otherwise participated in the persecution of another person on account of race, religion, nationality, membership in a particular social group, or political opinion. (US Immigration and Nationality Act, Sec. 101(a)(42)(a) and 243 (h)(2(A); 8 C.F.R Sec. 208.16(c)(2)(i). Under U.S. case law, former Nazis have been barred from asylum as persecutors. See, e.g., *Matter of Laipenieks*, 18 I & N Dec. 433 (BIA 1983); *US. v. Breyer*, 829 F. Supp. 773 (E.D. Pa 1993). See also *US v. Koreh, 856* F. Supp. 891 (D.N.J. 1994) (finding that an editor of a Hungarian newspaper that published anti-Semitic propaganda during World War II assisted in persecution). See also discussion of this issue under Art. 1 F (c).
30. Quoted in Weisman, op. cit. 22 at p. 132.
31. See Goodwin-Gill, p. 101. See also Weisman, N., *Article 1 F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law*, International Journal of Refugee Law Vol 8 No 1/2, Jan-April 1996.

their high position, bear collective responsibility for their government's actions, irrespective of the availability of any evidence indicating wrongdoing on their part, and even if they were not personally involved in the prohibited acts in question. One state has already enacted legislation giving effect to the concept of 'guilt by association'[32]. UNHCR does not support this interpretation.

41. A proper application of the exclusion clauses entails making individual determinations of exclusion for the officials in question. In order to fall under the exclusion clauses, an individual need not personally have committed the crime(s) in question. There may be sufficient grounds for exclusion if the individual had personal knowledge of the crimes and contributed to them or, being in a position to do so did not take measures to prevent or help stop them (i.e. was passive) where the crimes were committed by subordinates.

42. It is a prerequisite for exclusion that a moral choice was in fact available to the individual. An individual examination is required precisely in order to ascertain whether the applicant knew of the acts committed or planned, tried to stop or oppose the acts, and/or deliberately removed him/herself from the process. A moral choice may not be considered to have been available where an individual could oppose or disengage from such a process only at risk of grave danger to his or her life, or to the lives of bis or her family members. Persons who are found to have performed, engaged in, participated in orchestrating, planning and/or implementing, or condoned or acquiesced in the carrying out of any specified criminal acts by subordinates, should rightly be excluded[33].

43. Voluntary continued membership of a part of a government engaged in criminal activities may constitute grounds for exclusion where the member cannot rebut the presumptions of knowledge and personal implication. The Nuremberg Tribunal distinguished membership of, or a senior position in, a government from voluntary membership of *a part of the Government engaged in criminal acts, where these acts were generally known.* Thus, it declared certain formations of the Nazi Schutzstaffel (SS) to be criminal organisations, excluding those who were drafted into the organisation by the State[34].

44. Individuals are excludable, therefore, where there is a clear nexus of the individual to the act(s), or the actions of the individual are determining or decisive. The mere fact of a for-

32. Canada recently enacted a law which had the effect of excluding, *ipso facto*, all former senior officials of repressive regimes. (See Bill C-86 of 1993 and Bill C-44 of 1994). The officials affected by this legislation include senior diplomats, cabinet ministers, heads of state and their advisers, senior bureaucrats and military officers as well as members of the judiciary.

33. In establishing that the acts in question were voluntary or that no choice was available for the applicant, relevant questions may therefore include: Were the acts part of official government policy of which the official was aware? Was the official in a position to influence this policy one way or the other? To what extent would the official's life or that of family members have been endangered if (s)he had refused to be associated with or involved in the perpetration of the crime(s)? Did the official make any attempt to distance him or herself from the policy, or to resign from the government?

34. With regard to the specified parts of the Nazi SS, the International Military Tribunal stated the following: 'The Tribunal finds that knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal organization to the extent hereinafter described. It does appear that an attempt was made to keep secret some phases of its activities, but its criminal programmes were so widespread, and involved slaughter on such a gigantic scale, that its criminal activities must have been widely known. It must be recognised, moreover, that the criminal activities of the SS followed quite logically from the principles on which it was organized.' Judgment of the International Military Tribunal, p. 78.

mer position in a repressive regime does not constitute the 'serious reasons' required for exclusion. To conclude otherwise is to judge people based on their title, rather than their actual responsibilities, actions or activities. As already mentioned, the consequences flowing from exclusion are so grave that ordinary principles of fairness, natural justice and due process of law require a prior investigation of the actual role played by these officials before passing judgment on their responsibility for grave human rights violations or other criminal acts.

(iii) Association: Groups which Commit Crimes/Advocate Violence

45. As with membership of a particular government, membership *per se* of an organization which advocates or practices violence is not necessarily decisive or sufficient to exclude a person from refugee status. The fact of membership does not, in and of itself, amount to participation or complicity. The adjudicator will need to consider whether the applicant had close or direct responsibility for, or was actively associated with, the crimes specified under the exclusion clauses.

46. UNHCR has consistently emphasised that an applicant should not be excluded if (s)he is able to give a plausible explanation that (s)he did not commit, and was not directly or closely associated with, the commission of any crime specified under Article 1F of the 1951 Convention[35]. A plausible explanation regarding the applicant's non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence to the contrary, should remove the applicant from the scope of the exclusion clauses.

47. Notwithstanding the above, the purposes, activities and methods of some groups or terrorist organizations are of a particularly violent and notorious nature. Where membership of such groups is voluntary, the fact of membership may be impossible to dissociate from the commission of terrorist crimes. Membership may, in such cases, amount to the personal and knowing participation, or acquiescence amounting to complicity, in the crimes in question[36].

48. Again, great caution must be exercised in this regard. Care should be taken to consider defences to exclusion, notably factors such as duress or self-defence[37]. Moreover, regard must also be had to the fragmentation of certain terrorist groups. In some cases, the group

35. 1988 reissue: *Determination of Refugee Status of Persons Connected With Organizations or Groups Which Advocate and/or Practice Violence.* (UNHCR IOM/FOM/78/71).

36. See also *Ramirez v. M.E.I*, [1992] 2 F.C. 317 (C.A.): 'mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status.' ... 'no one can commit international crimes without personal and knowing participation'. The Court found, further, that mere presence at the scene of an offence is insufficient to qualify as personal and knowing participation. The Court also held however that 'where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts.'

37. For example, in one Canadian case the applicant who had been forcibly conscripted into the Salvadoran army, deserted at the first possible opportunity after finding out that the army used torture. The court considered this a relevant factor in concluding that the applicant was not guilty of the commission of war crimes or crimes against humanity. *Moreno v Canada* (Minister of Employment and Immigration), Action A-746-91 (F.C.A., 14 Sept. 1993).

in question is unable to control acts of violence committed by militant wings. 'Unauthorized acts' may also be carried out in the name of the group.

V ARTICLE 1 F (B): SERIOUS NON-POLITICAL CRIMES

49. Article 1F(b) provides for exclusion of persons who have committed a 'serious non-political crime' outside the country of refuge prior to being admitted to that country as a refugee. The issues for determination here are: (i) what constitutes a serious crime; (ii) whether the crime in question is of a *non-political* nature; and (iii) the meaning of the phrase 'outside the country of refuge prior to his admission'. State practice on what constitutes a 'serious non-political crime' for purposes of the exclusion clauses has not always been transparent or consistent. The intention of the Article is to reconcile the conflicting aims of, on the one hand, rendering due justice to a refugee even if (s)he has committed a crime and, on the other, to protect the community in the country of asylum from the danger posed by criminal elements fleeing justice. For this reason, several different variables are to be considered in the individual case[38].

(i) Serious Crime

50. The term 'serious crime' obviously has different connotations in different legal systems. The IRO Constitution excluded 'ordinary criminals who are extraditable by treaty.' This is echoed in the language of the UNHCR Statute, which excludes a person in respect of whom there are serious reasons for considering that he has conmitted a crime covered by the provisions of treaties of extradition. Similar language in regard to extraditable crimes was not retained for the 1951 Convention which describes the nature of the crime with greater precision. In the light of developments in extradition law, the fact that a crime is covered by an extradition agreement will not of itself constitute a ground for exclusion. It must meet the 'serious, non-political crime' criterion.

51. *The Handbook* specifies that a 'serious' crime refers to a capital crime or a very grave punishable act. Examples would include homicide, rape, arson and armed robbery. Certain other offenses could also be deemed serious if they are accompanied by the use of deadly weapons, serious injury to persons, evidence of habitual criminal conduct and other similar factors. It is evident that the drafters of the 1951 Convention did not intend to exclude individuals simply for committing non-capital crimes or non-grave punishable acts. The seriousness of the crime can be deduced from several factors, including the nature of the act, the extent of its effects and the motive of the perpetrator. The overriding consideration should be the aim of withholding protection only from persons who clearly do not deserve any protection on account of their criminal acts[39]. While there are risks in seeking to define cri-

38. UNHCR Eligibility Manual, 1962, p. 138.

39. The President of the Conference of Plenipotentiaries for the 1951 Convention stated: 'When a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the extent to which his fear of persecution was well-founded.' UN Document A/Conf.2/SR.29, p. 23.

mes which would not be thus covered, crimes such as petty theft, or the possession and use of soft drugs should not be grounds for exclusion under Article 1F(b), because they do not reach a high enough threshold to be regarded as serious.

52. Article 1 F(b) should be seen in parallel with Article 33, which permits the return of a refugee if there are reasonable grounds for regarding him as a danger to the security of his country or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

53. The primary question in determinations under Article 1 F(b) is whether the criminal character of the refugee outweighs his/her need for international protection or character as a *bona fide* refugee. As stated in the *Handbook*, it is important to strike a judicious balance between the nature of the crime in question, and the likely persecution feared by the applicant. Thus, if the applicant has reason to fear severe persecution, a crime must be very serious in order to exclude the applicant.

(ii) Non-political Crime

54. For exclusion, the serious crime must also be non-political, which implies that other motives - such as personal reasons or gain - predominate. Increasingly, extradition treaties specify that certain crimes, notably acts of terrorism, are to be regarded as non-political for the purpose of applying extradition treaties, although such treaties typically also contain protective clauses in respect of refugees. For the purpose of the refugee definition, the nature of the crime should be assessed in each case, takin all factors into account[40].

55. For a crime to be regarded as political, the political ohjective must also - for purposes of this analysis - be consistent with human rights and fundamental freedoms. A political goal which breaches fundamental human rights cannot form a justification. The IRO Constitution specified that grounds for refugee protection were 'persecution, or fear ... of persecution because of race, religion, nationality or political opinions, *provided these opinions are not in conflict with the principles of the United Nations*, as laid down in the Preamble of the Charter of the United Nations.'[41] This is consistent with provisions of other human rights instruments specifying that their terms shall not be interpreted as implying the right to engage in activities aimed at the destruction of human rights and fundamental freedoms[42].

(iii) Expiation

56. Article 1 F b itself offers no guidance as to the role of expiation, whether through the sentence having been served for the commission of the crime; an amnesty; the lapse of time; or other rehabilitative measures. The *Handbook* specifies that:

40. *McMullen v. I.N.S.*, 788 F. 2d 591 (9th Cir. 1986).
41. Annexe 1, Section C (1) (a), IRO Constitution, 1946.
42. A test enunciated by a court in one case dealing with the question was as follows:
Under this standard, a 'serious non-political crime' is a crime that was not committed out of 'genuine political motives', was not directed toward the 'modification of the political organization or ... structure of the state', and in which there is no direct, 'causal link between the crime committed and its alleged political purpose and object'. In addition even if the preceding standards are met, a crime should be considered a serious non-political crime if the act is disproportionate to the objective, or if it is 'of an atrocious or barbarous nature'. *(McMullen v. I.N.S.*, op cit 44).

In evaluating the nature of the crime presumed to have been committed, all the relevant factors - including any mitigating circumstances - must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates[43].
The original UNHCR Eligibility Guide (1962) noted that UNHCR practice was to interpret this exclusion clause as applying chiefly to fugitives from justice, and not to those who had already served their sentences unless they were regarded as continuing to constitute a menace to a new community.

(iv) Outside the country of refuge

57. The exclusion clauses also require that the offence have been committed 'outside the country of refuge prior to his admission to that country as a refugee.' As the *Handbook* points out in paragraph 153, 'outside the country of refuge' would normally be the country of origin, although it also could be another country. However, it can never be the country where the applicant seeks recognition as a refugee. Refugees who commit serious crimes within the country of refuge are subject to that country's criminal law process, and to Articles 32 and 33(2) of the Convention in the case of particularly serious crimes; not to the exclusion clauses under Article 1 (F)[44].
58. In rare cases, domestic courts have interpreted Article 1F(b) of the 1951 Convention to mean that any serious non-political crime committed *before the formal recognition as a refugee* would lead automatically to the application of Article 1F(b). Under this interpretation, an applicant who committed a serious non-political crime *in the country of asylum*, but *before formal recognition as a refugee*, would be excluded. UNHCR does not endorse this interpretation of the exclusion clauses. It would not be correct to use the phrase 'prior to admission...as a refugee' to refer to the period in the country prior to *recognition* as a refugee, as the recognition of refugee status is declarative and not constitutive. 'Admission' may therefore include mere physical presence in the country.

VI ARTICLE 1 F (c): ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS

59. Article 1F(c) excludes from protection as refugees persons who have been 'guilty of acts contrary to the purposes and principles of the United Nations.' The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter[45]. The broad, ge-

43. para 157.
44. 'The Conference eventually agreed that crimes committed before entry were at issue ...', Goodwin-Gill, p. 102.
45. The purposes of the United Nations are: to maintain international peace and security; to develop friendly relations among nations; to achieve international co-operation in solving socio-economic and cultural problems, and in promoting respect for human rights; and to serve as a center for harmonizing the actions of nations.

neral term of the purposes and principles of the UN offer little guidance on the types of acts which would deprive a person of the benefits of refugee status[46]. Under the Universal Declaration of Human Rights, also, the right to seek and to enjoy in other countries asylum from persecution 'may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'

60. *The travaux préparatoires* reflect a lack of clarity in the formulation of this clause. It is suggested that, by their nature, these purposes and principles can only be violated by persons who have been in a position of power in their countries or in state-like organizations[47]. The *Handbook* also suggests in paragraph 163 that 'an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles.' The fact that the Charter of the United Nations addresses itself to States also suggests that references to 'acts contrary to purposes and principles' imply a State-like or quasi-State capacity. The delegate who, at the Conference of Plenipotentiaries, pressed for the inclusion of this clause likewise specified that it was not aimed at the 'man in the street.'

61. Implicit in the comments of some delegates is the notion that persecutors themselves should not become refugees, and this concept of refusing protection to persecutors has subsequently been echoed in some States' caselaw, both recently and in the more distant past. In the 1950s, a number of persons were excluded under this Article where their denunciations of individuals to the occupying authorities had had serious consequences, including death.

62. Commentators underline that even if non-State actors could be regarded as having committed acts contrary to the purposes and principles of the UN, there is a qualitative difference between the many and varied acts that could be so described. The acts in question must be criminal acts. It was suggested by the drafters that these were human rights violations short of crimes against humanity[48].

63. This particular exclusion clause is rarely used. The broad wording of Article 1F(c), the hesitation of the drafters and their assumption that this clause could be invoked only very rarely, strengthens the case for limiting the application of Article 1F C[49].

The principles of the United Nations are: sovereign equality; good faith fulfillment of obligations; peaceful settlement of disputes; refraining from the threat or use of force against the territorial integrity or political independence of another state; and assistance in promoting the work of the United Nations.

46. The wording of the Statute differs in referring to *prosecutions genuinely arising from non-political crimes or* from acts contrary to the purposes and principles of the United Nations.
47. Grahl-Madsen writes: 'It appears from the records that those who pressed for the inclusion of the clause had only vague ideas as to the meaning of the phrase 'acts contrary to the purposes and principles of the United Nations. (...)...it is easily understandable that the Social Committee of the Economic and Social Council expressed genuine concern, feeling that the provision was so vague as to be open to abuse. It seems that agreement was reached on the understanding that the phrase should be interpreted very restrictively.' *The Status of Refugees in International law*, Sijthoff, Leiden, 1972, p. 283.
48. The delegate of Pakistan, concurring with the representative of Canada, said the phrase was 'so vague as to be open to abuse by governments wishing to exclude refugees', (E/AC.7/SR160, p. 16, quoted in Eligibility Manual 1962 p. 143).
49. According to the (non-binding) 1994 *Declaration on Measures to Eliminate International Terrorism* (A/Res/49/60), 'Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations ...'.

VII OTHER CRIMES: DEVELOPING AREAS UNDER ARTICLE 1 F (a) AND (b)

64. Certain other acts are emerging as crimes under international law, and thus universally punishable. The Draft Articles on State Responsibility (ILC) establish a category of international crimes, in cases of 'a serious breach on a wide-spread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide or apartheid.' The ILC refers to a crime under international law as the breach of 'a norm of international law accepted and recognized by the international community of states as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals.' In its recent deliberations, while reiterating the need for 'a comprehensive legal instrument for the suppression of exceptionally serious crimes...in view of the increase in serious crimes against the peace and security of mankind perpetrated by individuals who very often acted with impunity,'[50]
deep disagreement persisted on which crimes should be defined as 'crimes against the peace and security of mankind,' in particular, in respect to international terrorism and drug trafficking which, it was suggested, should not he placed on the same level as 'large-scale violations of humanitarian norms such as those that had occurred in the former Yugoslavia or Rwanda.'[51]

65. Crimes of this nature may fall within the terms of 1 F, but *not every act under the broad headings below suffices for exclusion*: this will depend on all the circumstances. While the magnitude of certain acts and their inherently political nature clearly places them beyond the 'serious non-political crimes' described in Article 1 F(b) of the Convention, the very purpose of current legal developments is to criminalize certain acts - whether politically-driven or not. As regards Article 1 F (a), not all acts discussed under this heading constitute crimes against humanity. Pending further deliberations on international crimes, the specific crimes discussed here must be considered on a case by case basis, bearing in mind the background provided in this paper on the ambit of each of the exclusion clauses.

(i) Terrorism

66. There is, as yet, no internationally-accepted legal definition of terrorism. The final report of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind did not include a crime of 'terrorism'. During deliberations on the Draft Code in the Sixth Committee, general support was however expressed for the inclusion of acts of terrorism in the category of crimes against humanity[52]. While this has remained stymied by the lack of a legal definition, the focus has turned to the various prohibited acts broadly described as terrorism[53].

50. Report of the International Law Commission on the Work of its Forty-Seventh Session (1995), A/CN.4/472 of 16 February 1996, para 7.
51. Ibid., para 23.
52. Ibid., para 131.
53. One delegation noted that the international community has, instead, concluded individual conventions 'that identify specific categories of acts that the entire international community condemns, regardless of the motives of the perpetrators, and that require the parties to criminalize the specified conduct, prosecute or extradite the

67. The UN continues to devote considerable attention to the issue of terrorism[54]. In a recent report, the Secretary-General of the United Nations has noted that efforts to adopt international instruments addressing the problem of international terrorism have failed, whether under the auspices of the League of Nations or of the United Nations. However, there are currently thirteen global or regional treaties pertaining to international terrorism (although twelve are in force, many are far from universal in terms of ratification)[55]:

- 1963 *Convention on Offences and Certain Other Acts Committed on Board Aircraft*;
- 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft*;
- 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*;
- 1973 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*;
- 1979 *International Convention against the Taking of Hostages*; and
- 1979 *Convention on the Physical Protection of Nuclear Material*;
- 1988 *Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*;
- 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*;
- 1988 *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*;
- 1991 *Convention on the Marking of Plastic Explosives for the Purpose of Detection (not yet in force)*;
- 1977 *European Convention on the Suppression of Terrorism*;
- 1971 OAS *Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are Internationally Significant*;
- 1987 SAARC *Regional Convention on the Suppression of Terrorism*.

68. Those committing terrorist acts as defined within these instruments are, in principle, excludable from refugee status, although the basis for exclusion under Article 1 F will depend

transgressors and cooperate with other States for the effective implementation of these duties ... By focusing on specific types of action that are inherently unacceptable ..., the existing approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism.' Ibid., para 123.

54. See also the (nonbinding) *Declaration on Measures to Eliminate International Terrorism*, GA Res 49/60 of 9 December 1994, which declares that
'2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;
3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic or any other nature that may be invoked to justify them.'

55. The Report of the Secretary-General (*Measures to Eliminate International Terrorism*, A/51/336 of 6 September 1996) includes an analysis of each of these conventions, information received from Member States, and a bibliography on international terrorism.

on the act in question and all surrounding circumstances. As with the crimes enumerated under Art. 1 F (a) above, the personal and knowing involvement of the individual in acts of terrorism is required for exclusion.

(ii) Hijacking

69. Hijacking, covered by some of the conventions listed above, is considered an international crime. An act of hijacking does not automatically exclude the culprit from refugee status. It is evident that hijacking poses a grave threat to the life and safety of innocent passengers and crew; it is for this reason that there is so much opprobrium attached to acts of hijacking. Thus, the threshold for the proportionality test should be extremely high, and only the most compelling circumstances can justify non-exclusion for hijacking. Among issues for consideration are the following:

- whether the applicant's life was at stake for persecution-related reasons;
- whether the hijacking was a last and unavoidable recourse to flee from the danger at hand (i.e., whether there were other viable and less harmful means of escape from the country where persecution was feared);
- whether there was serious physical, psychological or emotional harm to other passengers or crew.

70. While hijacking is illegal under international law, there also is a well-established legal principle to protect refugees and not return them to places where they may face persecution. It has been argued that the methods of flight condemned under international law, in the absence of grave or lifethreatening action, do not preclude granting asylum to deserving individuals[56].

(iii) Torture

71. Torture deserves special mention as several recent recommendations for exclusion are based on acts of torture. The relevance of torture also lies in the fact that certain provisions of the *Convention against Torture* are directly related to issues of exclusion. In particular, the UN Committee against Torture, an international human rights treaty body established as a monitoring body under the *Convention against Torture*, reinforces the principle of *non-refoulement.*

72. The *Convention against Torture* defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person' for certain purposes 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.' Thus, to qualify as torture in the context of this Convention, an act must have been carried out with the involvement of a person acting in an official, rather than a private, capacity.

56. Arthur C. Helton, 'The Case of Zhan Zhenai: Reconciling the International Responsibilities of Punishing Air Hijacking and Protecting Refugees', 13 (4) *Loyola L.A. International & Comparative Law Journal* 849 (June 1991).

73. It is evident from the definition that acts of torture carried out on a systematic scale against an identifiable group of persons constitute crimes against humanity under Article 1 F(a). Under other circumstances, acts of torture could constitute serious non-political crimes under Article 1 F(b).
74. A considerable number of international conventions proscribe torture, and the prohibition against torture is now also considered to be part of customary international law. Torture is described as a crime against humanity in the Statutes of the International Criminal Tribunals for former Yugoslavia and for Rwanda, and in the draft Code of Offences of the ILC. The *Convention against Torture* considers it a criminal offence which cannot be justified by any exceptional circumstances whatsoever.

VIII DEFENCES TO EXCLUSIONS

75. In certain circumstances, there are valid defences to the crimes in question, notably where the criminal intent *(mens rea)* is absent. These defences relate to crimes committed under duress, or in self-defence, lack of knowledge of the nature of the actions, or lack of responsibility due to, for example, immaturity or mental or psychological handicap. Self-defence is another limited and selfexplanatory defence.

(i) Superior Orders

76. A commonly-invoked defence is that of 'superior orders' or coercion from higher governmental authorities. However, it is an established principle of law that the defence of superior orders does not absolve individuals of blame. According to the Nuremberg Principles, 'The fact an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility under international law, *provided a moral choice was in fact possible for him.*'[57]
77. Article 7(4) of the Stature of the International Criminal Tribunal for former Yugoslavia provides, 'the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility.'

(ii) Coercion/Duress

78. The defence of coercion was often linked with that of superior orders during the post-war trials. For a defence of coercion to be sustained, 'the perpetrator of the incriminating act must be able to show that he would have placed himself in grave, imminent and irremediable peril if he had offered any resistance.' In addition, the perpetrator must not have 'contributed to the emergence of this peril'[58]. Moreover, the harm caused by obeying the illegal order cannot be greater than the harm which would result from *disobeying* the order[59]. The-

57. Principle IV, Nuremberg Principles (emphasis added).
58. Article 9, Draft Code.
59. Weisman, op. cit. 22, p. 132.

re are, therefore, three stringent conditions which must be met for the defence of coercion or duress to have validity.

(iii) Necessity

79. In the case of crimes committed as a means of, or concomitant with, the process of flight for fear of persecution, the factors to be taken into account include: whether the means used were the most reasonable or logical, or there were alternative means of achieving the ultimate goal; whether the gravity of the offence was proportionate to the political goal; and whether there was a close and direct link between the offence and its alleged political objective.

(iv) Lack of awareness of criminal nature of act

80. Where an individual is totally unaware of the criminal nature or consequences of the acts in question, or of links to such acts, this defence may be raised.

IX TEMPORAL ASPECT OF EXCLUSION

81. Whereas Article 1 F B specifies that the crime in question is one committed *prior* to admission, the other exclusion clauses contain no temporal references. In general, the exclusion clauses are applicable to acts committed prior to entry: the Convention makes provision for the handling of crimes committed by the refugee following admission[60]. A refugee committing a crime in the country of refuge is subject to due process of law in that country. Therefore, in the event that a recognized refugee were to commit such crimes, the principle generally applicable is that of the obligation of the host country to bring to trial, or to extradite the individual, subject to the *non-refoulement* principle.

82. Facts which would have justified exclusion may, however, become known only subsequently. The Handbook indicates that

60. The issue of acts committed by the refugee in the host country is extensively discussed in Grahl-Madsen, pp. 148-178, including acts of violence, military activities, and propaganda. The author discusses the responsibility of the host State under international law, noting in particular that
'Just as a State does not incur international responsibility by receiving refugees in its territory and granting them asylum, it will be no more responsible for injurious acts committed by refugees than it is for acts committed by anyone else in its territory. A state is not obliged to be more suspicious of the average refugee (as a potential author of acts injurious to other States or their nationals) than of other persons, and it has consequently no duty to keep refugees under constant surveillance in order to forestall any mischief on their part. Only in the case of refugees with known terroristic or revolutionary leaning the authorities of the host country may have to be more on the alert' p. 184. 'In cases where the host State, by the willful co-operation or culpable negligence on the part of its organs, becomes internationally responsible for acts committed by refugees, it may not be demanded of it that it ends the asylum by expelling the refugees or by extraditing them to the offended State. Its duty is simply to provide redress by the normal means, applicable in cases of international responsibility, notably the payment of damages and/or the punishment of the guilty individuals.' p. 187.

Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken[61].

X OTHER PROTECTIONS

83. A person falling under the exclusion clauses is nevertheless entitled to basic human rights. While as a rule States enjoy almost complete freedom to expel aliens from their territory, there are a number of restrictions to this. Among the restrictions applicable to the expulsion of persons other than recognized refugees are the following:

- Article 3 (1) of the UN *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* provides that 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[62];
- Article 22(8) of the *American Convention on Human Rights* provides that in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions;
- According to the established case-law of the European Commission and Court of Human Rights, the expulsion or extradition of a person to a country where he risks to be subjected to torture or to inhuman or degrading treatment or punishment violates Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*;
- The return of a person to face a death penalty may be prohibited under applicable international human rights law, as may return to a serious danger of inhuman or degrading treatment or punishment or execution;
- The European Court of Human Rights has also held that the expulsion of an alien may involve a breach of Article 8 of the European Convention, converning the right to private and family life;
- Several international instruments embody the principle that no alien who is lawfully present in the territory of a State (or, as the case may be, no alien coming under the specific category covered by the instrument) may be expelled therefrom except in pur-

61. Para 141.
62. On the first occasion on which the Committee against Torture considered the case of an asylum-seeker under the *Convention against Torture*, authorities were obliged to refrain from removing a rejected asylum-seeker to his country of origin or to any other country where the asylum-seeker run the risk of being expelled or returned to the country of origin or of being subjected to torture (*Balabou Mutombo v. Switzerland* (Communication No. 13/1993 of 27 April 1994), reprinted in *International Journal of Refugee Law* 322 (1995). In another recent case, the Committee found an obligation to refrain from forcibly returning the applicant to his country. (*Tahir Hussain Khan v. Canada* (Communication No. 15/1994 of 18 November 1994).

suance of a decision reached in accordance with the law[63]. Some of these instruments provide that the expulsion of such an alien may not be made except on grounds of national security or public order.

- Various international instruments enshrine the pinciple that the collective expulsion of aliens is prohibited. In addition, the principle that an expulsion must be carried out in a manner least injurious to tbe person affected was well established by the beginning of the century[64].

84. Execution of a decision to return a refugee claimant (including pursuant to an extradition order) should be suspended until a final decision on refugee status is made. The applicant should always benefit from the principle of *non-refoulement* in the interim, because the refugee status determination is declarative, not constitutive. Only a negative decision after examination of the individual's application may remove the applicant from the benefits of refugee status.

(i) Extradition

85. UNHCR Executive Committee Conclusion No. 17 (XXXI) recognises that cases in wbich the extradition of a refugee is requested may give rise to special problems, noting that 'refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution ... '[65]. States are called on to take account of the principle of *non-refoulement* treaties relating to extradition and in their national legislation. In situations where prosecution is likely to be politically manipulated, the 'refugee claim should not be dismissed as raising a simple issue of 'fear of prosecution or punishment', but should instead be examined on its merits.'[66] This does not prejudice the need for States to ensure that such individuals are tried and punished for serious crimes.

86. In certain circumstances, the country of asylum should be encouraged to try the asylum-seeker for the alleged crime. For example, the *Convention against Torture* allows for universal jurisdiction over perpetrators of torture, making it an obligation for state members to try offenders who are present on their territory. Another ground for jurisdiction is provided by Security Council Resolution 978 (1995), which urges states to arrest and detain and, where appropriate, prosecute persons found within their territory against whom there is sufficient evidence that they were responsible for genocide and other grave human rights violations (in this case, in Rwanda).

63. International Covenant on Civil and Political Rights Art. 13; Protocol No. 7 to the European Convention on Human Rights, Art. 1(1); American Convention on Human Rights Art 22(6); African Charter on Human and People's Rights Art. 12(4); 1954 Convention relating to the Status of Stateless Persons Art. 31.
64. Borchard, Edwin M., *The Diplomatic Protection of Citizens Abroad*, The Banks Law Publishing Co., New York, 1919. p. 60.
65. *Problems of Extradition Affecting Refugees*, EXCOM Conclusion No. 17 (XXXI)(1980).
66. James Hathaway, *The Law of Refugee Status* 172 (1991).

THE NEED FOR SUPPORT OF JUDGES IN CENTRAL AND EASTERN EUROPE

I am most grateful for having this opportunity to address you on the question of support of judges in Central and Eastern European countries. The issue is, indeed, becoming increasingly important as these countries are gradually becoming parties to the 1951 Refugee Convention and countries of final destination for asylum-seekers, rather than merely transit countries. Moreover, in a number of Central and Eastern European countries judges have already become or are gradually becoming involved in various manners with cases of asylum-seekers, and refugees.

As you are aware, the countries of Central and Eastern Europe have only in recent years begun adhering to the 1951 Convention and its 1967 Protocol. Gradually, they are also implementing the international refugee instruments, through the adoption of implementing legislation and decrees.

Of course, judges are not involved in the process of determination eligibility for asylum and refugee status in all the Central and Eastern European countries. However, even in countries where judges have not been given a specific role in the asylum procedure, they may be dealing with asylum cases. This is for example the case in countries where any administrative decision, including a decision on an asylum case, can be appealed to the courts. It could also be the case when judges are deciding on cases of expulsion of aliens.

The point I would like to make is that not only judges directly involved in eligibility determination should be the target group for training and other forms of support with regard to asylum cases, but also other judges who may in one or the other way be involved in such cases. Even judges who are not involved with such cases could usefully be targeted by such activities. Indeed, there are some countries where it is widely believed that there should be an involvement of judges in asylum cases and that the judges themselves, if properly informed about the issues at stake, may wish to promote such involvement.

What are then the needs for support for judges in Central and Eastern Europe and how could Western European judges contribute to providing such support?

Of course, the needs differ from country to country. Training as regards refugee law and handling of asylum cases is, however, a need which exists in almost all the countries of the region. The participation of judges from countries which have long experience in the area is very useful and has been appreciated by Central and Eastern European judges. We have seen that the practical tips based on their experience which for example Western European judges can provide, have been much appreciated by Central and Eastern European countries. The mere fact that the training is conducted by colleagues with similar educational background and professional experience is also of importance. Moreover, judges from Western Europe, for example, may be considered less "biased" by their Central and Eastern European colleagues than, for example, UNHCR or NGO's.

What would appear to be particularly interesting for the Central and Eastern European judges is participating in study trips, of some duration, allowing them to work with their collea-

gues on concrete cases. Even judges who are not presently involved in asylum cases may benefit from contacts with colleagues for example from Western Europe, who could make them understand the important role which the judiciary can play in this regard.

Another important need is translation of basic international law texts and foreign jurisprudence. At present, many such texts can only be read by the few who master foreign languages. In this situation, there is an urgent need for language training. Knowledge of foreign languages, and in particular English and French, would also facilitate the participation by judges in seminars and conferences, such as this one, and make contacts with foreign colleagues more useful.

Computer training is another essential need, including the use of Internet and CD-ROM. Of course, computer training is only useful if the necessary hardware and software is available, which is not the case in many Central and Eastern European countries. The judges in those countries may also lack other essential hardware such as fax machines, photocopiers etc..

In conclusion, there are considerable needs which need to be covered before judges in Central and Eastern Europe will be able to deal efficiently and effectively with asylum cases. These needs would have to be covered urgently. It would be most regrettable, if in countries where the asylum procedure has started to function properly at the first instance level, because of blockage at the level of the judiciary due to lack of support required, the end result would be an inefficient procedure. It would be even more serious if the judiciary, due to lack of support, would be unable to correct the errors of a mal-functioning first instance.

Clearly, only part of the support required can be provided by the judiciary of other countries. The remainder would have to come from other sources. To this effect, UNHCR has been trying to convince donors of the need for judges support. We have for example recently drawn the attention of the European Union to the need to provide funds for supporting judges in Central and Eastern Europe. We are considering preparing submissions to the so-called PHARE and TACIS Democracy Programmes to this effect. We were hoping that we could count on your co-operation in this regard and more generally for providing support to the judiciary of Central and Eastern European countries called upon to deal with asylum and refugee cases. The International Association of Refugee Law Judges may be a good framework for providing such support. It could for example as an NGO serve to submit projects to the European Union PHARE and TACIS Democracy Programme. It could also be a forum where we could together work out concepts of training of judges in Central and Eastern Europe. In order to ensure a harmonised approach, one could perhaps also imagine constituting a roster of judges members of the Association which would be willing to participate in activities in Central and Eastern Europe.

Finally, the planning of the activities requiring participation of judges from outside the Central and Eastern European region could be co-ordinated in the framework of the Association so as to ensure availability of participants well in advance.

Exclusion Clauses

Applying the Exclusion Clauses: An Overview of Canadian Jurisprudence[1]

Mr Philip Palmer*

Incorporated into the definition of Convention refugee in Canada's *Immigration Act* is the proviso that a person is not included in the definition if he falls under Article 1F of the 1951 Convention For the Status of Refugees. The Immigration and Refugee Board (the Board), charged with refugee determination in Canada and also the country's largest administrative tribunal, has been responsible for many innovative decisions dealing with the Article 1F exclusion clause. In interpreting Article 1F the Board has applied conventional and customary international law in the context of modern day crimes, committed not only during times of internal or international armed conflict but also during times of peace. In considering whether individuals are deserving of Canada's protection as a result of a well-founded fear of persecution, the Board has been faced on many occasions with those individuals undeserving of protection as a result of the commission of either an international crime or a common crime, and has denied these individuals Convention refugee status. As a result of the Board's adjudication of these matters it has developed a large body of jurisprudence in this area and has thus played a major role in the ongoing development of international humanitarian law.

The Board has on many occasions been required to determine whether certain acts committed by a refugee claimant constitute crimes against humanity under Article 1F(a), whether committed in times of war or in times of peace. The Board has also been required to determine whether an individual, who has not in a 'physical sense' committed an atrocity, may nonetheless be complicit in crimes against humanity because of his membership in a group whose members have committed atrocities.

The initial challenge facing the Board when presented with a claimant who may have been involved in the commission of crimes is distinguishing between crimes against humanity on the one hand and ordinary common crimes. One of the first of these cases involved a claimant from Sri Lanka who had risen through the ranks of the LTTE (a revolutionary group fighting for an independent homeland, responsible for numerous atrocities involving civilian deaths). The Board found that the atrocities committed by the LTTE amounted to crimes against humanity. In upholding the Board's decision, the Federal Court of Appeal, after reviewing international jurisprudence and instruments, including the definition of crimes

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against humanity contained in the Charter of the International Military Tribunal, determined that for crimes to be categorized as crimes against humanity, they must have been committed in a 'widespread, systematic fashion'[2]. This case was important for two reasons. First, it set the stage for the Board to consider the commission of crimes against humanity in the context of a civil war, as opposed to an international armed conflict. Second, it allowed the Board to consider perpetrators who had committed atrocities us individuals without any connection to the state[3].

A few years later the Board had the opportunity to consider another innovative aspect of the definition of crimes against humanity, namely the commission of such crimes during times of peace. The case involved a claimant from China who had been employed as a birth control officer in furtherance of the one-child policy. In this capacity he went on several missions seeking out women violators of the one-child policy, tying them up and forcibly taking them to the hospital where they were forcibly aborted and then sterilized. He was aware of all the methods used to enforce this policy, including forcible abortion on women in advanced stages of pregnancy and the injecting of fetus' born alive. The Board was faced with determining whether forcible abortion and sterilization and the killing of live births are crimes against humanity. After reviewing various international instruments, the Board concluded that 'the victimizers of those forcibly sterilized or aborted are violators of human rights'[4], and as such have committed crimes against humanity. As a result the claimant was excluded from the definition of Convention refugee.

Many of the cases dealing with the Article 1F(a) exclusion clause have required the Board to determine the culpability of a claimant in atrocities committed by others in a group to which the claimant was associated. One of the first cases before the Board on this issue involved a claimant from El Salvador who had voluntarily enlisted in the Salvadoran Army during the time of the civil war and was promoted to the rank of sergeant. He admitted to being present at many instances of torture and killings of civilians although he was never personally responsible for any of these atrocities. The Board had to determine whether the claimant, who never personally committed an atrocity, could be found an accomplice to the crimes against humanity committed by his fellow soldiers. The Federal Court of Appeal[5] upheld the exclusion of the claimant and found that he in fact was complicit in crimes against humanity since he had knowledge of the atrocities, yet rather than leave at the first available opportunity, he made the decision to remain in the Army. As such he 'shared in the common purpose' of an army where torture of civilians had been described as a 'military way of life'.

Since this landmark decision, there have been numerous decisions of the Board, upheld by the Federal Court[6], that have determined that mere membership in an organization known

2. *Sivakumar* v. *M.E.I.*, [1994] 1 F.C. 433 (C.A.) at 443.
3. Ibid., p. 444.
4. U93-04493, Goldman, Wakim, February 1995. Leave to Federal Court denied May 3, 1995.
5. *Ramirez* v. *M.E.I.*, [1992] 2 F.C. 306 (C.A.).
6. *Saridag, Ahmet* v. *M.E.I.* (F.C.T.D., no. IMM-5691-93), McKeown, October 5, 1994.

to commit atrocities does not automatically result in a finding of complicity. The Board must still have evidence that the claimant had knowledge of the atrocities being committed. In instances where the claimant admitted membership in such an organization but denied having knowledge of its crimes, the Board has on many occasions inferred knowledge on the part of the claimant based on the notoriety of the atrocities and the length of time the claimant spent in the organization.

The following are examples of claimants who were determined to be complicit in crimes against humanity and therefore excluded from Convention refugee status even though they personally never committed any atrocities. A claimant from Uruguay[7] who, while in the military, transported tortured political prisoners and admitted to being physically present when detainees were beaten, was found complicit in crimes against humanity and therefore excluded. Another claimant[8] was excluded because for five months he taught 'Kung Fu' to Iranian secret police (Sahana) agents, an organization which the Board found existed primarily for brutal purposes. Similarly, a claimant[9] who acted as a driver and body guard for a local police chief in the Afghani secret police (Khad) was found complicit in crimes against humanity as he had knowledge of the atrocities committed by that organization.

Other claimants who have been found complicit in the crimes against humanity committed by others in their group, and have therefore been excluded, even though they never personally committed any of the atrocities themselves, have included a sergeant in the National Police Force in Ghana[10], a member of the Revolutionary Guard in Iran who acted as an intelligence officer in a prison for political prisoners[11], an Iranian policeman who, prior to 1979, acted as a liaison officer to Savak[12], a director of a prison in Afghanistan where torture of prisoners took place[13], and a member of the Uruguayan military who reported the names of leftists to his superiors which led to their mistreatment[14]. In all of the above-mentioned cases the Board excluded the claimant not only because of his membership in an organization known for the commission of atrocities but also because the claimant either admitted to knowledge of the atrocities or the Board inferred that given the claimant's rank or length of time in the organization, the claimant must have been aware of the crimes. In each of these examples, the Federal Court upheld the decision of the Board to exclude.

Under Article 1 F(b) of the 1951 Convention, the claimant may be excluded if he has committed a 'serious non-political crime outside the country of refuge'. In Canadian law the

7. *Gutierrez* v. *M.E.I.* (1994), 30 Imm.L.R. (2d) 106 (F.C.T.D.).
8. *Nejad, Saeed Javidani-Tabriz* v. *M.C.I.* (F.C.T.D., no. IMM-4624-93), Richard, November 16, 1994.
9. *Zadeh, Hamid Abass* v. *M.C.I.* (F.C.T.D., no. IMM-3077-94), Wetston, January 21, 1995.
10. *Sulemana, Halilu* v. *M.C.I.* (F.C.T.D., no. IMM-3355-94), Muldoon, March 17, 1995.
11. *Torkchin, Shahram* v. *M.E.I.* (F.C.A., no. A-159-92), Hugessen, Strayer, Robertson, January 24, 1995.
12. *M.C.I.* v. *Bazargan, Mohammad Hassan* (F.C.A., no. A-400-95), Marceau, Décary, Chevalier, September 18, 1996. The Court determined that one need not be a formal member of a group in order to be an accomplice to its acts. An individual is complicit if he contributes, directly or indirectly, to an organization and has knowledge of the crimes committed.
13. *Mohammad, Zahir* v. *M.C.I.* (F.C.T.D., no. IMM-4227-94), Nadon, October 25, 1995.
14. *Alza, Julian Ulises* v. *M.C.I.* (F.C.T.D., no. IMM-3657-94), Mackay, March 26, 1996.

term 'country of refuge' has been interpreted as meaning the country in which the claimant has sought Convention refugee status, namely Canada[15]. The most challenging aspect of this exclusion clause, however, has been in determining whether a common crime committed with political motives outside Canada deserves the term 'political' crime, thus shielding the claimant from exclusion.

This very question was presented to the Board in the following case. The claimant, a citizen of Iran, had joined an underground, militant anti-Khomeni group. He and other group members were involved in numerous bombing incidents whereby bombs were placed in crowded market places where businessmen from the local revolutionary committees had their shops. These bombs resulted in numerous injuries and deaths of innocent bystanders. The Board asked itself the following question: could the claimant's actions be considered 'non-political' crimes even though the claimant had a 'political' motive for the commission of these crimes? The Board determined that the crimes were 'non-political' and excluded the claimant under Article 1F(b). The decision was upheld by the Federal Court of Appeal[16] after the Court did an extensive review of foreign jurisprudence dealing with the law of extradition. Even though the claimant had a political motive, the crimes were considered 'non-political' (therefore subject to exclusion because there was no rational connection between injuring the commercial interests of wealthy Khomeni supporters and a realistic goal of forcing the regime to change[17]. The Court also looked at the means employed and found that the attacks were not against armed adversaries but rather innocent civilians; thus the violence was wholly disproportionate to a legitimate political objective[18].

The Court also considered the nature of the regime and found that if a regime is a liberal democracy with constitutional guarantees of free speech and expression, it would be very difficult to consider a serious crime as an acceptable method of political action as there exists the possibility of a peaceful change of government or government policy[19]. However, the Court was quick to point out that the killing of innocent civilians is 'unacceptable as a form of political protest against any regime, no matter how repressive, totalitarian or dictatorial'[20]. This is in keeping with the view of a noted Canadian author on extradition law that acts of terrorism are not likely to be characterized as 'political' crimes, despite the perpetrator's political motives, because the victims are not related to the central state authorities[21].

Under Article 1F(c) the Board has been at the forefront in defining what is an 'act contrary to the purposes and principles of the United Nations'. In effect the Board, upheld by tbe Federal Court, has extended the reach of this exclusion clause to include claimants who have committed certain serious crimes within Canada, specifically drug trafficking.

15. *Malouf* v. *M.E.I.*, [1995] 1 F.C. 537 (T.D.) at 553.
16. *Gil* v. *M.E.I.*, [1995] 1 F.C. 508 (C.A.).
17. Ibid., at p. 533.
18. Ibid., at p. 534.
19. Ibid., at p. 535.
20. Ibid., at p. 535.
21. La Forest, Anne Warner, *Extradition to and from Canada*, Third Edition, (Toronto: Canada Law Book Limited, 1991), p. 94.

One of the first cases in which this issue first presented itself to the Board dealt with a claimant who had been convicted in Canada of conspiracy to traffic in a narcotic, namely heroin, with a street value of ten million dollars. The claimant was sentenced to an eight-year term of imprisonment. In considering whether the claimant had committed an 'act contrary to the purposes and principles of the United Nations' and therefore subject to being excluded from the Convention refugee definition, the Board considered Article 1, section 3 of the United Nations Charter which indicates that one of the 'purposes' of the United Nations is '... to achieve international problems of an economic, social, cultural or humanitarian character....'. By putting forth the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Board reasoned, the United Nations had identified drug trafficking as an 'international problem'. Thus, drug trafficking, the Board concluded, even within the confines of a state, falls within Article 1F(c)[22].

This novel approach to the interpretation of Article 1F(c), upheld by the Appellate division of the Federal Court of Canada[23], has significant implications not only for claimants coming before the Board, but also in the continuing development of international humanitarian law. While the UNHCR Handbook suggests that Article 1F(c) applies only to those individuals acting in positions of power in a state[24], the Federal Court of Appeal rejected this observation. In referring to the exact wording of Article 1F(c), the Court noted that 'on its face this provision clearly applies to individuals and is in no way qualified by expressions as 'in authority' or 'acting on behalf of the state'.'[25]

With these principles in mind, the Board has excluded a number of claimants[26] under Article 1F(c) as a result of their convictions in Canada of trafficking in large amounts of heroin. What is as yet unsettled in Canadian law is whether all claimants who have committed a drug trafficking offence in Canada, no matter how minor the offence, would be subject to exclusion under Article 1F(c). The Federal Court noted that there may be minor offenders who would not fall under the exclusion clause[27], yet did not elaborate further as to what level of drug trafficking would be categorized as a minor offence so as not to invoke the exclusion clause. It could be argued that since Article 1F(a) deals with the gravest crimes in international law, and Article 1F(b), by definition, applies only to 'serious' common crimes, caution should be exercized when considering the application of Article 1F(c) for claimants who have committed minor drug trafficking offences in the country of refuge.

22. U92-04760, Hanson, Beale, January 25, 1993. Upheld by Federal Court Trial Division and Court of Appeal in *Pushpanathan* v. *M.C.I.*, [1996] 2 F.C. 49 (C.A.).
23. Ibid. Leave to Appeal to Supreme Court of Canada granted on question whether Court of Appeal erred in interpreting Article 1F(c) to exclude from refugee status an individual guilty of trafficking in heroin in Canada.
24. Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, January 1988, paragraph 163.
25. *Supra*, footnote 21, at p. 66.
26. See *Thamotharampillai* v. *M.E.I.*, [1994] 3 F.C. 99 (T.D.); *Safi* v. *M.C.I.* (1994), 26 Imm.L.R. (2d) 160 (F.C.T.D.); *Kabirian, Farhad Sayed* v. *S.G.C.* (F.C.T.D., no. IMM-82-94), McGillis, January 27, 1995, *Atef* v. *M.C.I.*, [1995] 3 F.C. 86 (T.D.).
27. *Supra*, footnote 21, at p. 70.

Clearly, Canada's refugee, determination system has chosen not to limit the application of Article 1F(c) to only those individuals who have acted on behalf of their state or who have shown a flagrant disregard of human rights[28], the more conventional approach. Grahl-Madsen, in considering the Travaux Préparatoires, cautioned that Article 1F(c) was so vague as to be open to abuse and therefore was to be interpreted restrictively[29]. It may be argued however, that the Board's consideration of conventional international law, namely those conventions dealing with the illicit traffic in narcotics to interpret the purposes and principles of the United Nations, has recognized the need to consider current international challenges in the development of international humanitarian law.

Another significant issue concerning all three paragraphs of Article 1F that the Board has dealt with is whether there is a need to balance the seriousness of the Article 1F crime committed with the persecution feared by the claimant. The UNHCR Handbook calls for the weighing of these factors only under Article 1F(b), the rationale being that if a person has a well-founded fear of very serious persecution, he will only be subject to exclusion if the crime committed was very serious[30]. The Federal Court of Appeal, however, has affirmed in a number of landmark decisions that since the exclusion clauses are integral to the definition of Convention refugee, if Article 1F is applicable the claimant is not entitled to obtain the status of Convention refugee[31]. Thus, in Canada, if a claimant falls within Article 1F(a), (b) or (c), he will be excluded from the Convention refugee definition irrespective of a well-founded fear of persecution.

It is evident that Article 1F of the 1951 Convention Relating to the Status of Refugees has presented many challenges to the Immigration and Refugee Board. As a signatory to the Convention Canada's refugee determination system is mandated to consider not only its own jurisprudence but also international instruments and jurisprudence when interpreting the exclusion clauses. By the same token, the Immigration and Refugee Board has been at the forefront in applying existing international laws and customs to modern day problems and conflicts. In this capacity the Board has contributed significantly to the progressive development of international law applicable to those individuals undeserving of international protection.

28. Grahl-Madsen, Atle, *The Status of Refugees in International Law*, Vol. 1 (Leyden; A.W. Sijthoff, 1966), at p. 286.
29. Ibid., at 283.
30. *Supra*, footnote 23, at paragraphs 156, 157. See also Hathaway, James C., *The Law of Refugee Status*, (Toronto: Butterworths, 1991), at pp. 156-157 and Goodwin-Gill, Guy S., *The Refugee in International Law*, (Oxford: Clarendon Press, 1983), at p. 61.
31. *Gonzalez* v. *M.E.I.*, [1994] 3 F.C. 646 (C.A.); *Malouf* v. *M.C.I.*, [1995] 1 F.C. 537 (T.D.); *Gil* v. *M.E.I.*, [1995] 1 F.C. 508 (C.A.).

Persecution by Non Public Agents

Frédéric Tiberghien*

Article 1er, A,2 of the Geneva Convention demands a well founded fear of persecution, without giving a definition of the word 'persecution'. Despite that silence but according to a shared view, a persecution involves an agent of persecution, commonly a public authority.

But is there a strict bilateral relationship between a persecution by a public agent or authority and the refugee definition? If not, are there some limits to the notion of agent of persecution and which ones?

To answer to these questions, it is necessary to take into account:
- the Geneva Convention and the rules governing the interpretation of international 'treaties;
- the UNHCR Handbook and the UNHCR doctrine;
- the jurisprudence of various countries.

1 *The definition of the refugee puts forward, as its main element, the absence of protection from the State of origin: 'the term 'refugee' shall apply to any person who owing to well-founded fear of being persecuted ... is unable or ... unwilling to avail himself of the protection of that country'.*

But nothing in that definition restricts the persecution to public authorities. The consultation of the travaux préparatoires to the Geneva Convention does not allow us to conclude that the authors of the convention intended to define the persecution as emanating from public authorities. On the contrary, the authors of the convention favoured a comprehensive interpretation of the term 'refugee'.

The rules governing the interpretation of the treaties (art. 31 of the Vienna Convention) foresee that a treaty is to be interpreted according to the current meaning of the terms in their context and in the light of the aim or of the purpose of the treaty. The Geneva Convention is entirely dedicated to extend the protection of the refugees.

Should the persecution be inflicted by public authorities or not, a person who cannot avail himself of the protection of his country of origin is a refugee. The meaning of persecution and the aim of the treaty command that persecution is not limited to public authorities. The wording of article 1er, A,2 ('is unable or is unwilling to avail... of the protection of that country') implies very clearly that the mere impossibility of availing from the protection of

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the country of origin (for example because of persecutions by non public agents) is sufficient to define the refugee.
This is the clear UNHCR position (UNHCR - An overview of protection issues in Western Europe; Legislative trends and positions taken by UNHCR, vol 1, n 3, September 1995, p. 27-30).

'The ordinary meaning of the persecution as explained above is that it embraces all persecutory acts irrespective of whether or not the complicity of the State is involved'
(Agents of persecution, Note of the UNHCR, March 1995 p. 2, n 7).

'... the restrictive interpretation according to which individuals fleeing from threat of persecution by non-State agents should be excluded from refugee status, would be clearly contrary to the object and purpose of the 1951 Convention. ... Hence, the position of UNHCR ... that exclusion from refugee status of persons fleeing persecution by non-government agents, who have no link with the State or 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 accountable for the violation of his/her fundamental human rights by a non-governmental actor'.

This position has been restated in other recent documents on the same matter; UNHCR Position paper with regard to persecution by non-State agents, The Hague, 30th January 1996.

The international doctrine generally shares the UNHCR views (Atle Grahl-Madsen, The status of refugees in international law, Leyden, 1996, p. 29; Douglas Gross, The right of asylum under United States Law, 1980, 80 Columbia Review 1125, p. 1139 and 1140; Job van der Veen, Does persecution by fellow-citizens in certain regions of a State fall within the definition of 'persecution' in the Convention relating to the Status of Refugees of 1951? Some comments based on Dutch judicial decisions (1980), 11 Netherlands Y.B. Intl. L. 167, p. 172; Geoffrey S. Gilbert, 'Right of asylum: A change of direction', International Comparative Law Quarterly (1983), vol 32: 633, p. 645; J. Hathaway, The Law of Refugee Status, Toronto, Butterworths, 1991, p. 127; 'The 1951 Convention definition of refugee: an appraisal with particular reference to the case of Sri Lankan Tamil Applicants' (1987), vol. 9 Human Rights Quarterly 49, p. 67; Gary Evans, Agent of persecution: a question of protection refugee law, research unit Osgoode Hall Law School York University, Gary Evans Principal researcher, 1991, the centre for research on public law and public policy co-publisher, p. 10).

The UNHCR guide (n 65) indicates that normally persecution is an action of the authorities of a country. But that action can also be the act of groups which do not behave according to the laws of the country. If these serious acts are perpetrated by the population, they can be assimilated to a persecution if they are tolerated by the authorities or if the authorities are unable to protect efficiently their citizens.
Most of the countries which have ratified the Geneva Convention have adopted an interpretation of the Geneva Convention, more or less comprehensive, along these guidelines.

2 *Normally, a persecution is an act of the authorities.*

But who are the public authorities? And who can be considered as a public authority? The list is not limited but according to the French jurisprudence, public authorities mean:

- the ruling government (CRR, Pritsch, 02-03-1956, req. 1.389; CRR, Gueron, 26-06-1956, req. 986);
- the public or administrative authorities (CRR, Yarhi, 25-07-1956, req. 1093; CRR, Joubi, 23-01-1986, req. 30763; CRR, Zaoude, 01-02-1997, req. 8.637);
- the military authorities (CRR, Mlle Lambert, 25-09-1986, req. 43.599);
- the police and the 'death squadrons' (CRR, Ranjan Kumararíri, 27-01-1994, req. 251493; CRR, Mostefai, 22-05-1995, req. 270763 for the security police in Algeria);
- the legal authorities (CRR, Faissal, 12 décembre 1987, req. 43.193 for a Druze fearing a Druze militia in Lehanon);
- the health authorities in public hospitals which accept to perform excisions (Mlle X, 18-09-1991, req. 164.078);
- the Bulgarian Embassy in a foreign country which exerts pressures on the local government to imprison a Bulgarian (CRR, Mlle Araoujo, 14-03-1989, req. 85-599).

And a claimant has always to indicate the State he thinks responsible for his persecutions: if he does not mention any State, his claim is rejected (CRR, Hamda, 17-10-1994, req. 268095 for a Palestinian born in Naplouze).

On the contrary, cannot be considered as inflicted by public authorities persecutions inflicted by:

- a group of criminals (CRR, Brown, 25-04-1978, req. 9.427; CRR, Shanmugalingam, 21-10-1986, req. 35.003; CRR, Joumenko, 24-06-1993, req. 243.936 for the 'caucasian mafia');
- a militia, which is not controlled by the public authorities (CRR, Semaan, 28-10-1986, req. 33.464 for the lebanese phalange; CRR, El Kazzi, 27-10-1987, req. 58.645; CRR, Faissal, 14-12-1987, req. 43.193);
- members of the governmental party against a member of a political party belonging to the opposition (CRR, Parekh, 06-01-1986, req. 38.053);
- members of an opposing party (CRR, Abdennadhar, 20-11-1990, req. 127.452);
- the heads of a political party against a member of tbat party after an internal dissent (CRR, Tissera, 05-01-1987, req. 27.507);
- the secret police in a foreign country (CRR, El Merheby, 10-03-1989, req. 62.798);
- foreigners in the country of origin (CRR, Sow Harouna, 19-11-1990, req. 130.788) or in the welcoming country (CRR, Haidar Moussa, 08-01-1991, req. 76024);
- separatists (CRR, Rajeswaran Sivanaiah, 19-12-1990, req. 142-557 for fears from the 'Tigers' in Sri Lanka; Ragula Anthonopillai, 03-10-1991, req.172-950 for the LTTE);
- fanatics (CRR, Godian, 01-03-1984, req.23.030) or nationalists (CRR, Tiltins, 27-05-1993, req. 240002);
- guerillas (CRR, Sanchez, 17-01-1991, req. 97.573 for the 'Shining Path') or terrorist groups (CRR, Mora Silva, 27-11-1990, req. 94.101; CRR, Mme Ontanilla, 07-01-1991 for the GAL in Spain).

Considering the above list, there is a clear cut distinction between agents who share part of the power exercised by the legal authorities in a country and groups or people who do not

hold any legal power towards the nationals of the country. The former are public authorities, the latter are private groups or individuals whose behaviours, as serious as they are, are not persecutions but ordinary crimes or illegal acts, which are penalized or indemnified according to the law.

3 *Theoretically, a claimant can only fear persecution by the legal authorities of his country of origin and in his own country. But the reality is more complex and a citizen can fear persecution by diverse authorities.*

3.1 The claimant can fear persecution by authorities of the country of residence if the claimant has no nationality (Article 1er, A, 2 of the Geneva Convention foresees that situation) or if the country of origin does not ensure the protection of his nationals (CRR, Mme Ramos Furtado 07-06-1988, req. 23.965).

3.2 The claimant can fear persecution inflicted by public authorities of his country of origin outside that country. For example, the French Conseil d'Etat has recognized the refugee status to Basques who had been hurt in France by groups related to the Spanish authorities (Conseil d'Etat, Urtiaga Martinez, 04-12-1987, req. 61.376 and three similar decisions of the same day; AJDA 1988 p. 154; Documentation Réfugiés n 67, p. 1).

Similarly, a Christian Syrian, belonging to the Christian Phalanges in Lebanon, has been considered as a refugee because he was threatened by the Syrian military authorities in Lebanon (CRR, Atiah, 15-09-1988, req. 67.920; CRR, Nassar, 05-01-1989, req. 70.558; see also CRR, Amine El Rami, 10-05-1994, req. 250-358).

3.3 The claimant can fear persecutions inflicted by the authorities of a foreign country which has invaded his own country or his country of residence. For example, a jewish Iranian living in Lebanon and member of the PLO has been granted the refugee status because of the persecutions inflicted by the Hezbollah, of Iranian obedience (CRR, Beida, 09-05-1988, req. 59-304).

3.4 In some cases - strange as it may seem - the claimant can fear persecution at once by the authorities of the country of origin and by the authorities of the country of residence. That situation has been met when Yugoslavia collapsed and was divided into four states, including citizens of different nationalities.
Due to the specific situation of these new states at that time, the fears or persecution have been examined under two respects: the country of origin and the country of residence (CRR, Lozancic, 12-02-1993, req. 232.259, for a Croatian living in Bosnia-Herzegovia; CRR, Dabetic, 29-01-1993, req. 229.956, for a Croatian fearing persecution in Croatia and in Serbia/Montenegro after his desertion).

4 *Persecution is not limited to public agents or authorities.*

4.1 As already mentioned and according to the UNHCR guide, groups formed among the population can also inflict persecution, if the actions of the groups are tolerated by the authorities and if the citizens remain without any protection.

There is a very copious jurisprudence along these guidelines.
For example repetitive maltreatments systematically organized by the population against a minority (for example against a christian minority in Turkey) are regarded as persecution (CRR, Duman, 03-04-1979, req. 9.744). The rationale underlying that jurisprudence is that a systematical maltreatment assumes the obliging passivity of the authorities (of A. Heilbronner, Etudes et Documents du Conseil d'Etat 1978, p. 111). This view is shared by other jurisdictions: a fear is regarded as well founded if the persecutions is the doing of the public authority and exercised on the whole territory of the State or, although it is exercised by part of the population only, the administration and the government approve it or if the administration or the government turn out to be unable to protect the harassed persons (Administrative Tribunal of Austria, 8-10-1980 mentioned in JDI 1983, p. 622).

In an important decision (CES Dankha, 27-05-1983, AJDA 1983 p. 481, conclusions Genevois; JDI 1984, p. 119, note Julien-Laferrière; RGDIP 1984 p. 753, note Rousseau), the French Conseil d'Etat stated that it did not stem from article 1er, A, 2 of the Geneva Convention that persecution have to emanate directly from the public authorities. Persecution exercised by individuals, organized or not, can be taken into account, seeing that they are encouraged or voluntarily tolerated by the public authority so that the claimant is not really able to avail from the protection of that authority.

The Dankha decision recalls, along with the UNHCR doctrine, that persecution does not automatically imply a public authority. So it clearly opens the door to persecution by non public agents, but in a rather restrictive manner.

That solution is realistic as, very often, in our contemporary world, a State can organize or let a group exercise harassment on part of the population.
The jurisprudence of other countries is more or less similar.

In Germany '... persecution pursuant to Art. 16a of the German Constitution and 51 (1) German Aliens Act ... must either emanate from the State or at least be imputable to the State if originating from non-State agents' ('German jurisprudence regarding persecution by non-State agents', UNHCR, Bonn, January 1996 published in 'La Convention de Genève et la détermination de l'agent de persécution en Europe: problèmes posés par l'harmonisation européenne', L. Meunier, mémoire pour le DEA de droit européen, Université de Picardie; Der Home Fluchtlingskommisar der Vereinten Nationen, European harmonization and agents of persecution. Germany, ref. 385-95/0814, 03-03-1995).

In Portugal, '... usually persecution by non-government agents does not justify the granting of refugee status. In the context of an Angolan asylum-seeker, this problem was analyzed. The claimant had been discriminated against by his colleagues on the basis that he was Jehovah's witness. The Supreme Administrative Court considered that the discrimination practised by the colleagues does not emanate from the authorities and does therefore not constitute a character of danger to be taken into consideration' (UNHCR, Lisbon, note, 07-03-1995, ref. 108/1995).

In Italy '... the persecution has to come from governmental authorities or at least has to be tolerated by them (notion of 'agents of persecution'). Therefore, such groups as victims of civil war (like) situations, (potential) victims of generalized human rights violations, hardly are recognized as refugees' (UNHCR, Rome, note 06-03-1995, ref. HCR/ITA/0181).

In Switzerland, we find the same guidelines. For example a decision I/N 250 200 of the Première Chambre of the Commission Suisse de Recours en Matière d'Asile dated 11-03-1996 indicates '...la jurisprudence des autorités suisses considère que seuls sont déterminants les actes de persécutions imputables aux organes de l'Etat, détenteurs de la puissance publique. Tel est le cas non seulement de mesures ordonnées directement par les organes de l'Etat, mais aussi de celles indirectes, émanant de tiers, lorsque l'Etat les a encouragées, soutenues ou tolérées, démontrant ainsi qu'il n'était pas prêt à accorder sa protection quand bien même il aurait dû faire preuve de diligence'.

4.2 Following the Dankha decision of 1983, plenty of French decisions have precised the notion of group (organized or not) and of encouragement or of voluntary tolerance by the authority. These notions are vague and refer to an active or passive behaviour of the authorities, in their turn subject to interpretation.

For example, the following has been regarded as persecution:
- an extremist group, acting under the protection of the public authorities, and particularly of the police (CRR, Sabbar, 26-01-1984, req. 19.123);
- armed muslims and tolerated by the authorities, exercised against a member of another religious minority (CRR, Misquita, 31-08-1984, req. 26.289);
- members of the Ba'ath in Syria, given the role of that party in Syria (CRR, Yousif Yousif, 15-01-1991, req. 148-627); that solution has been extended to situations of the same kind in other countries (CRR, Rabezanahary, 13-06-1991, req. 158.934);
- a para-governmental militia in Columbia (CRR, Lopez Wilches, 10-02-1995, req. 264.759);
- worshippers of another religion if they are encouraged by the public authorities and if these authorities do not protect the victims (CRR, Cobanoglu, 19-11-1987, req. 39.575; CRR, Taqi, 04-10-1991, req. 183.801 for the Ahmadi in Pakistan; CRR, Isaak, 05-10-1994, req. 267797 for a christian in southern Sudan);
- a political organization, the actions of which are supported by the authorities (CRR, Thevarajah, 10-11-1993, req. 240.429 for a former member of the LTTE, persecuted by the PLOTE, and searched for by the authorities of Sri Lanka);
- Azeris nationalists against the Armenian community in Azerbaidjan, the violence being voluntarily tolerated by the authorities (CRR, Zakharova, 05-05-1993, req. 229.098);
- antisemite militants against a Belorussian or Russian jew, who was not protected by the authorities despite his claims (CRR, Zoui, 18-01-1993, req. 233.897; CRR, Tcheremnich, 04-11-1993, req. 252-525);
- extremist militants against a tzigane in Slovakia, the police and the politicial and judicial authorities having refused to protect him (CRR, Feko, 13-09-1993, req. 247.984);
- an influential Moorish family against a Haratine slave in Mauritania, with the voluntary tolerance of the authorities (CRR, M'Zeirigue, 30-06-1995, req. 281-347).

On the contrary the following are not regarded as persecution when:

- maltreatments inflicted by the worshippers of another religion or by a sect, if they are not tolerated or encouraged by the authorities (CRR, Danial, 20-10-1987, req. 64.591; CRR, Chawachian, 03-11-1987, req. 67.506; CRR, Khodja, 26-11-1987, req. 34.054 for the 'Muslim Brothers' in Algeria; CRR, Nawaz, 31-10-1989, req. 53.445 for a jew in Pakistan; CRR, Tabraoui, 28-09-1993, req. 240.425);
- harassment by members of another political party (CRR, Mohammed Oais, 11-09-1991, req. 160.720; CRR, Chandrakani, 26-11-1990, req. 139.309; CRR, Soobbo Naidoo, 12-12-1990, req. 145.574) or organization (CRR, Bourhala, 28-05-1993, req. 244.536 for threats by militants of the SIF in Algeria; CRR, Gaspar Ncto, 27-01-1994, req. 249021 for the 'UNITA' in Angola);
- acts committed by demonstrators or rioters (CRR, Dumas, 29-10-1987, req. 65.740);
- harassment against transsexuals by non organized groups in Argentina (CRR, Mme Gambini, 24-07-1990, req. 93.031, Documentation Réfugiés n 145 p. 3);
- violence exercised by individuals, students, the inhabitants of a village, armed unknown persons, or even terrorists (CRR, Mlle Alexandra, 19-11-1987, req. 58.875; CRR, Pastakia, 18-09-1989, req. 50.571; CRR, Baruc Ali, 12-04-1990, req. 108-249; CRR, Rode Levere, 19-12-1990, req. 95.891; C.E. Abib, 31-01-1996, req. 163.009 for a terrorist group in Algeria);
- revenge feared from the population but not encouraged by the authorities (CRR, Solis, 02-10-1991, req. 171.229);
- maltreatment inflicted by a militia, without being encouraged by the authorities (CRR, Mme Chahine, 15-09-1986, req. 33.958; CRR, El Kazzi, 27-10-1987, req. 58.645 for militia in Lebanon; CRR, Mme Ontanilla, 07-01-1991, req. 58.484 for the 'GAL' in Spain);
- persecutions inflicted by a group of extreme-right militants against a tzigane in Czech Republic, without being encouraged or voluntarily tolerated by the authorities (CRR, Mme Makulova, 06-07-1993, req. 247-545);
- extortions by Touareg rebels in Nigeria or persecution by rebels in Casamance (Sénégal), which are not encouraged or voluntarily tolerated by the authorities (CRR, Boureima, 30-06-1993, req. 243.234; CRR, Diaby, 14-06-1993, req. 240.205).

Generally speaking, groups which are opposed by the authorities cannot be regarded as encouraged by them and as inflicting persecution to the population. It has been judged for example:

- for the separatist (Tigers etc ...) in Sri Lanka (CRR, Dela George Visanthy, 25-10-1990, req. 137.105; CRR, Kathirchelvam, 8-10-1987, req. 51.110; CRR, Ragula Anthonipillai, 03-10-1991, req. 172.590);
- for the 'Shining Path' in Peru (CRR, Sanchez, 17-01-1991, reg. 97.573; CRR, Soto Huamani, 10-11-1993, req. 240.773; CRR, S.R, Cearhuarupay, 19-04-1996, req. 240.036);
- for terrorist groups in Peru (CRR, Mora Silva, 27-11-1990, req. 94.101), in Colombia (CRR, Mlle Suarez, 27-02-1991, req. 98.180) or in Algeria (CRR, Mme Benafia, 25-10-1996, req. 281.356);
- for members of the SIF in Algeria (CRR, Benalia Amor, 6-06-1991, req. 159.886; CRR, Alatouche, 02-02-1993, req. 238.947);

- for the fundamentalist muslims in Egypt (CRR, Wagih Wasily Atta, 11-06-1996, req. 279.702; CRR, Ishak, 10-11-1993, req. 225.537).

4.3 As the refugee definition implies - at the end - a lack of protection by the country of origin, it is necessary to check, in each case, if the claimant can avail of the protection of his country.

In that respect, the French CRR has developed an interesting but intricate jurisprudence, protecting the 1983 Dankha decision.

In order to know if the authorities voluntary tolerate the persecution by individuals, organized or not, the CRR examines if the claimant has applied to the authorities in order to be protected and what these authorities have done with the claim. Different situations can be found.

4.3.1 The authorities can refuse their protection and, in that case, they are regarded as tolerating voluntary the persecutions (CRR, Tehari, 25-02-1994, req. 254.554 for a Christian Kabyle threatened by muslims and whom the authorities refused to protect).

For instance, if the authorities refuse the registration of a complaint, block the preliminary investigation of a complaint, immediately free the culprit, they are regarded as tolerating voluntarily the persecutions (CRR, S.R, Meziane, 17-02-1995, req. 267.462; CRR, Karroubi, 28-02-1995, req. 266.045; CRR, Patanjan, 25-10-1994, req. 258.101; CRR, Mlle Sidi Yahla, 21-07-1995; CRR, Begouchev, 14-09-1995, req. 280.571). The same solution is adopted if the complaint is registered but if no protection is obtained from the police (CRR, Sellaoui, 7-02-1996) or if the authorities do not search for the culprits of the persecutions (CRR, S.R, Oukolova, 18-03-1994, req. 179.198; CRR, S.R, Slepcik, 01-06-1994, req. 256.061).
According to the CRR, the claimant has to prove that he has applied to the authorities and that their protection was refused (CRR, Tali Maamar, 19-05-1994, req. 261.727; CRR, Benarmas, 05-05-1995, req. 258.992; CRR, Rosli, 31-05-1994, req. 250.239; CRR, S.R, Soto Huamani, 10-11-1993, req. 240.773; CRR, S.R, Wagih Wasily Atta, 11-10-1996, req. 279.702). The jurisprudence is not always very clear; sometimes the refusal of protection has to be 'systematic' but it seems that the CRR more and more demands a 'systematic' refusal of protection (CRR, S.R, Asanoski, 29.11.1996, req. 284.147).

To alleviate the burden of the proof, the judge automatically examines if the claim for protection would anyway have been in vain (CRR, S.R, Naas, 25-02-1994, req. 241.548; CRR, Sellami, 19-06-1995, req. 281.938), would presumably have been vain (CRR, 31-01-1996, Khaldoun) or would have been dangerous (CRR, Mostefai, 22-05-1995, req. 270.763).

4.3.2 The authorities, local or national, can be aware of the persecution inflicted to a claimant and deliberately refrain from acting. In that case, they are regarded as voluntarily tolerating persecutions (CRR, S.R, Elkebir, 22-07-1994, req. 237.939 CRR, Diaf, 12-12-1995, req. 281.626; CRR, Mokhtari, 30-05-1995, req. 270.957; CRR, Mehdi, 20-06-1995, req.

272.728). These decisions show that the jurisprudence has recently become more flexible and less demanding.

4.3.3 On the contrary, the protection given by the authorities can be insufficient or ineffective. In that case, the authorities are considered as giving their protection. For example, the members of the police are, by nature, imperiled when fighting against groups such as the SIF in Algeria. So the CRR has judged, in their case, that 'the impossibility, for the authorities, to protect personally and efficiently the claimant cannot be regarded, in the absence of a systematic refusal of protection, as a voluntary tolerance by these authorities of the acts the claimant suffered'. (CRR, Redouane, 11-04-1995, req. 271.021; CRR, Benamed, 12-09-1995, req. 277.904) or that the inefficiency of the protection is not originated in a will to endanger the life or the security of the claimant for one of the five reasons mentioned in the Geneva Convention (CRR, S.R, Seddiki, 12-03-1996; CRR, S.R, Bouteraa, 12-03-1996).
The ineffectiveness of the protection or of the measures adopted by the authorities (personal advise; personal custody; removing to an other part of the country etc ...) does not benefit to the claimant as there is no 'systematic' refusal of protection (CRR, Benahmed, 12-09-1995, req. 277.904 for a policeman; CRR, S.R, Ferchiche, 8-12-1995, req. 275.958 for a journalist; CRR, Rizi, 13-12-1994, req. 268.788 for an intellectual; CRR, Sahnoun, 12-07-1994. req. 266.769 for a party and union member).

That jurisprudence is, of course, questionable under the terms of article 1er, A, 2 of the Geneva Convention: a person who is unable to avail of the protection of her country is a refugee, even if the authorities have deployed in vain efforts to protect her.

4.3.4 The above considerations show that the jurisprudence derived from the Dankha decision has become intricate. To assess the voluntary tolerance of the persecution by the authorities, the judge takes into account:
- the local environment and the specifics of the claimant (his vulnerability etc ...);
- the circumstances under which the applicant sought for the protection of the authorities;
- the conditions and terms upon which the refusal has been formulated by the authorities, local or central etc ...

And that jurisprudence refuses the refugee status to a person:
- who has not sought for the protection of the authorities, except if it would been in vain;
- who has sought for that protection but does not prove it has been refused;
- who has got an insufficient or an ineffective protection.

Even if it has enlarged the notion of agent of persecution far beyond the mere public agents, the Dankha jurisprudence can be criticized under the following arguments:
- it is imprecise in certain respects (the 'systematic' character of the refusal of protection for example ...);
- it has developed without any ground in the terms of article 1er, A, 2 of the Convention (for example it is never said in the Convention that an ineffective protection discharges the State of origin of his protection duty towards its nationals);

- the Dankha decision itself has been poorly written and interpreted; in writing that 'persecution exercised by individuals ... *can* be taken into account ... *seeing that* they are encouraged ...' the Conseil d'Etat has wrongly shut the door to further evolution and obliged the CRR to contortions in order to stay within the boundries of the persecution definition;
- it has reinforced the burden of proof bearing on the applicant (for example he has very often to prove that he has sought for the protection of the authorities and that the protection has been refused);
- in some cases it looks like a medieval casuistry designed to deny the refugee status to persons who are granted that status in other countries.

5 *The persecution agent is of course a notion at stake when a civil war occurs in a country.*

5.1 Are the victims of a civil war regarded as persecuted by the public authorities? Hesitation is permitted because in case of a civil war, that is to say in case of a war between two or more factions of the population, the public authorities are not fighting against their nationals but against opponents or rebels. And if citizens globally suffer, they generally are the passive victims of a conflict and not the personal target of persecution inflicted by the legal authorities.
Thus fears deriving from the insecurity feeling during a civil war are generally not assimilated to a fear of a personal persecution by public authorities (CRR, Mlle Nazet, 21-11-1985, req. 35.657; CRR, Badakian, 11-06-1985, req. 31.147).

5.2 But, persecution by armed groups or militia can be encouraged or voluntarily tolerated by the public authorities during a civil war. If, during a civil war, the legal authorities cannot control the whole of a territory, they can also support one of the factions or refrain from alleviating the sufferings of the population. For these reasons, in such circumstances, the granting of the refugee status is subject to checking the legal authorities behaviour: are the alleged persecution inflicted by the public authorities or by groups supported, voluntarily or not, by the public authorities (CRR, Godian, 01-03-1984, req. 23.030; CRR, Saba, 21-02-1984, req. 22.973; CRR, Sinno, 02-03-1987, req. 48.304)? If the claimant cannot prove the existence of links between the authorities and opposing groups or the abstention of the public authorities, it is difficult to regard as persecution inflicted by the authorities acts perpetrated without their knowledge.

The analysis of the German courts is partly similar: 'If persecution is in this way linked to State accountability, it follows that there can be no persecution in areas over which the government has lost effective control and, moreover, there can be no persecution in countries in which no longer exists any State Authority. Consequently, the German Federal Constitutional Court has held that persecution generally requires that the State is effectively in control of the area he is acting in ... there can be no persecution within the meaning of article 1er, A, 2 of the Convention in countries in which the State authority bas ceased to exist. This would apply especially in situations of total anarchy in the asylum-seeker's country of origin. If, however, in the country whose government had ceased to exist regional state-like powers had evolved gross human rights violations of these powers could be considered as persecution' (Henkel, Who is a refugee? Asylum Law Series 1 IARLJ - London 1995).

'While in the decisions of 1983 and 1986 the State's effective loss of control over territory is a perequisite for the imputability of persecutory acts from non-State agents (assuming that otherwise *protection* could be obtained from the government), later decisions like from the one from 1994 exclude imputability precisely under circumstances where the State has lost control over the territory' (UNHCR, Agents of persecution and German jurisprudence regarding imputability, 8th March 1995, 385-95/0872).

5.3 But here also, reality is complex. A national, persecuted by a private group during a civil war, can apply to the public authorities to be protected against such persecution.

If the public authorities turn out to be unable to protect their own nationals, the refugee status can be granted according to the Geneva Convention (UNHCR Handbook, January 1992, 98; CRR, Mlle Hammoud, 12-04-1990, req. 109.304 for a Lebanese, persecuted by the Hezbollah and unprotected by the government despite her claim; see also the Canadian jurisprudence mentioned in F. Guibault, Notes sur la jurisprudence récente de la Cour Fédérale du Canada en matière de réfugiés, Documentation Réfugiés n 115). In that respect, the complicity of the legal authorities with the non-public agent of persecution is not a requisite to fulfill the refugee definition.

5.4 The Geneva Convention allows a broader interpretation of the persecution agent in case of a civil war. If, in a given country, the power is shared by two or more factions fighting against each other, is it impossible to grant the refugee status to a claimant claiming that he cannot return to his country where no public authority can protect him? The 10-09-1969 AUO convention foresees that the refugee status is granted to a person who is obliged, by a foreign occupation or internal upheavals etc ..., to leave his country. The same solution is applicable according to the Geneva Convention. Faced with the Liberia situation, after the death of Président Doe, the CRR stated that a claimant had well founded fears of persecution in case he would come back to Liberia where 'two rebel factions sharing the de facto power, he could not avail from the protection of public authorities' (CRR, Kaba, 5-07-1991; Freemans, 4-09-1992; Togbah, 30-09-1991 in Documentation Réfugiés n 181 p. 4).

These decisions are fundamental: if no public authority is able to protect their own nationals (because there are no longer or not yet public authorities), the refugee definition nevertheless is applicable (The refugee is the person who is 'unable or unwilling to avail himself of the protection of that country').

In a situation of civil war, it seems that the following questions have to be raised according to the above jurisprudence:

- are there still public authorities in the country? If not, the refugee definition is applicable in case of de facto authorities;
- if yes, different situations can be found, leading also to the refugee status:
  - the legal authorities can persecute their opponents;
  - the legal authorities can tolerate or encourage the persecution inflicted by militia or private groups;
  - the citizens can apply to the public authorities to be protected and these authorities can be unable to protect their citizens;

- the citizens living in a region which is not controlled by the legal authorities of the country can be unprotected either by the legal authorities or by the de facto authorities controlling that region.

5.5 But even with such a frame of analysis in mind, a last question seems today unresolved: does the refugee definition suppose or not the existence of organized States, and consequently of authorities, public or de facto? In the case of Somalia, the CRR recently judged that 'the fears ... are linked to a general climate of insecurity in a country where, after the disappearance of all legal powers, clans, subclans and factions of the same ethnic group are fighting to create or to extend spheres of influence within the national territory, without being able to exert in that zones an organized power which could lead to regard them, eventually, as de facto authorities' (CRR, Ahmed Abdullah, 26-11-1993, req. 229.619. Documentation Réfugiés n 237, p. 1). This decision has been confirmed many times since, the wording of the most recent ones mentioning the 'anarchy' still prevailing in the country, despite the efforts by the UNO to restore a legal power (CRR, Maxamed Xasan Maxamuud, 03-05-1996, req. 276.383).
So to speak, in a situation of anarchy, of lack of any organized power or authority, there is no room for a persecution according to article 1er, A, 2 of the Geneva Convention because there are no longer public authorities or not yet de facto authorities (see below).

It is interesting to underline that the Belgian CPRR has not adopted the same solution for Somalia; it has observed that 'the civil war ... has resulted in the collapse of the central government, the fragmentation of the territory and the disappearance of any form of statal-authority' and that 'the victims are ... designated according to their belonging to such elan' (F 267, 2 fr. 6.6 1994 mentioned in Revue du droit des étrangers 1994, n 80/81 p. 511). For the CPRR, the disappearance of any form of central government is not an obstacle to the granting of the refugee status.

Contrary to the CPRR, the Dutch Council of State seems to share the CRR view: 'the term persecution ... has been interpreted by the Department in constant case law, in such a way that it has to be understood as persecution by some agent of the authorities, or by third parties, against which the authorities are unable or unwilling to provide sufficient protection. According to the present view of the Department, there can be no question of persecution in the sense of the Convention and the Aliens law if in the country of origin of the alien there are no authorities.
... Based on this information, it has to be assumed that at the time of the decision there existed no government in Somalia' (Decision of the Judicial Department of the Council of State, 6.11.1995, R02 93.4400/61/245). But the view of the Council of State is sometimes contradicted by administrative tribunals: 'on december 1995, the Vreemdelingenkamer van de rechtbank in Zwolle did consider an asylum request on its merits and did not reject the case for reasons of absence of government and the Court in Haarlem on 22 December 1995 considered that the absence of government and the Court in Haarlem on 22 December 1995 considered that the absence of government in itself is not a reason to reject refugee status' (VK Zwolle, 8/12/1995, Awb 95/6120 et VK Haarlem, 22/12/1995 Awb 95/2185, mentioned in UNHCR. Position paper with regard to persecution by non-State agents, the Hague, 30-01-1996).

The swiss CSRA has also adopted the same solution: 'La Somalie est confrontée à une situation d'anarchie et ne peut donc être assimilée à un Etat normalement constitué (doué de la puissance publique et organisé pour exercer celle-ci qui aurait failli à son devoir de protection' (CSRA, 29-06-1995 mentioned in JICRA, 1995/25 p. 234-242).

6 *In some situations, there are not only or no longer public or legal authorities but also de facto authorities.*

6.1 The breaking up of former Yugoslavia raised that concern. Until 1993, it was generally accepted in France, with some exceptions, that militia, terrorists groups or guerillas were not among the 'authorities' inflicting persecution according to the refugee definition (see 4.2. above).

But in 1993, a set of important decisions granted the refugee status to claimants who invoked fears of persecution:

- in the region of Vukovar by militia of de facto authorities so-called 'Self proclaimed Serbian Republic of Krajina', supported by the armies of the Federal Republic of Yugoslavia (CRR, Dujic, 12-03-1993, req. 230.571; CRR, Karaica, 07-04-1993, req. 125.776; CRR, Mlle Skankovic, 07-04-1993, req. 125.777);
- in Bosnia by Serbian militia which forcibly enlisted Bosnian muslims in the federal army of Yugoslavia (CRR, Kurtic, 27-11-1992, req. 227-353);
- in Bosnia by militia of de facto authorities so-called 'H.V.O.' and thus cannot avail from the protection of the Bosnian government the jurisdiction of which do not cover today the region (Zenica) in which he lived (CRR, Mirie, 02-03-1993, req. 227.640);
- in Bosnia by militia of de facto authorities so-called 'Self proclaimed Serbian Republic of Bosnia' and thus could not avail from the protection of the Bosnian authorities the jurisdiction of which did not cover the region controlled by that de facto authority (CRR, Dzebric, 12-02-1993, req. 216.617; CRR, Mlle Mujkanovi, 06-09-1993, req. 247.455).

All these decisions underline that the legal public authorities, born with the breaking up of Yugoslavia, do not control the territory under their jurisdiction and are unable to protect their nationals. Reversely, a de facto authority can control their territory and persecute persons who are not always their 'nationals'. And to determine the refugee status, a very meticulous examination is necessary: a public or a de facto authority can only control some districts in a town (for example in Sarajevo in 1993). In the determination of that status, the French jurisprudence takes also into account the possibility for the claimant to find an internal flight alternative, where the legal authorities could efficiently protect him. Incidentally, the notion of 'efficient' protection is subject to discussion, by reference to the wording of article 1er, A, 2 of the Geneva Convention.

6.2 Other countries have adopted the same solution.
In Germany '... in countries affected by civil war, the possibility of recognition as refugees exist if non-State agents have gained effective control over a defined territory and persecution emanating from such agents may thus be qualified as 'State-like' persecution. This jurisprudence has, for example, in many cases led to the recognition of refugees from Bosnia-

Herzegovina' (UNHCR, German jurisprudence regarding persecution by non-State agents, mentioned above).

In Switzerland, a decision N 271248 of the Commission Suisse de Recours en Matière d'Asile dated 10th January 1995 is very similar: 'les persecutions imputables à des groupes organisés qui, sans être revêtus de la puissance publique, exercent un pouvoir de fait sur une partie déterminée du territoire national et de la population qui y réside, doivent être assimilées à des persécutions exercées par l'Etat; on parle alors de 'persécutions quasi-étatiques" pour la définition desquelles les critères suivants sont déterminants: degré d'intensité et de pérennité du pouvoir de fait' (Jalons n 35, juin 1995 p. 7 à 10).

6.3 From 1993, de facto authorities have been identified:
- in South Lebanon where there is clearly an occupation by an army (CRR, Hanna, 14-09-1993, req. 247-551; CRR, Bourji, 12-12-1994, req. 262243);
- in Liberia where the Charles Taylor's partisans presently have the de facto power in the region of Nimba (CRR, Dolley, 05-04-1993, req. 228.394) or control part of the country and represent a de facto authority (CRR, Johnson, 21-6-1994, req. 222081);
- in Afghanistan where there are at the same time the forces of the former president Rabbani, those of the former Prime Minister Hekmatyar and other authorities which presently exert a de facto power on the Afghan territory (CRR, S.R., Mme Nourestani, 26-10-1994, req. 253902).

In Algeria, however, there is no de facto power according to the French and Swiss jurisprudence.

> '... De même, sont assimilables à des persécutions étatiques, les agissements d'un mouvement insurrectionnel, lorque ledit mouvement s'est mué en autorité de fait et exerce, d'une manière effective, stable et durable, la puissance publique sur le territoire soumis au contrôle de sa propre administration... C'est ainsi qu'en l'abence d'une autorité 'de jure" ou de 'facto" exerçant les attributs de la puissance publique (à savoir en l'absence d'un agent de persécution étatique ou quasi étatique), d'enventuelles mesures de persécution ne sont pas prises en considération en matière d'asile ...
>
> Bien que la situation en Algérie reste tendue, on ne peut pas parler de déliquescence du pouvoir de l'Etat et conclure à un partage de fait entre des zones soumises entièrement au pouvoir islamique du FIS et des zones restées sous le contrôle du pouvoir central. Le FIS a réussi à créer des maquis contre lesquels les autorités engagent des opérations, parfois d'envergure, dans le but de les démanteler ou de capturer les maquisards et de découvrir leurs caches d'armes. On ne saurait toutefois admettre que le FIS s'est érigé en autorité de fait exerçant la puissance publique sur l'ensemble du pays ou sur quelque portion du teritoire algérien avec les caractéristiques de stabilité et de pérénnité nécessaires à l'excercice de la souveraineté ... Les persécutions subies par la recourante n'étant pas imputables aux organes de l'Etat algérien, elle ne saurait s'en prévaloir pour fonder sa demande d'asile au sens de l'article 3 LA' (Commission Suisse de Recours en Matière s'Asile, 1ere chambre, 14-03-1996, I/N 297472).

6.4 But from when is a de facto authority regarded as an agent of persecution? The answer is not easy and there is no clearcut edge. In the light of some recent decisions, we can put forward that the actions of militias become persecution when these militias or groups become de facto authorities. And they become de facto authorities when they exert a stable power on a given territory, with the ordinary attributes of a power:

- they forcibly enlist in their militia, like regular armies (Dzebric, mentioned above; Kurtic, mentioned above; CRR, Yaacoub, 05-07-1996, req. 276-496 for a Lebanese citizen forcibly enlisted in the SLA);
- they must show a minimum organization.

These criteria were met in Yugoslavia. In Somalia, for example, the matter is subject to discussion (see above): can the mere existence of some fifteen heads of clans, searching to expand their sphere of influence, without exerting an organized power in that sphere, qualify as an 'authority' or a persecution agent?

In fact, it seems that there is an underlying agreement behind that question, deriving from the nature of the refugee status and from the aim of the Geneva Convention. The refugee status is generally presented in our century as a temporary and alternate substitute to the rights attached to the citizenship of a country. The implicit requisite of the refugee status is the existence of an international community, formed of States, hence the existence of authorities, public or de facto.

7 *Going further, some countries consider that the refugee status can be granted irrespective of the quality (public or non public) of the agent of persecution.*

In Austria, the Administrative Court granted the refugee status to a Nigerian asylum-seeker persecuted by the Catholics (VwGH 17.2.1994, ZI 94/19/0938) and to a Lebanese asylum-seeker belonging to the Christian minority (VwGH 3.4.1986, 2i 84/01/0202) ruling that 'in case of persecution that does not emanate from the State, it has to be evidence that the State was either unwilling or unable to provide protection' (UNHCR Survey on the notion of agents of persecution as interpreted by member States of the European Union, 1995, n 1).

In the same manner 'The Danish appeal board has adopted the interpretation that well-founded fear of persecution by non-government agents justifies refugee status under Art. 7, paragraph 1 of the Danish Aliens Act (Convention status) when the State has proven unable to provide effective protection. This is exemplified by decisions concerning Jewish citizens in the SNG, who suffered persecution by Pamjat, and whose refugee status was recognized on the ground that the Russian authorities were not able to provide protection' (ibidem).

In Finnish case law, 'State failure to provide protection against persecution by non-State agents has been found to justify the granting of asylum in cases concerning Bosnian asylum-seekers persecuted by Bosnian Serb forces and in cases concerning Somalians persecuted by the other clans' (ibidem).

'The Dutch Supreme Court decided in *Saydawi vs The Netherlands* that if, given the general circumstances in the country of origin, the applicant has a well-founded fear of being perse-

cuted by non-government agents and the State authorities are not able or willing to protect the applicant, he/she can be considered to be within the meaning of the 1951 Convention and the Dutch Aliens Act' (ibid.).

The executive bodies in Greece and Spain do not demand a public agent to qualify a persecution. For instance, in Spain Peruvian nationals persecuted by the 'Shining Path' have been granted the refugee status (for their refusal in France, see 4.2. above).

In United Kingdom - RVSSHP *ex parte Jeyakumaran* - the Queen's Bench Division ruled that the Secretary of State had been in error to base his decision on (among other things) a view that because the Tamil applicant had suffered persecution by non-government actors which were out of the Government's control, any violence he suffered could not amount to persecution. The Court (Taylor J.) simply quoted paragraph 65 of the Handbook as an appropriate guide to follow in this situation (ibid). In an appeal (*Ibrahim Hussein Mahmood*, 10-12-1991, (8305), the Immigration Appeal Tribunal ruled 'In our view there has been demonstrated a reasonable degree of likelihood that if the appellant is returned to Egypt, he would be persecuted either by the PLO or agents of the Lebanon, Libya or Syria for his political opinions. We accept that the Egyptian authorities would try to protect him but, in our opinion, there is a serious possibility that they would be unable to do this'.

In Belgium, the CPRR has also ruled that '... des persécutions peuvent être le fait non seulement des autorités du pays mais également de groupes de la population suite à des actes à caractère discriminatoire grave on très offensant sciemment tolérés par les autorités ou contre lesquels les autorités sont incapabels d'offrir une protection efficace' (CPRR, Kaman Haci, 90/145/FA017 du 08-11-1990). In other cases of persecution by non-public agents, the CPRR refers to the paragraph 65 of the UNHCR Handbook, underlying that the State is unable to protect efficiently its national (CPRR, Hanna Samir, 92/631/F138 du 28-10-1992). Following that jurisprudence, the CGREA has granted several times the refugee status to algerian journalists or intellectuals who feared persecutions by islamist groups (for a contrary solution in France, see 4.3.3 above).

We can also refer to the famous Canadian decision *Canada (A.G.) v. Ward*, 1993, 2, CSC n 21937 p. 689-697, which raised precisely the question of the complicity of the State in the refugee definition in a case where the persecution emanated from a non-governmental agent, the INLA The Supreme Court ruled that 'La persécution comprend les cas où l'Etat n'est pas strictement complice de la persécution, mais est simplement incapable de protéger ses citoyens. La dichotomie 'ne peut' et 'ne veut' s'est quelque peu estompée. Pour déterminer si un demandeur est visé par la définition de 'réfugié au sens de la Convention', il faut mettre l'accent sur la question de savoir si celui-ci 'craint avec raison' d'être persécuté, ce qu'il doit d'abord établir, et tout ce qui vient après doit être 'du fait de cette crainte'. Il existe deux catégories qui exigent que le demandeur se trouve, du fait de cette crainte, hors de l'Etat dont il a la nationalité. Le demandeur qui fait partie de la première catégorie doit être incapable de se réclamer de la protection de cet Etat. Au départ, cette catégorie ne visait que le apatrides, mais elle peut maintenant viser les personnes qui se voient refuser un passeport ou d'autres protections par l'Etat dont elles ont la nationalité. Le demandeur qui fait partie de la deuxième catégorie doit, du fait de cette crainte, ne pas vouloir se réclamer de

la protection de son Etat. Toutefois, ni l'une ni l'autre catégorie de la définition de réfugié au sein de la Convention n'exige que l'Etat ait participé à la persécution'.

All the above decisions consider two steps in the application of the refugee definition:
- is there a well-founded fear of persecution, the question of the agent of persecution (public or non-public agent) being irrelevant towards the terms of article 1er, A, 2 of the Convention?
- is the State of origin able to provide its (effective?) protection to its national or, to say the same, can the applicant reasonably avail of its protection?

That approach takes into account any persecution, by public or non-public agents, and does not to distinguish between voluntary or involuntary tolerance of persecution of the applicant by the authorities in case of a return to the country of origin.

8 *So, very clearly, there is a difference in the interpretation of the Convention regarding the notion of persecution and of agent of persecution within Europe.*

This difference was identified during the preparation of the 'Position commune du 4 mars 1996 définie par le Conseil sur la base de l'article K.3 du traité sur l'Union Européenne, concernant l'application harmonisée de la définition du terme 'réfugié' au sens de l'article 1er de la Convention de Genève, du 28 juillet 1951, relative au statut des réfugiés' (JO CE, 13-03-1996, n L 63/3). Regarding the notion of agent of persecution, the paragraph 5.2 reproduces exactly the terms of the CJAI Resolution dated 23-11-1995:

'Persecution par des tiers.
On considerera que les persécutions commises par des ties sont comprises dans le champ d'application de la Convention de Genève lorsqu'elles se fondent sur les motifs de l'article 1A de cette Convention, qu'elles ont un caractère personnalisé et qu'elles sont encouragées par les pouvoirs publics.

Lorsque les pouvoirs publics restent inactifs, ces persécutions doivent donner lieu à un examen particulier de chaque demande du statut de réfugié, conforme aux jurisprudences nationales, au regard notamment du caractère volontaire ou non de l'inaction constatée.

Les personnes concernées pourront être éligibles en tout état de cause à des formes appropriés de protection conformes au droit national'.

Countries like the United Kingdom, France and Germany preferred a non-binding rule, directed only to administrative bodies and preserving the sovereignty of their jurisdictions. The compromise which was reached allows each country to keep unchanged its national jurisprudence and is not very helpful to harmonize the interpretation of the Convention regarding the agent of persecution.

What conclusions can we derive from this examination?

- The notion of agent of persecution is certainly not limited to public agents of persecution. The notion is evolving, as the forms of persecution do. It is enlarging rapidly and most countries have recently expanded the scope of the notion, devising complex jurisprudence to overcome initial limitations, probably laid down too early and too abruptly.

- Many differences in the interpretation of the notion are not so important. They relate mainly to concepts such as 'effective or efficient protection', de facto authorities or 'State-like persecutions', the (systematic) refusal of protection, the anarchy and the absence of any State or authorities. By confronting with and analysing the differences, a common platform could be easily found.

- One difference remains fundamental: the imputability (because of voluntary tolerance or complicity) of the persecution to the State in case of a persecution by non-public agents. The consequence of that difference is a rate of admission to the refugee status which varies with the countries of destination and does not ensure an equal treatment of the applications, even in the Schengen framework.

  On that point, we rather share the analysis of the Canadian Supreme Court, which seems both according to the terms of article 1er, A, 2 of the Convention and to its aim and to the UNHCR doctrine.

  The jurisprudence invented to circumvent the problem is in the end too complex and too difficult to understand. A Convention designed to protect human rights and vulnerable people must be easily presented and understood by them. And it relies on the Supreme Courts not over complicate and not to mortgage the future but on the contrary, from time to time to come back to simplicity.

  The Canadian Supreme Court has paved the way we should all follow suit: a refugee is a persecuted person (irrespective of whom is the agent of persecution) and a person the State of origin is thought unable to protect. Why should we reinvent and complicate the refugee definition, so plain in the article 1er, A, 2 wording?

Refugee Status and the 'Internal Flight Alternative'[1]

G. de Moffarts*

The Internal Flight Alternative is increasingly used to refuse the recognition of refugees on the grounds that they could have sought or can safely find refuge in another area of their country of origin[2]. It is also explicitly mentioned as a ground for refusal in the Joint position of the European Council of 4 March 1996 concerning a harmonised application of the definition of refugee[3].

Hereafter first I will determine the compatibility of the notion of Internal Flight Alternative with the Geneva Convention. Next I will examine national jurisprudence[4] and comment on the Joint position of the European Council and the position taken by UNHCR in August 1995.

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1. New Zealand jurisprudence renamed the 'Internal Flight Alternative' 'Relocation Principle' 'because the proper question to address is not that of flight, but of protection, inability, unwillingness and the presence of a well-founded fear' (Refugee Appeal No. 11/91 Re S, 5 September 1991, p 19). 'Relocation Principle' is also used by the Council of the European Union in the 'Joint position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonised application of the definition of refugee mentioned in article 1 of the Geneva Convention' (hereafter mentioned as 'Joint Position EU', *OJEC*, 13 March 1996, No L63).
2. UNHCR, 'An overview of protection issues in Western Europe: legislative trends and positions taken by UNHCR', August 1995, 23.
3. 'Where it appears that persecution is clearly confined to a specific part of a country's territory, it may be necessary, in order to check that the condition laid down in Article 1A of the Geneva Convention has been fulfilled, namely that the person concerned 'is unable or, owing to such fear (of persecution), is unwilling to avail himself of the protection of that country', to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may reasonably be expected to move.' (Joint Position EU, 8. Relocation within the country of origin).
4. I wish to thank R.P.G. Haines for his kind collaboration in sending me the relevant New Zealand jurisprudence. National jurisprudence is not easily comparable even when applying the same international law. The distinction between the application of the Geneva Convention or national (constitutional) law is not always clear. For instance the application of Article 16, 2, Grundgesetz (Constitution of the Federal Republic of Germany) that guarantees political asylum to 'political persecutees' and the Convention of Geneva is similar but not identical (Kälin, W., 'Well-founded fear of persecution: A European perspective' in *Asylum Law and Practice in Europe and North America*, edited by Bhabha, J., and Coll, G., 1992, 22-23).
In some countries the Geneva Convention is not applied to some cases but (temporary) national protection is awarded by national law while in other countries the same persons would get refugee status. In the Netherlands a request for sojourn on compelling humanitarian reasons (Article 15, Vreemdelingenwet) is always examined besides the refugee status. In other countries (Belgium for instance) asylumseekers normally only get protection if their refugee status is recognized.

1 THE COMPATIBILITY OF THE NOTION OF INTERNAL FLIGHT ALTERNATIVE AND THE GENEVA CONVENTION

The Internal Flight Alternative is not explicitly mentioned in the Geneva Convention and was not discussed in the 'travaux préparatoires'. It was introduced in refugee law long after the Geneva Convention came into being. It was probably first used in German jurisprudence[5]. In Germany the Internal Flight Alternative is generally accepted in doctrine and jurisprudence[6].

The introduction by the Dutch Raad van State (Council of State)[7] of the Internal Flight Alternative in its jurisprudence concerning Turkish Christians was criticized by Dutch doctrine.
According to Fernhout the notion of internal flight is not compatible with the text of Geneva Convention or the opinion of its authors. It would signify that the element 'is outside of the country of his nationality' is replaced by 'being outside the region of his habitual residence'. The lack of protection by the authorities is the important element for recognition of refugee status. The authors of the Convention had a clear view of the continuing psychological significance of the state (not the city or region) where the refugee was persecuted. The Internal Flight Alternative is an invention of the states to deny them refugee status and protection[8].

According to Van der Veen the judgment of the Dutch Raad van State adds a supplementary requirement to those limitatively mentioned in article 1.A.(2), that it must be impossible for the persons in question to take up residence elsewhere in their country (because the government does not give them protection there either). According to him the same objection goes for paragraph 91 of the UNHCR-Handbook[9] that requires that 'it would not have been reasonable to expect' the persons concerned to seek refuge elsewhere in the country[10].

5. Fernhout, R., *Erkenning en toelating als vluchteling in Nederland*, Kluwer-Deventer, 1990, N 147, 113; Bundesverfassungsgericht (Constitutional Court Germany), 2 July 1980, 1 BvR 147/80, *BVerfGE*, 54, 341, *InfAuslR*, 1980, 338.
6. Nicolaus, P., 'Kein Asylrecht trotz Verfolgung? Eine Studie zum Problem der inländischen Fluchtalternative', *ZDWF Schriftenreihe*, N 6, November 1984.
7. Raad van State, 18 August 1978, (Turkish Christians), *Rechtspraak Vreemdelingenrecht (RV)*, 1978, Ars Aequi Libri, Nijmegen, N 30; Raad van State, 21 June 1979, (Turkish Christians II), *RV*, 1979, N 8.
8. Fernhout, R., 'Het binnenlands vluchtalternatief en de vluchtelingendefinitie', *NJB*, 1981, 1075-1082; Fernhout, R., *Erkenning en toelating als vluchteling in Nederland*, Kluwer-Deventer, 1990, N 147-154, 120.
9. 'The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all circumstances it would not have been reasonable to expect him to do so.' (UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', Geneva, January 1988, (hereafter Handbook), paragraph 91.
10. Van der Veen, J., 'Does persecution by fellow-citizens in certain regions of a state fall within the definition of persecution in the convention?', *Netherlands Yearbook of International Law*, Volume XI, 1980, Sythoff en Noordhoff, the Netherlands, TMC Asser Institute, The Hague, 1981, 167. This condition is not an additional condition for refugee status but rather a restriction of the Internal Flight Alternative.

Paragraph 91 of the Handbook did not introduce the Internal Flight Alternative. Rather it is a reaction against its less than careful application. The UNHCR-representative at the session of the Dutch Raad van State where the Internal Flight Alternative was first discussed did not deny the possibility of refusing an asylum claim on the grounds of an Internal Flight Alternative but stated that it should not be applied in the case pending before the court[11]. The UNHCR position of August 1995 does not deny the concept of Internal Flight Alternative either.

The Internal Flight Alternative is a consequence of the surrogate nature of international protection. The Convention definition itself limits refugee status to a person who can demonstrate inability or legitimate unwilligness 'to avail himself of the protection of (the home) state'[12].
The Internal Flight Alternative principle is well established in national jurisprudence of States party to the Geneva Convention. The courts of Australia[13], Belgium[14], Canada[15], France[16], Germany[17], the Netherlands, New Zealand[18], Switzerland[19], the United Kingdom[20] and the United States of America[21] apply the Internal Flight Alternative. This concept is also used in some decisions of the European Commission for Human

11. Raad van State (Netherlands), 18 August 1978, (Turkish Christians I), RV, 1978, N 30, 93.
12. 'The drafting history of the Convention and its companion UNHCR Statute support this interpretation by their insistence on the exclusion of internally protected persons.' Hathaway, J.C., 'The Law of Refugee Status', Butterworths, Toronto, 1991, 133-134, mentioning the statements of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.172, at 4, August 12, 1950 and U.N.Doc.A./CONF.2/SR.24, at 17 July 17,1951 and the Statement of Mrs. Roosevelt of the U.S.A., 4 UNGAOR (264 plenary meeting) at 473, December 2, 1949; see also: Nicolaus, P., o.c., mentioning German jurisprudence and doctrine; Van Dijk P., 'Asiel- en vluchtelingenrecht en de rechten van de mens', in Hoeksma, J.A., red., *Asiel- en Vluchtelingenrecht*, Nijmegen, 1985, 17-18; Spijkerboer, T.P., and Vermeulen, B.P., *Vluchtelingenrecht*, Utrecht, 1995, 167; Henkel, J., 'Who is a refugee? Refugees from Civil War and other Internal Armed Conflicts', *Internal Conference on Asylum Law and Procedures*, 30 November - 2 December 1995, London.
13. Federal Court of Australia, 19 May, 11 August 1994, Randhawa, *Australian Law Reports*, 124, 265.
14. Vaste Beroepscommissie voor Vluchtelingen (Permanent Appeals Commission for Refugees), 23 December 1991, 91/290/W244; 12 November 1992, 92/676/W701; 21 May 1992, 90/235/R642; 2 October 1992, 92/422/R823; 19 November 1993, 93/213/R1550; 17 October 1994, 94/583/R2455 (not published).
15. Federal Court of Appeal, Canada, Toronto, 1991, Rasaratnam v. Canada, *1 C.F.*, 1992, 706-712, abstracted in *IJRL*, 1992, 95.
16. Commission des recours (Appeals Commission), jurisprudence mentioned in Tiberghien, F., 'La crise yougoslave devant la Commission des recours', *Documentation Réfugiés*, supplément au n 223, August 1993, 3.
17. Bundesverfassungsgericht (Constitutional Court), 10 July 1980; Bundesverwaltungsgericht (Federal Administrative Court), 2 August 1983, 9C600.81.
18. Refugee Status Appeals Authority, 5 September 1991, No 11/91.
19. Schweizerische Asylrekurskommission (Swiss Asylum Appeals Commission), 28 November 1995 i.S. Ö.C.Turkei, *EMARK*, 1996/1.
20. R v. Immigration Appeal Tribunal, Ex parte Jonah (1985), *Imm AR*, 7 (QBD). A detailed analysis of the recent 'United Kingdom Case Law on the 'Internal Flight Alternative' (IFA)' was made by Hugo Storey and will be published in IJRL.
21. United States Court of Appeal, 1990, Etugh v. Immigration and Naturalization Service, n 90-3240, abstracted in *IJRL*, 1992, 96.

Rights[22] and the European Court for Human Rights[23] applying Article 3 of the European Human Rights Convention (EHRC).

Taking in account the above mentioned legal, jurisprudential and doctrinal arguments the Internal Flight Alternative does not seem contrary to the Geneva Convention. A person who could have found meaningful protection in his own country does not have to go abroad and may be refused refugee status. The increased use of the principle and its inclusion in accelerated procedures may be worrying though.

2 THE CONDITIONS FOR APPLICATION OF THE INTERNAL FLIGHT ALTERNATIVE

According to Article 1A the first point an asylumseeker must establish is a well-founded fear of being persecuted.
If the asylumseeker is a credible witness he will further have to establish a nationwide lack of protection of his country against the alleged persecution.

2.1 Regional persecution, state or non state agent of persecution

In case of fear of persecution by central authority or organisations linked to this authority it may be assumed that the fear of persecution is nationwide and that the asylum seeker is unable to ask protection to his persecutor or is unwilling to do so. In such cases in principle the persecution should be considered country-wide[24] and 'protection of the country' not available.

Commenting on German jurisprudence Dr. Henkel states: 'In case of fear of persecution from the authorities of his country of origin it has to be assumed that, normally, the asylumseeker is threatened with persecution country-wide unless, exceptionally, it is clearly estab-

22. Henkel, J., o.c., 22-23; 'Noting that the applicant does not allege that, when expelled, he will be compelled to take up residence in his village, ...' (European Commission for Human Rights, 13 Oktober 1993, N 21350/93 (Togo)); '... the applicant has provided no evidence for the allegation that, while being a Lebanese citizen, she would be persecuted as the spouse of a Palestinian currently residing in Berlin, throughout the entire Lebanon, or in a Palestinian camp established in the country in which she would have to reside.' (European Commission for Human Rights, 10 Decemher 1986, N 12461/86 (Lebanon)); 'The applicant has furthermore not shown that he was prevented from taking up residence in other parts of Turkey.' (European Commission for Human Rights, March 11, 1994, N 23551/94 (Turkey)); 'As a leading Sikh militant, who is suspected of involvement in acts of terrorism, and who is to be deported because of the threat he poses to the security of the United Kingdom, the first applicant is likely to be a person of special interest to the security forces, irrespective of the part of India to which he is returned' (European Commission for Human Rights, June 27, 1995, N 22414/93, Chahal Family (India)).
23. ECHR, November 15, 1996, Chahal/United Kingdom, 70/1995/576/662.
24. 'The underlying assumption justifying the application of 'Internal Flight Alternative' is that the State authorities are willing to protect the rights of the individual concerned but are being prevented from or otherwise are unable to assure such protection in certain areas of the country. Therefore the notion should not, in principle, be applied in situations where the person is fleeing persecution from State authorities, even if the same authorities may refrain from persecution in other parts of the country' (UNHCR, 'An overview ...', 24-25).

lished that the risk of persecution by government authorities is limited to a part of the country which may be the case especially in situations in which persecution is part of a regional conflict with rebel or terrorist forces'[25].

The jurisprudence of the Canadian Federal Court[26] also stresses the importance of the agent of persecution related to Internal Flight Alternative. For instance, a claimant who fears the military, whose persecutory actions are condoned by a government in control of its territory, may not have an Internal Flight Alternative[27]. However the fact that the agent of persecution is an agent of the government is not determinative of the issue of protection[28]. In the Rodriguez Molina case the Canadian Federal Court concluded that while the claimant feared the federal police, the evidence showed that members of that police force could not interfere with the protection offered by the provincial police force[29]. Also evidence of a governmental nationwide network of intelligence gathering and dissemination does not, in and of itself, preclude Internal Flight Alternative[30].

The fact that the agent of persecution is a state agent is an important element of proof that someone cannot avail himself of the protection of his country. This proof can be reversed if meaningful protection might be obtained of another state agent, eventually in another part of the country. Prosecution of state agents or redress of damages through courts can eventually be effective protection.

For instance in case of persecution by local authorities the asylumseeker should normally avail himself of the protection of the central authorities[31]. In a Federal State a person, fearing persecution in one memberstate, should eventually avail himself of the protection of another memberstate. In a Federal State the central State executes its duty of protection

25. Dr. Henkel, J., o.c., 14, mentioning Bundesverwaltungsgericht, 10 May 1994, 9C434.93, *Deutsches Verwaltungsblatt*, 1994, 1407; See also Bundesverfassungsgericht, 1990, 2 525/90, *InfAuslR*, 4/91, 136-140: The supposition that someone who was arrested repeatedly by the authorities for his political activities could live without problems in a big city is not the proof of the existence of a relocation-possibility.
26. I used the overview of this jurisprudence found in: IRB Legal Services, 'Internal Flight: When is it an Alternative?', April 1994 and in IRB, Guidelines issued by the Chairperson, 'Civilian non-combatants fearing persecution in civil war situations', March 7, 1996.
27. M.E.I. v. Sharbdeen, Mohamed Faroodeen (F.C.A., No. A-488-93) Mahoney, MacGuigan, Linden, March 21, 1994. See also Soopramanien, Dorothy Anette et al. v. M.E.I. (F.C.T.D., A-1572-92) Pinard, October 5, 1993, both mentioned in IRB Legal Services, o.c., 4.
28. IRB Legal Services, o.c., 4.
29. Rodriguez Molina, Mario Osvaldo v. M.E.I. (F.C.A., n A-1319-91) Marceau, Décary, Desjardins, July 14, 1993, mentioned in IRB Legal Services, o.c., 4.
30. Sidhu, Jagdish Singh v. M.E.I. (F.C.T.D., n 92-A-6540) Muldoon, May 31, 1993, mentioned in IRB Legal Services, o.c., 4.
31. 'Insofar appellant states that he fears persecution from the Tawaye, since he left this group without their permission, the Raad van State esteems that claimant has not proven that he could not invoke the protection of the central authorities. Insofar as the claimant does mention that the persecutory agent are the local rather than the central Niger authorities he has not proven that no effective protection could be given by the central authorities' (Raad van State (Netherlands), 6 December 1994 (R02.92.4410), Niger, cited according to Bruin, R., 'Bescherming door de overheid; over het binnenlands vluchtalternatief', *NAV*, 1995, 783 (own translation)).

through the memberstates[32]. However an asylum-seeker need only avail himself of the protection of another state authority if it is a realistic option but not if it is a purely theoretical one[33]. The Internal Flight Alternative must be examined in the specific situation of the person and country[34].

When the agent feared is a non-governmental group evidence pertaining to the likelihood that it will expand its activities to the rest of the country in the foreseeable future is relevant. In the case of a localized conflict rooted in political or religious grounds, consideration should be given to whether or not the reasons behind the fear of persecution in the localized area remain in another part of the country[35].

2.2 Effective protection

2.2.1 *Accessability of the protection*

A person who cannot safely reach an Internal Flight Alternative is unable to avail himself of the protection of his country. Being unable implies circumstances that are beyond the will of the person concerned. One cannot expect the asylum-seeker to cross life endangering natural barriers or a region at war or occupied by the persecutors if he can safely reach another country.

The asylum claim has to be examined in the light of the situation of the country of origin at the moment of the decision[36]. If an accessible Internal Flight Alternative came to existence after the flight out of the country but before the decision refugee status may be refused[37].

32. Nicolaus, P., o.c., '2b. Verfolgung durch einen Gliedstaat in einem Bundesstaat', mentioning Naxalites and Nirankaris persecuted in some Indian States but not in other States.
33. For instance the European Commission for Human Rights stated in Turkish cases concerning the destruction of houses and property in South East Turkey by the Turkish army that while the Turkish Government outlined a general scheme of remedies that would normally be available for complaints against the security forces, that, although the destruction of houses and property has been a frequent occurrence, the Government had not provided a single example of compensation being awarded to villagers for damage comparable to that suffered by the applicants. Nor had relevant examples been given of succesful prosecutions against members of the security forces for the destruction of villages and the expulsion of villagers (Commission for Human Rights, Decision as to the admissibility, 23186/94, 9 January 1995, 6; Report of the Commission, 21893/93, Akdivar, 26 October 1995).
34. cfr. Raad van State (Netherlands), 2 November 1990, *RV*, 1990, N 5. The claimant had refused to execute ritual murders at his succession of the preceding king of Ashanti. The Raad van State refers to evidence showing that such problems do exist in Ghana and states that the claimant should have had the opportunity to refute the possibility of relocation.
35. IRB Legal Services, o.c., 4.
36. Raad van State (Belgium), Mumsiensi, nr. 46.530, 16 maart 1994; Commission des Recours, France, jurisprudence mentioned in TIBERGHIEN F., *La Protection des réfugiés en France*, Economica, Paris, 1988, 385-389); The (Canadian) Trial Division has specifically addressed the issue of at what point in time Internal flight Alternative is to be considered. In Dubravac v.M.C.I. (1995), 29 *Imm.L.R.* (2d) 55 (F.C.T.D.) where the claimants' home town had been surrounded by opposing Serbian forces, the Court commented that the claimants 'would not be required to go from their home town to the safe zone of Croatia, but ... from whenever they were relanded upon being sent back' (p. 56)(IRB, Guidelines, o.c., footnote 48). Violation of article 3 of ECHR must also have to be considered at the moment of the decision of the European Court for Human Rights, (ECHR, November 15, 1996, Chahal/United Kingdom, paragraph 86).
37. In the same sense Bruin (o.c., *NAV*, 1995, 774) commenting on the UNHCR point of view that the possibility

2.2.2 *Agent of protection*

The Geneva Convention does not specify what authority should give 'the protection of his country'.

According to the Canadian jurisprudence 'even where there is a breakdown of state apparatus, there may be several established authorities in a country able to provide protection in the part of the country controlled by them'[38]. Adequate state-protection might be given by the state in the form of a government of even a militia[39]. When the agent feared is a non-governmental group, e.g. a militia, a clan or a tribe, evidence that the group to which the claimant belongs controls another part of the country[40], or benefits from the protection of another group located in another area of the country is relevant.

Having regard to the former civil war situation in Lebanon and Eritrea, German jurisprudence accepted the possibility of protection given by de facto authorities for persons fearing persecution of state agents or other de facto authorities. The different regions in Lebanon or the de facto state Eritrea were regarded as being able to offer protection to their de facto citizens[41].

Commenting on this jurisprudence Nicolaus considers that for the application of Article 1, A, (2) of the Geneva Convention the persons concerned should be treated as having more than one nationality and that they should avail themselves of the effective protection of each country of which they are (de facto) national.

According to Bruyn non-governmental organisations are not party to international conventions and the protection they give in the territory they effectively control cannot be considered the 'protection of his country'. In such a situation there is no legal system and even if there is it will normally not meet international standards. He also stresses that according to the UNHCR-Handbook protection can only be given by central state authority[42]. Commenting on the issue of protection given by clans in Somalia, Bruyn states that this protection-issue should not be linked to the Internal Flight Alternative because this principle can only be applied if central authority is willing but unable to offer protection in a part of the country. It cannot be applied if there is no central state authority.

of finding safety in other parts of the country must have existed at the time of flight (UNHCR 'An overview ...', 24).

38. IRB, Guidelines, o.c., 12 mentioning Zalzali v. M.E.I. (1991) 3 F.C. 605 (C.A.) and Sami, Sami Qowdan v. M.E.I. (F.T.C.D., N A-629-92), Simpson, June 1, 1994 and Saidi, Ahmed Abrar v. M.E.I. (F.T.C.D., N A-749-92), Wetson, September 14, 1993 where, in each case, the Court upheld the Refugee Division's findings that protection was available in northern Somalia.
39. IRB Legal Services, 'Internal Flight: When is it an Alternative?', 4.
40. Federal Court Canada, Ali, Mohamed Anwar et al. v. M.E.I. (F.C.A., n A-4189-92) Mahoney, Robertson, McDonald, September 22, 1993, mentioned in IRB Legal Services, o.c.
41. Nicolaus P., o.c.
42. Bruin, R., 'Bescherming door de overheid; over het binnenlands vluchtalternatief', *Nieuwsbrief Vluchtelingen en Asielrecht*, 1995, 777; 'Zijn de vijanden van mijn vijanden wel mijn vrienden?', *Nieuwsbrief Vluchtelingen en Asielrecht*, 1996, 352-358.

Considering the fact there is no legal dual nationality but a de facto nationality Article 1E should be applied. This Article can not be applied unless the person has already taken residence in the country of his de facto nationality[43].

In my opinion the protection issue is essential to the refugee definition and the Internal Flight Alternative. The Geneva Convention does not give a definition of the agent of the country that can give protection. If central authority only controls a very small part of the territory or if there is no central authority in a country 'de facto authorities' may eventually give meaningful protection to their 'de facto citizens'.
There is no need to consider the persons having plural nationality. One should consider if they have meaningful protection of the country through a state agent or a de facto state agent. In exceptional crisis situations when state authorities are absent or ineffective private persons or non governmental organisations may be considered (de facto) state authorities lawfully executing state-functions, for instance the duty of protection of citizens[44].
In such cases there may be different authorities eventually giving meaningful 'protection of the country'. Whether this is the case, is really a question of factfinding rather than of legal reasoning. If one does consider the protection issue as essential effective protection of anyone be it a clan or militia should be considered in conformity with the Geneva Convention.

2.2.3 *Contents of the protection*

The Joint Position EU mentions 'that it may be necessary ... to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may reasonably be expected to move'. The Internal Flight Alternative is linked to the protection issue, the protection should be 'effective' and the expectancy of moving to the concerned area 'reasonable'. This criterion is derived from paragraph 91 of the Handbook stating 'if under all circumstances it would not have been reasonable to expect him to do so'.

The Joint Position EU or the Handbook does not provide much guidance with respect to what is 'reasonable' or 'reasonable in all circumstances' but the opinion of UNHCR of August 1995 is more specific:
'The discussion about the contents of the protection available in an internal flight alternative have primiraly focused on the aspects relating to physical safety. However, other aspects must also be taken into consideration. Protection must be meaningful. A person should not be excluded merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so. In addition to security aspects, this would require that basic civil, political and socio-eco-

43. Bruyn, R., 'Zijn de vijanden van mijn vijanden wel mijn vrienden?', *NAV*, 1996, 355-356.
44. A private person may in exceptional crisissituations legally take up public functions. This was for example the case of the temporary city-authorities nominated by officers of the secret army after the second world war in some Belgian cities. They were considered lawful state agents by the court because of the absolute necessity to have a government for the city. The principle of the continuity of public service was applied (Hof van Cassatie (Belgium), 11 June 1953, mentioned in Mast, A., Dujardin, J., *Overzicht van het Belgisch Administratief Recht*, 1994, N 70).

nomic human rights of the individual would be accepted. Questions of an economic nature, such as access to suitable employment, are not strictly relevant to the availability of protection, al-though the inability to survive elsewhere in the country may be another compelling reason to grant international protection'[45].

According to Canadian Jurisprudence two conditions must be met for the Internal Flight Alternative:

1. On a balance of probabilities there must be no serious possibility of the claimant being persecuted in the part of the country of relocation.
2. Conditions in the part of the country considered as an Internal Flight Alternative must be such that it would be not unreasonable, in all circumstances, including those particular to the claimant, for him to seek refuge there[46].

The criterion 'not reasonable in all circumstances' is analogous to 'undue hardship'[47]. This test is a flexible, objective test that takes into account the particular situation of the claimant and the particular country involved[48]. The proposition that the Internal Flight Alternative should be sufficiently secure to ensure that the asylum-seeker would be able to 'enjoy the basic and fundamental rights' was rejected by the Canadian Federal Court[49].
In the civil war context, relevant factors include the state of infrastructure and economy in the region (i.e. destroyed or not), and the stability or instability of the government that is in place there[50].

The German jurisprudence does not use the 'basic and fundamental rights' criterion in case of an Internal Flight Alternative either.

45. UNHCR, *An Overview* ..., 24. See also Hathaway: 'Where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic rights or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized' (Hathaway, J., *The law of refugee status*, Butterworths, Toronto, Canada, 1991, 134).
46. IRB, Guidelines, o.c., 13, mentioning Rasaratnam v. M.E.I., (1992) 1 F.C. 706 (C.A.) and Thirunavukkarasu v. M.E.I. (1994) 1 F.C. 589 (C.A.).
47. Federal Court, Canada, Ahmed, Ali v. M.E.I. (F.C.A., n A-89-92) Marceau, Desjardins, Décary, July 14, 1993, mentioned in IRB Legal Services, o.c.
48. Federal Court of Appeals, Canada, Thirunavukkarasu, Sathiyanathan v. M.E.I. (F.C.A., n A-81-92) Linden, Heald, Holland, November 10, 1993, mentioned in IRB, Legal Services, o.c.
49. IRB, Legal Services, 'The internal Flight alternative', *Reflex*, issue 8, march 1992, 69, mentioning The Rasaratnam-decision.
50. IRB, Guidelines, o.c., 13, mentioning Farrah, Sahra Said v. M.E.I. (F.C.T.D., N A-694-92), Reed, October 5, 1993, 3; Megag, Sahra Abdilahi v. M.E.I. (F.C.T.D., N A-822-92), Rothstein, December 10, 1993, 3 where the Court holds that instability alone is not the test of reasonableness; Irene, Steve Albert v. M.C.I. (F.C.T.D., N IMM-6275-93), Rohstein, October 6, 1994, the Court in considering relocation in an area controlled by one of the groups to the conflict, did not disagree with the applicant's submission that the group was not internationally recognized, had lost territory, was not an established force in the country (Liberia) and the applicant could not reasonably claim protection from that group.
According to Canadian jurisprudence a refugee camp normally is not to be considered as a meaningful Internal Flight Alternative (Federal Court of Appeals, Canada, Maariif, Ayman v. M.E.I. (F.C.T.D., n 93-A-343) Cullen, December 13, 1993, mentioned in IRB Legal Services, o.c.).

There is an Internal Flight Alternative if the person concerned would not be there in a hopeless situation. It must be sufficiently safe against political persecution and against disadvantages and dangers that are equal to persecution because of their gravity and intensity, and did not exist at the previous residence[51]. The lowering of the living standard caused by the forced displacement is not normally a sufficient reason for refugee status, but if the person could not survive economically asylum will not be refused[52]. If this impossibility to survive economically already existed in the region of origin but was caused by persecution the existence at the previous residence will not be a ground for refusal[53].

The Dutch Raad van State seems only to have one condition for Internal Flight Alternative, namely the safety of that part of the country. The worsening of the economic and social situation of the appellant caused by his displacement is not taken into account for refugee-status[54]. According to Dutch law in every asylum case in principle refugee status and compelling humanitarian grounds are examined. If refugee status is refused national protection may still be given on humanitarian grounds.

Economic and social factors normally are not taken into account for refugee status by the Swiss Refugee Appeals Commission unless it concerns state action with the purpose of economic anihilation of the person concerned or the political, religious or ethnical group of which he is a part. The reasonableness criterion is not part of refugee-status criteria but of another status concerning the (im)possibility of executing an expulsion[55].
There must be an individual examination of all circumstances and more specifically the possibility to survive economically (language knowledge, education), criteria according the alternative area such as previous stay or employment there or the presence of relatives or friends and social integration (sex, civil status, age, number and age of children and their knowledge of the language, general health and family situation)[56].

If a human rights standard is used to determine the definition of 'persecution' in the Geneva Convention the criterion of reasonableness can be considered as an inherent part of the Convention. The internationally accepted human rights standard found in the International Bill of Rights is the adequate standard for determining the existence of persecution and the possibility of an Internal Flight Alternative. Not only the deprivation of life or physical freedom should be considered as a form of persecution but also actions which deny human

51. Bundesverfassungsgericht July 2, 1980, a.a.O, S. 357, mentioned in Verwaltungsgericht Baden-Württemberg, May 10, 1990, *InfAuslR*, 11-12/90, 357; Bundesverwaltungsgericht, May 22, 1996 (BVerwG 9 B 136.96) mentioning BVerwG May 15, 1990 (BVerwG 9C 17.89, BVerwG November 20, 1990 (BVerwG 9 C 72.90 and BVerwG December 14, 1993 (BVerwG 9 C 45.92).
52. Bundesverwaltungsgericht, March 24, 1995, BVerwG 9 B 747.94, *Deutsches Verwaltungsblatt*, 1995, 868; March 31, 1992, BVerwG 9 C 40.91, *Deutsches Verwaltungsblatt*, 1992, 1541, mentioned in Henkel, J., o.c., 13.
53. Bundesverwaltungsgericht, May 22, 1996 (BVerwG 9 B 136.96).
54. Spijkerboer, T.P., Vermeulen, B.P., *Vluchtelingenrecht*, NCB, Utrecht, 1995, 170, mentioning Raad van State (Netherlands) June 21, 1979, *RV*, 1979, 8; Februari 7, 1980, *RV*, 1980, 3; August 13, 1981, *RV*, 1981, 4.
55. Article 18 and 14a of the AsylGesetz (Asylumlaw).
56. Article 14a, exigibility of expulsion, Schweizerische Asylrekurscommission, October 9, 1995, Turkey, *EMARK*, 1996/2.

dignity in any key way and the sustained or systematic denial of core human rights. A cumulation of violations of rights such as the discriminatory exclusion by the authorities from certain persons or minorities of the the right to work, form and join trade unions, social security, protection and assistance to the family, food, clothing and housing, healthcare, education, to take part in cultural life may in some cases be considered persecution[57].

The general situation of the country, in the former place of residence, and personal factors concerning the person have to be used to evaluate the reasonableness of an Internal Flight Alternative. Each case should be decided on its particular circumstances, not according to some blanket approach to different categories or nationalities of claimants. It is important though to use well-researched sources of data concerning general country situations to avoid an eclectic or ad hoc jurisprudence concerning claimants from the same countries and in similar situations[58].

2.3 Proof

2.3.1 *Burden of proof*

The burden of proof for the Internal Flight Alternative is no different from the general burden of proof in asylum cases. The burden of proof lies on the asylum seeker but this principle must be adapted to the specific situation of asylumseekers. The duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner[59]. The examiner will have to compare the facts brought up by the asylum seeker with information concerning the general human rights situation in the country and information available concerning Internal Flight Alternatives.

2.3.2 *Presumptions of protection*

If an asylum seeker goes to another part of his country and only leaves his country after a period of time without problems this may be the proof of a successful Internal Flight Alter-

57. 'An internationally accepted standard can be found in the International Bill of Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). More than any other gauge, the international Bill of Rights is essential to an understanding of the minimum duty owed by a state to its nationals. Its place derives from the extraordinary consensus achieved on the soundness of its standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords.' (Hathaway, J.C., o.c. 106-107).
58. Cfr. Hugo Storey, 'United Kingdom Case Law on the 'Internal Flight Alternative' (IFA)', 18.
59. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statement will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very often even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt (UNHCR, *Handbook*, paragraph 196).

native[60]. The fact that one does not immediately leave one's country does not necessarily mean that a person is not in danger. The person may have lived underground or otherwise hidden himself[61].

2.3.3 *Standard of proof in the case of the authorities inability to give protection*
The non-existence of a government[62] should not be an obstacle to claiming refugee status but the inability of the state to protect the claimant is not, in itself, a sufficient basis for his claim. The claimant must demonstrate a prospective risk of persecution[63].

While the unwilligness of a state to protect may be proven by the fact that it is persecuting or accountable for the persecution, persecution is not proven by the authorities inability to give protection.

In the *Ward* decision the Canadian Federal Court defined the standard of proof in the case of the authorities inability to give protection. As a presumption the Court held that except in situations where the state is in a condition of complete breakdown, states must be presumed capable of protecting their citizens. The Court found that this presumption can be rebutted by 'clear and convincing' evidence of the state's inability to protect[64]. 'For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize'[65].

2.4 Persons who have experienced persecution in their country

2.4.1 *Standard of proof*
Unless there is a significant change in the situation in the country of origin past persecution by state agents is normally a sufficient proof of possible future persecution[66].

60. 'The basis of the decision was the fact that he was able and had been shown to be able to live in his country for a period of two years a substantial period of time in a part where he was not persecuted in the way that he was when he was living home' (R v Secretary of State for the Home Department ex parte Celal Yurekli, Queen's Bench Division, 15 February 1990, CO/2065/89); see also Raad van State (Netherlands), September 21, 1994, *RV*, 1994, N 8, 23: After the murder of his father a Liberian asylumseeker remained in Liberia during 13 months without having problems.
61. An asylumseeker lived prior his departure for New Zealand three years underground, changed his address frequently and had no contact with his wife and two children (Refugee Status Appeals Authority (New Zealand), N 167/92 Re RS, December 1992, 18).
62. A situation of civil war does not exclude the application of the Geneva Convention. In each individual case the fear of persecution for one of the grounds of the Convention must be examined (Raad van State (Belgium), Muric (Bosnia), nr. 43.082, May 26, 1993, *Revue du droit des étrangers 1993 (RDE)*, 336).
63. IRB, Guidelines, o.c., endnote 36, mentioning Noble, Abdi Burale v. M.E.I. (F.C.A., N A-1101-91), Heald, Stone, McDonald, April 25, 1994, where the agent of persecution (the NSS in Somalia) was no longer a factor.
64. IRB, Guidelines, o.c., 12.
65. Canada (Attorney General) v. Ward, La Forest J., March 25 1992; 30 June 1993, *2 S.C.R.*, 1993, 724-725. Considering that the abovementioned elements of proof, are not different from the proof generally used in an asylumcase, this does not seem an 'onerous evidentiary burden' as stated by Audrey Macklin ('Attorney-General v. Ward: A Review Essay', *IJRL*, 1994, 367).
66. 'Where a person has experienced torture, particularly on more than one occasion, one should be reluctant to

The German jurisprudence has a specific proof standard for asylumseekers who have experienced persecution before their flight. 'They are only refused asylum if the danger that persecution will be repeated can be excluded without any serious doubt concerning the asylum seeker's security in the case of return to his native country. In this way, the serious and lasting harm of previously experienced persecution can be taken into account'[67].

2.4.2 *Compelling reasons arising out of previous persecution*

The Refugee Status Appeals Authority of New Zealand gave elaborate arguments concerning the application of the humanitarian principles mentioned in Article 1C(5) and (6) of the Geneva Convention to the Internal Flight Alternative:

Those Articles, allowing one not to avail oneself of the protection of one's country of nationality or former residence because of compelling reasons arising out of previous persecution, is restricted to statutory refugees falling under Article 1A(1) of the Convention.

The validity of the underlying humanitarian principles whereby in certain circumstances a person will continue to be recognized as a refugee even if, due to changes of circumstances in the country of origin, he ceases to have a well founded fear of persecution, does not depend upon their inclusion in a particular Article of the Convention.

While relocation (Internal Flight Alternative) and cessation are separate issues, the humanitarian principles behind the exception to the application of the cessation clauses are the same as, or analogous to, the humanitarian principles underpinning the 'reasonableness' limb of the relocation (Internal Flight Alternative) test.

It is therefore entirely consistent both with the Convention and with refugee doctrine for refugee status to be recognized under Article 1A(2) even though the individual in question could access meaningful protection in some part of the country of origin, if in the circumstances, it would be unreasonable to expect the individual to seek out that protection[68].

Torture or degrading or inhuman treatment can be considered persecution. In applying the abovementioned humanitarian principle to the Internal Flight Alternative the following elements[69] are relevant: the fact that the torture victim is suffering from a mental affliction, the subjective consequences of torture upon its victim, the trauma of witnessing the torture and murder of a friend, the continuing physical and related disabilities as a result of torture, the

rule out the possibility of future torture or persecution, so long as the same conditions or regime prevails in the person's country of origin' (Refugee Status Appeals Authority (New Zealand), Refugee Appeal N 55/91 Re RS, August 10, 1992).

67. Kälin, W., 'Well-founded fear of persecution: a European perspective', *Asylum Law and Practice in Europe and North America*, Ed. G. COLL and J. BHABHA, 1992, 32, mentioning Bundesverwaltungsgericht, 25 September 1984, 70, 1969, *E.Z.A.R.*, 200, Nr. 12, 3. 'The fear of persecution of applicants who have not been persecuted before coming to Germany is regarded as well-founded if persecution can be expected with 'considerable probability' (i.e., it is impending in the objective view of a judicious beholder). The leading test is whether or not, according to general opinion, the applicant can be expected to further remain in the country of origin'.

68. Refugee Appeal N 135/92, Nicholson, Haines, Domzalski, June 18, 1993; see also Commission des recours (France), Goïcoechea, 18.913, December 20, 1985 (Spain) in Tiberghien, F., *La protection des réfugiés en France*, 400; Immigration and Refugee Board (Canada), CRDD M 92 92-00768, June 19, 1992, *Reflex*, december 1992, 8.

69. as mentioned by the Refugee Status Appeals Authority of New Zealand, see footnote 69.

detention and torture of family members and the frequency and time elapsed since the torture took place.

The claimant does not necessarily have to have been personaly persecuted. The serious traumatic and lasting effects of persecution suffered by relatives caused on their relatives can be considered persecution and is relevant[70].

2.5 Internal Flight Alternative and the subjective circumstances surrounding the alleged persecution

According to UNHCR: 'Another consideration in assessing the qualification of 'reasonable', as mentioned in paragraph 91, includes an evaluation of the subjective circumstances surrounding the alleged persecutions, such as the depth and quality of the fear itself. In some situations the subjective fear may be so great that the applicant, quite understandably, is unwilling to avail himself of the protection of his or her country regardless of the absence of real danger elsewhere in the country. This must remain a persuasive factor in the overall claim'.

The importance of the subjective character of the 'fear' of persecution of an asylum seeker is stressed by UNHCR not only in the case of Internal Flight Alternative but generally. Defining persecution the Handbook states: 'The subjective character of fear of persecution requires an evaluation of the opinion and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary'[71].

The relevance of the subjective character of fear for the definition of persecution is a matter of controversy[72].

70. Schweizerischen Asylrekurskommission, December 20, 1995, L. and R.S. (Hungary), *EMARK*, 1996, N 10, applying Article 1, C (5).
Concerning a Liberian asylum seeker having seen his father murdered in front of him refugee status was not given because he stayed without problems more than a year in Liberia. The Dutch Raad van State considered the traumatic experience relevant considering national protection for compelling humanitarian reasons (Raad van State (Netherlands), September 21, 1994, N R02.92.2328, *RV*, N 8, 23). In another case an Angolan minor asylumseeker who's parents where shot because of the political activity of his father was not considered refugee because the court stated that he would not be persecuted by the Angolan authorities. National protection for compelling humanitarian reasons should be given according to the court. (Arrondissementsrechtbank Zwolle, Oktober 30, 1996, *Jurisprudentiebijlage, 1996, nr. 20, 19-21*)(See also, Raad van State, March 29, 1989, *RV*, 1989, N3 and the 'Tamil-letter' to the Dutch parliament, *TK*, 1986-1987, 18940, N 28 and *TK*, 1992-1993, 22735, N 5, 10. Applying the humanitarian principles of 'compelling reasons', refugee status could have been given in such cases.
71. UNHCR, *Handbook*, No. 40-41, 'Persecution', No. 51-53 and 'Discrimination', No. 54-55.
72. 'It is not accurate to speak of the Convention definition as 'containing both a subjective and an objective element'. While the word 'fear' may imply a form of emotional response, it may also be used to signal an anticipatory appraisal of risk. ... It is clear from an examination of the drafting history of the Convention that

If persecution is to be defined according to internationally recognized human rights it does not seem adequate as a general principle to evaluate violation of human rights according to 'variations in the psychological make-up of individuals'. Such an approach might be considered discriminatory. Defining prohibited discrimination the European Human Rights Court cites as one of the criteria the fact that 'the distinction (made) does not have an aim, i.e. it has no objective and reasonable justification with regard to the aim and effects of the measure under consideration'[73].

An objective approach to the fear in the sense of prospective risk of persecution does not necessarily signify a restrictive interpretation or creation of de facto refugees who are in need of protection but do not get asylum[74] or exclude personal characteristics within the evaluation of the risk. Those characteristics do not matter because 'of the opinion and feelings of the person concerned' but because of the risk they may cause[75].
The prospective risk must be evaluated and the principle of the benefit of the doubt in favor of the asylumseeker should be applied.

2.6 Conclusion

The question of Internal Flight Alternative is an integral part of the Convention definition but only has to be adressed if the claimant has otherwise met the requirements of the refugee-definition. If the ground for refusal is a lack of credibility of the story of the asylumseeker or lack of gravity of the alleged persecution the existence of an Internal Flight Alternative can be an additional ground for refusal.

the term 'fear' was employed to mandate a forward-looking assessment of risk, not to require an examination of the emotional reaction of the claimant' (Hathaway, J., o.c., 66-75).
'Although this construction advanced by the UNHCR does not necessarily follow from the wording of article 1A, para. 2 of the Refugee Convention (the relationship between the objective and the subjective element is not set forth in the article), it is in conformity with the history of the Convention. The drafters did not want to require the asylum-seeker to prove the existence of persecution but regarded a showing of good reasons for fearing persecution as sufficient. This view was not contested at the time of drafting the Convention. One reason for this may have been the 'Zeitgeist'. After the experience of World War II, a consensus existed that freedom from fear was a value in itself. Thus, the preamble of the 1948 Universal Declaration of Human Rights stresses, inter alia, that the 'advent of a world in which human beings shall enjoy ... freedom from fear ... has been proclaimed as the highest aspiration of the common people' (Kälin, W., 'Well-founded fear of persecution: A European perspective, 3. Subjective Fear or Objective Danger of Persecution?' in Bhabha, J. and Coll, G., o.c., 26-29).

73. European Court of Human Rights, 23 July 1968, A.6, 1968, 34.
74. Kälin, W., o.c.
75. '... The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g. a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is 'well-founded'.' (Handbook, N 43).
In determining whether there is an objective basis for fearing persecution in the Internal Flight Alternative region, the personal circumstances of the claimant, and not just general evidence concerning other persons who live there should be considered (IRB, Guidelines, o.c., endnote 45).

The Internal Flight Alternative involves complex issues of fact and law. The burden of proof being shared between the applicant and the examiner should collect information concerning the general human right situation in the country and Internal Flight Alternatives in that country[76]. If the procedure is adversarial the parties can bring evidence concerning Internal Flight Alternatives.

Considering the prementioned complex issues implied it does not seem appropriate to use the Internal Flight Alternative as a criterion for accelerated procedures as proposed in a resolution of the Ministers of the Member States of the European Union in 1992[77]. Each case should be examined with care and a case cannot be considered manifestly unfounded on this ground alone[78]. All circumstances concerning the person, the past persecution, the prospective risk and the reasonableness have to be considered.

Applying the Internal Flight Alternative both conditions safety of persecution and reasonableness are considered in most jurisprudence I have analysed. In some countries this is done within the Geneva Convention, in others it is protection is given by national law to persons considered in need of protection.
If the criteria of reasonableness and the humantarian principle concerning past persecution are considered many cases deserving protection and getting a national protection could be considered for refugee status, which not only guarantees international protection and protection against refoulement but also a number of rights mentioned in the Geneva Convention. Cases falling within the application of the Geneva Convention are guaranteed international legal protection and thus do not depend of the discretionary competence of the executive. This also gives full competence to the courts to review te cases in accordance with international law and not limit the judiciary review to the evaluation of the reasonableness of the use by the executive of its competence.

76. Concerning the repatriation policy of the Netherlands authorities concerning refused Somalian asylumseekers to the region of their (sub)clan the Court stated after hearing experts that the necessary protection may not be afforded in all cases by the (sub)clan, but rather by the near extended family, as considered by Somali. Each subclan is composed of several extended families (Vreemdelingenkamer Zwolle, 28 June 1996, *NAV*, 1996, 778-779.
77. 'Applications for asylum from claimed persecution which is clearly limited to a specific geographical area and where effective protection is readily available for that individual in another part of his own country to which it would be reasonable to expect him to go may be included within an accelerated procedure. When necessary, the Member States will consult each other in the appropriate framework, taking account of information received from UNHCR, on situations which might allow, subject to an individual examination, the application of this paragraph.' (paragraph 7 of the Resolution of the Ministers of the Member States of the European Communities on manifestly unfounded applications for asylum (London, 30 November and 1 December 1992)), *NAV*, 1992, 626.
78. Spijkerboer, T.P. and Vermeulen, B.P., o.c., 171.

The Prohibition of Inhuman Return and its Impact upon Refugee Status Determination

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I INTRODUCTION

The relationship between refugee law and international human rights instruments is a complex one. On the one hand, there are clear indications of an interrelationship between the two areas of law concerned: The eminent 1948 Universal Declaration of Human Rights, in its article 14, states the 'right to seek and to enjoy in other countries asylum from persecution' as one of the guarantees which, according to the preamble was proclaimed 'as a common standard of achievement for all peoples and all nations.' In similar vein, the 1951 Convention on the Status of Refugees (hereinafter 1951 Refugee Convention) contains, in its preamble, an explicit reference to the affirmation of every human being's fundamental rights and freedoms by the UN Charter and the 1948 Universal Declaration. Thus, it is recognized that the 1951 Refugee Convention belongs to the category of human rights conventions. Even more important is the fact that granting refugee status and asylum together with the scrupulous observance of the principle of non-refoulement is one of the most effective means of securing human rights protection in that it ensures that the violator can no longer reach the victim of persecution. Finally, it is, of course, clear that the general human rights situation in countries of origin play a major role when it comes to the determination of specific asylum claims.

In contrast to the above, international human rights law and refugee law are, on the other hand, separate and distinct areas of law: The refugee definition of article 1A does not refer to human rights. More significantly, international law does not grant any individual right of asylum to refugees. Article 14 of the Universal Declaration on Human Rights accurately reflects the present state of international law by guaranteeing only the right to 'seek' and to 'enjoy' asylum but leaving out the pivotal right to receive such a status. Therefore, asylum is still granted as an expression of state sovereignty and not as a consequence of any human rights entitlement. The lack of a subjective right to asylum considerably weakens the position of refugees looking for protection abroad[1]. On a conceptual level, many still maintain that a distinction must be made between human rights and refugee law. In academic life, e.g., specializations in courses, research and journals still reflect this tradition. A similar specialization is found in many countries where appeals in asylum cases are decided by special

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1. Nevertheless, the concept of asylum as a 'right' (or competence) of sovereign states is an important one as it prohibits the country of origin from considering the granting of asylum as an unfriendly act under international law.

bodies[2] as opposed to ordinary courts entitled to apply domestic or even international human rights guarantees. Consequently, asylum authorities and courts apply domestic and - at least in countries where international law is applicable on the national level - international refugee law; however, international human rights law is hardly implemented.

Based on the above, one could quickly come to the conclusion that human rights conventions do not have any impact on the determination of claims to be recognized as a refugee. However, since the late 1980's and early 1990's, international human rights instruments have started to play a significant role in domestic asylum procedures of some countries such as - in alphabetical order - Belgium, Canada, the Netherlands and Switzerland. At the same time, international human rights bodies such as the European Court of Human Rights, the UN Committee against Torture set up by the 1984 Convention against Torture and, to a lesser extent, the Committee on Human Rights established by the 1966 International Covenant on Civil and Political Rights have begun to apply human rights law to persons claiming to be victims of persecution in another country. To me, there can be no doubt that this emerging convergence of refugee and human rights law is just the beginning of a process which, in the future, will deeply affect the work of refugee law judges in many countries.

It is not possible to address all aspects of the impact of international human rights upon refugee status determination in this paper. I shall focus here on the human rights prohibition of inhuman return in cases of imminent danger of torture and similarly serious human rights violations (II) and, further, on its relevance for substantive refugee laws and asylum procedures (III).

II THE HUMAN RIGHTS PROHIBITION OF INHUMAN RETURN

1 The European Case Law[3]

Probably the most important development in the area of human rights law for asylum-seekers and refugees is the emergence of a 'right not to be returned.' This right was developed in the early 1970s on the regional level in Europe and transferred to the universal level in 1984. In a series of cases, the European Commission of Human Rights and the European Court of Human Rights derived a prohibition of inhuman return from article 3 of the 1950 European Convention on Human Rights (ECHR) which states that '[n]o one shall be subjec-

2. Therefore, it is no coincidence that there is an International Association of Refugee Law Judges but not an equivalent Association of Human Rights Law Judges.
3. See, e.g., Ralph Alleweldt, Protection against Expulsion Under article 3 of the European Convention on Human Rights, 3 European Journal of International Law 373 (1993); Terje Einarsen, The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum, 2 IJRL 361 (1990); Joachim Henkel, Who is a Refugee? refugees from civil war and other internal armed conflicts, in: Asylum Law, First International Judicial Conference, Conference papers Series No. 1, London, 1996 at 26-33,; Richard Plender, Human Rights, ibid., at 47-52.

ted to torture or to inhuman or degrading treatment.' The Commission, in a well-established formula, stresses that 'according to its established case-law, the Convention does not secure any right of residence or asylum in a State of which one is not a national' but at the same time recalls that 'the deportation of a foreigner might, in exceptional circumstances, raise an issue under article 3 of the Convention where there is serious reason to believe, that the deportee would be liable, in the country of destination, to treatment prohibited by this provision'[4]. In Soering v. UK[5], a 1989 extradition case, the European Court of Human Rights confirmed this jurisprudence for the first time. In the Cruz Varas Case of 1991, the Court applied the principles developed in Soering to a rejected asylum seeker who was facing a *deportation* to Chile where he claimed a risk of torture[6]. In its Chahal Judgment of 1996, the Court summarized its approach with the following words:

> 'It is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have 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 these circumstances, article 3 implies the obligation not to expel the person in question to that country'[7].

In the same case, the Court made clear that article 3 of the ECHR can be invoked against any State Party to the European Convention even if the persons concerned will be sent to a country outside Europe. In the Cruz Varas case, the Court explained:

> 'Although the establishment of such responsibility involves an assessment of conditions in the requesting country against the standards of article 3, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (...)'[8].

This reasoning, in essence, rests on the idea that the act of deportation, extradition or expulsion is in itself an inhuman act in the sense of article 3 of the ECHR if it forces the alien to go to a country where his or her most basic human rights would be seriously violated. The returning state is responsible under the Convention because the return measure constitutes a crucial element in the chain of events leading to the human rights violation in the state to

4. Application No. 11933/86, A. v Switzerland, 46 D. & R. 257, 269 (Decision of Commission of 14 April 1986) and many others.
5. Soering Case, Judgment of 7 July 1989, Series A, No. 161.
6. Cruz Varas Case, Judgment of 20 March 1991, Series A, No. 201, para. 69 (quoting Soering Case, supra note 5, para. 91) and 70.
7. Chahal v. United Kingdom, Judgment of the Court of 15 November 1996, Reports 1996 (to be published), para.74 (quoting Soering v. the United Kingdom, supra note 5, paras. 90-91, the Cruz Varas Judgment, supra note 6, paras. 69-70 and Vilvarajah and Others v. United Kingdom, Judgment of 30 October 1991, Series A, No. 215, p. 34, para. 103).
8. Cruz Varas Case, supra note 6, para. 69.

which the person is returned. Thus, it is not only the country which actually kills or tortures the alien that violates his or her human rights but also the state which makes such persecution possible by handing the individual over to the persecutor.

Rationae personae, the protection provided by article 3 against forcible return can be invoked by anyone, including fugitive criminal offenders[9] and illegal aliens[10]. As the Court has stated, it also protects refugees and (rejected) asylum-seekers[11]. In addition, the Commission has been ready to examine the application of a refugee with 'subjective' post-flight reasons ('subjektive Nachfluchtgründe') who was not granted asylum[12].

What *types of human rights violations* awaiting the individual in the foreign country makes the return inhuman? The formula of the Court indicates that treatment must be 'contrary to Article 3 in the receiving country'[13], i.e. constitute 'torture or ... inhuman or degrading treatment or punishment'[14] which requires that '[i]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum, is, in the nature of things, relative; it depends on all the circumstances of the case'[15]. Both Commission and Court have indicated that in very serious cases, other kinds of human rights violations could make forcible return inhuman: The Court did 'not exclude that an issue might

9. Soering Case, supra note 5; Application No. 22742/93, Aylor-Davies v. France, 76-B D. & R. 164, 170 (Decision of the Commission adopted 20 January 1994) and many others.
10. Application No. 17550/90 and 17825/91, V. u. P. v. France, 70 D. & R. 298, 314 (Decision of the Commission adopted 4 June 1991).
11. Cruz Varas Case, supra note 6; see also, Vilvarajah and others v. UK (rejected asylum-seekers from Sri Lanka), supra note 7, para. 103: 'In its Cruz Varas judgment of 20 March 1991 the Court held that expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country where he was returned.' For the case law of the Commission see, e.g., application No. 23634/94, Tanko v. Finland, 77-A D. & R. 133, 137 (asylum-seeker)(Decision of the Commission of 19 May 1994), application No. 3110/67, 11 Yearbook 494, application No. 4162/69, 12 Yearbook 807 (recognized refugees) and application No. 4314/69, 13 Yearbook 900 (de facto refugee).
12. Application No. 11933/86, A. v. Switzerland, supra note 4 at 270.
'3. The applicant claims that (...). After arriving in Switzerland, he also engaged in political activities directed against the regime in Turkey. As a result, he would incur a substantial risk of prosecution if deported to Turkey.
(...) As to the political activities pursued in Switzerland, the Government observed that they were initiallyr estricted to a small group and became more extensive following the rejection of the applicant's request for asylum. According to the Government, an applicant for asylum should in his own interest limit his political activity in the receiving country. (...)
4. The Commission notes that there is some uncertainty as regards the applicant's activities prior to his departure from Turkey. Conversely, it is clear that in Switzerland he displayed a critical attitude to the military regime in Turkey. He made public statements on the subject and took part in demonstrations of a political nature. His case was reported in the Swiss press.
The Commission has considered whether these activities were such as to create a serious risk of the applicant's being subjected in Turkey to torture or other treatment prohibited by Article 3.'
13. Chahal Case, supra note 7, para. 74.
14. Cruz Varas Case, supra note 6, para. 69.
15. Vilvarajah Case, supra note 7, para. 107; similarly, Soering Case, supra note 5, para. 100.

exceptionally be raised under Article 6 ... in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country'[16]. The Commission has held that in cases of political persecution, 'the imposition of a long and severe sentence would raise an issue under Article 3'[17]. It indicated that return to violations of the right to life would be inhuman[18]. Finally, it did 'not exclude that a lack of proper care in a case where someone is suffering from a serious illness could in certain circumstances amount to treatment contrary to Article 3'[19].

In recent cases, both the Court and the Commission have clarified issues of particular relevance for refugees and asylum-seekers: They have concluded that article 3 of the ECHR provides protection not only in cases of torture and similarly serious human rights violations which are part of governmental policy but also in cases where such acts are committed by security forces acting *ultra vires*, by parties to a civil war and even by entirely private entities:

- In the Chahal case, the Court prohibited deportation to India of an alleged Sikh terrorist because of a serious risk of torture by Punjabi police forces acting *ultra vires*: The Court noted that although it did 'not doubt the good faith of the Indian Government in providing ... assurances .., it would appear that, despite the efforts of that Government ... and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjabi and elsewhere in India is a recalcitrant and enduring problem'[20].
- In the Ahmed case, the Commission rejected the argument advanced by the Austrian government that a 1951 Convention refugee convicted for a particularly serious crime within the meaning of article 33(2) of that Convention could be sent back to Somalia, under article 3 of the ECHR because he did not fear governmental persecution but torture and death by a designated clan. In unanimously concluding that the applicant's expulsion to Somalia would violate article 3, the Commission held that the 'position of the Austrian Authorities that there is no substantial risk for the applicant since the State authority had ceased to exist in Somalia cannot be accepted. It is sufficient that those who hold substantial power within the State, even though they are not the Govern-

16. Soering Case, supra note 5, para. 113.
17. Application No. 11933/86, A. v. Switzerland, supra note 4 at 269.
18. Application No 14912/89, X v. Switzerland, (unpublished): 'The Commission recalls that the right of an alien to reside in a particular country is not as such guaranteed by the Convention. However, expulsion may in exceptional circumstances involve a violation of the Convention, for instance where there is a serious fear of treatment contrary to *Articles 2* and 3 of the Convention.' (Emphasis added). In its report of 13 September 1996, application 25894/94, Shamsuddin Bahaddar v. Netherlands, (to be published), para. 78, the Commission confirmed this with the following clarification: 'As to the prohibition of intentional deprivation of life, the Commission does not exclude that an issue might be raised under Article 2 in circumstances in which the expelling State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be a near-certainty. The Commission considers, however, that a 'real risk' - within the meaning of the case-law concerning Article 3 (...) - of loss of life would not as such necessarily suffice to make expulsion an 'intentional deprivation of life' prohibited by article 2, although it would amount to inhuman treatment within the meaning of Article 3.'
19. Application No. 23634/93, Tanko v. Finland, supra note 11 at 137.
20. Chahal case, supra note 7, para. 105.

ment, threaten the life and security of the applicant'[21]. The Court, in its Judgment of 17 December 1996[22], confirmed this position and 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'[23]. In doing so, the Court confirmed the position of the Commission and stressed that Somalia 'was still in a state of civil war and fighting was going on between a number of clans vying with each other for control of the country'[24]. It recognized that its conclusion was not 'invalidated by ... the current lack of State authority in Somalia'[25]. 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[26]. With Ahmed, the Court has confirmed that article 3 also can be invoked in cases of return to situations of civil war.

- In H.L.R. v. France, the Commission came to the conclusion that it would be contrary to article 3 to deport a drug dealer to Colombia where he had collaborated with the police and, therefore, risked being killed by the drug mafia[27].

Finally, it is highly relevant for refugees fleeing torture and similarly serious human rights violations that the protection afforded by article 3 of the ECHR is an *absolute* one. In the Chahal case, the Court rejected the argument advanced by the government of the United Kingdom that in expulsion and extradition cases, the ECHR would allow balancing the threat posed by an individual to the national security against the individual's interests to be sent to another country. The Court recalled that article 3 'enshrines one of the most fundamental values of democratic society'[28] and, therefore, 'is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration'[29]. This principle was reaffirmed in the Ahmed case where it was held that the applicant should not be sent back despite his conviction for a particularly serious crime[30].

21. Sharif Hussein Ahmed v. Austria, Report of the Commission adopted on 5 July 1995, para. 68.
22. Case of Ahmed v. Austria (71/1995/577/663), Judgement of 17 December 1996, Reports 1996 (to be published).
23. No. 2 of the operative part of the unanimous judgement.
24. Id., para. 44.
25. Id., para. 46.
26. Id., para. 44, last sentence.
27. Application No. 24573/94, H.L.R. v. France, report of the Commission of 7 December 1995, ASYL 1996/4, pp. 132-4.
28. Chahal case, supra note 7, para. 79. Similarly, Soering case, supra note 5, para. 88: 'Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe (...).'
29. Id., para. 80.
30. Ahmed Judgment, supra note 22, paras. 41 and 46.

2 The Universal Level

a *The Convention Against Torture*[31]

European jurisprudence has heavily influenced developments on the universal level. The drafters of the 1984 UN Convention against Torture (CAT) have codified this case law in article 3 of that Convention which provides:

> '1 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.'
>
> 2 For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

This provision can be invoked in cases of individual applications under article 22 of the CAT. Thus far, the majority of all cases submitted to the Committee against Torture originated from rejected asylum seekers invoking article 3. Claimants have been successful in several cases. In the first such case, Mutombo v. Switzerland, the Committee stated that the

> 'aim of the determination, ..., is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture upon his return in his specific circumstances'[32].

On this basis, the Committee regularly focuses first on the specific traits of the case by looking at aggravating factors (such as history of detention, political activities, membership of an oppressed minority) and then, in a second step, assesses the risk of torture in light of the general human rights situation in the country concerned. In doing so, the Committee heavily relies on fact-finding done by Special Rapporteurs, Working Groups and other experts on behalf of the UN Human Rights Commission or the UN Secretary General[33].

31. See, e.g., Guy Goodwin-Gill, The Refugee in International Law, 2nd ed., Oxford 1996, p. 153,; B. Gorlick, Refugee Protection and the Committee against Torture, 7 IJRL 405 (1995); Mario Gattiker, Die Beschwerde gemäss Art. 22 UNO-Folterkonvention wegen Verletzung des Rückschiebeverbotes, ASYL 1996/1, p. 3; Walter Suntinger, The Principle of Non-Refoulement: Looking rather to Geneva than to Strasbourg?, 49 Austrian Journal of Public and International Law 210 (1995).
32. Views of the Committee against Torture under article 22, concerning Communication No. 13/1993 submitted by Mr. Balabou Mutombo. Date of communication: 18 October 1993; Date of Views: 27 April 1994, para. 9.3 (Annual Report 1994 (UN Doc A/49/44), pp. 45; also in HRLJ 1994, p. 164 and 7 IJRL 322 (1995).
33. See Mutombo case, supra note 32, para. 9.5: 'The Committee is aware of the serious human rights situation in Zaire, as reported, inter alia, to the United Nations Commission on Human Rights by the Secretary-General and by the Commission's Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special

Like the European Court of Human Rights, the Committee against Torture focuses on the *responsibility* of the *returning* state. In *Khan v. Canada*, it stated in this regard that it is not

> 'called upon to determine whether the author's rights under the Convention have been violated by Pakistan, which is not a State Party to the Convention. The issue before the Committee is whether the forced return of the author to Pakistan would violate the obligation of Canada under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'[34].

The Committee against Torture, which is composed of independent experts comprising not only lawyers but also medical doctors, has specifically addressed the problem of contradictory statements and belated submissions of torture; it has repeatedly noted 'that this behaviour is not uncommon for victims of torture' and, therefore, irrelevant if it does not concern essential aspects of their asylum claim[35].

b *The Covenant on Civil and Political Rights*

The 1966 International Covenant on Civil and Political Rights (CCPR) prohibits torture and 'cruel, inhuman or degrading treatment or punishment' in its article 7. For a long time, the Human Rights Committee, established by article 28 of the CCPR and entitled to examine individual communications on the basis of the First Optional Protocol to the CCPR, had no opportunity to consider whether article 7 is applicable to expulsion, deportation and extradition cases. However, in its General Comment No. 20 on article 7, it stated that 'States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'[36]. The Committee has also decided that forcible return might be prohibited if the individual concerned risks, in the country to which he or she is returned, a vio-

Rapporteur on torture and the Working Group on Enforced or Involuntary Disappearances. The Committee notes the serious concern expressed by the Commission in this regard, in particular in respect of the persistent practices of arbitrary arrest and detention, torture and inhuman treatment in detention centers, disappearances and summary and arbitrary executions, which prompted the Commission to decide, in March 1994, to appoint a special rapporteur specifically to examine and to report on the human rights situations in Zaire. The Committee cannot but conclude that a consistent pattern of gross, flagrant or mass violations does exist in Zaire and that the situation may be deteriorating.'

34. Views of the Committee against Torture under article 22, paragraph 7, concerning Communication No. 15/1994 submitted by Mr. Tahir Hussain Khan, para. 12.1. Date of communication: 4 July 1994; Date of Views: 15 November 1994 (Annual Report 1995 (UN Doc. A/50/44), pp. 46; HRLJ 1994, p. 426).
35. Khan case, supra note 34, para. 12.3; Views of the Committee against Torture concerning Communication No. 21/1995 submitted by Mr. Ismail Alan, para. 11.3. Date of communication: 31 January 1995; Date of Views: 8 Mai 1996; Views of the Committee against Torture concerning Communication No. 41/1996 submitted by Ms. Pauline Muzonzo Paku Kisoki, para. 9.3. Date of communication: 12 February 1996; Date of Views: 8 Mai 1996. – Compared to the European Court of Human Rights, the Committee against Torture seems to be less strict when it comes to standards of proof.
36. Human Rights Committee, General Comment 20/44 of 3 April 1992 (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, (UN Doc. HRI\GEN\1\Rev.1) at 30 (1994)), para. 9. Similar: views of the Human Rights Committee in respect of communication No. 469/1991, Charles Chitat Ng v. Canada, adopted on 5 Nov. 1993, paras. 14.2 (Annual Report 1994, UN Doc. A/49/40, Vol. II, p. 189; also in HRLJ 1994, p. 149).

lation of the right to life[37]. Again, this jurisprudence regards the act of handing an individual over to his torturer, murderer or executioner as a violation of the obligation to protect individuals against torture and unlawful deprivations of life. Thus the Human Rights Committee, in the *Ng* case, involving an extradition from Canada to the United States, observed

> 'that what is at issue is not whether Mr. Ng's rights have been or are likely to be violated by the United States, which is not a State party to the Optional Protocol, but whether by extraditing Mr. Ng to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. ... A State Party to the Covenant must ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for consideration of this issue must be the State party's obligation, under article 2 paragraph 1 of the Covenant, namely to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant'[38].

The case law of the Committee thus far refers only to situations of extradition. It can, however, be expected that the Committee will apply the same principles to the return of rejected asylum-seekers to their country of origin. Furthermore, it already indicated its willingness to provide protection even in cases of serious human rights violations by non-governmental entities. In this regard it stated that

> '[t]he aim of the provisions of article 7 ... is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'[39].

3 The Customary Law Character of the Right not to be returned

This analysis shows that a human right not to be returned to situations of torture and similarly serious human rights violations as derived from the prohibition of torture and inhuman treatment has become part of international human rights law. Like the prohibition of torture and inhuman treatment, itself, this right is not only part of treaty law but has arguably attained the status of international customary law and, at least in Europe, of ius cogens. In this regard, the European Court of Human Rights has recalled 'that it would hardly be compatible with the underlying values of the Convention, that 'common heritage of political tradition, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or to inhuman or degrading treatment or punishment, prohibited by Article 3, however heinous the

37. Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 470/1991, submitted by Joseph Kindler, para. 13.1. Date of communication: 25 September 1991; Date of Views: 30 July 1993 (Annual Report 1993, UN Doc. A/48/40, Vol. II, p. 138; also in HRLJ 1993, p. 307).
38. Ng case, supra note 36.
39. Human Rights Committee, General Comments, No. 20 (44), supra note 36, para. 2.

crime allegedly committed'[40]. In a similar vein, the European Court of Human Rights argued that the absolute character of article 3 of the ECHR 'enshrines one of the fundamental values of the democratic societies making up the Council of Europe'[41]. On the basis of such statements and taking state practice into account, the Swiss Federal Tribunal as well as the Swiss Federal Government and Parliament have expressed the firm conviction that the prohibition of expulsion, deportation or extradition in cases of imminent torture and inhuman treatment has become part of peremptory international law (*ius cogens*)[42].

III RELEVANCE FOR REFUGEE LAW

To what extent is this human rights prohibition of inhuman return relevant for the area of refugee law and, more particularly, for refugee status determination procedures? Human rights conventions oblige States Parties to ensure to everyone under their jurisdiction the rights provided in these documents[43] but leave them, to a large extent, the freedom to decide on their own how to achieve this. Thus, whether refugees and asylum-seekers are entitled to directly invoke articles 3 of the ECHR, 3 of the CAT or 7 of the CCPR as self-executing norms of international law depends on the domestic law. Where this is not possible, States must make sure by other means (such as providing a legal guarantee in domestic law protecting against inhuman return) that persons facing a serious risk of torture, ill-treatment or similarly serious human rights violations in the country of origin are not returned. Therefore, even though the human rights conventions do not grant a right to asylum, the application of the prohibition of inhuman return leads to 'de facto asylum' if a deportation to a third country is not possible. This has important consequences both for substantive and procedural law.

1 Impact on the Interpretation of Articles 1F and 33(2) of the 1951 Refugee Convention

Because of their absolute character, articles 3 of the ECHR, 3 of the CAT and 7 of the CCPR protect persons who risk very serious persecution but who

- are either excluded from refugee protection by virtue of article 1F(b) of the 1951 Refugee Convention because there are serious reasons for considering that they have committed serious non-political crimes outside the country of refuge,

40. Application No. 22742/93, Aylor-Davies v. France, supra note 9 at 170.
41. Soering case, supra note 5, para. 88.
42. BGE (Decisions of the Federal Tribunal) 111 Ib 70, 107 Ib 72; Botschaft des Bundesrates zur Initiative 'für eine vernünftige Asylpolitik' where the Swiss Government (Federal Council) asked Parliament to declare invalid a popular initiative to amend the Swiss Constitution with a provision that asylum-seekers who have entered Switzerland illegally would be deported without any procedure whatsoever. The government argued that often such asylum-seekers could only be sent back to the country of origin which, in cases of imminent torture, would violate ius cogens. Parliament accepted this position and the initiative was declared invalid in 1996. See also Walter Kälin, Internationale Menschenrechtsgarantien als Schranke der Revision von Bundesverfassungsrecht, Allgemeine Juristische Praxis (AJP) 1993, pp. 243.
43. Article 1, ECHR; article 2(1), CCPR.

- or who can be expelled and returned to the country of persecution by virtue of articles 32(1) and 33(2) of the 1951 Refugee Convention because they have committed, in the country of refuge, a particularly serious crime or constitute a danger to the security of that country.

Regarding very serious non-political crimes committed abroad[44], the European Court of Human Rights, in it Soering Judgment, stressed that '[i]t would hardly be compatible with the underlying values of the Convention [...] were a Contracting State knowingly to surrender a fugitive to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture, *however heinous the crime* allegedly committed'[45]. Similarly, in the *Chahal* and *Ahmed* judgments, the same Court concluded that '[t]he protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees'[46] in cases where the persons concerned were regarded 'as a danger to the security of the country' or as constituting 'a danger to the community of that country' because the had 'been convicted by a final judgment of a particularly serious crime' in the sense of article 33(2) of the 1951 Refugee Convention[47]. Of course, article 3 of the ECHR and similar guarantees in other human rights conventions do not require that states grant or continue to grant refugee status to persons falling under articles 1F(b) and 33(2) of the 1951 Refugee Convention. All they must do is to refrain from sending such persons back to a situation of torture or ill-treatment. However, it is recognized that in both cases, it is 'necessary to strike a balance between the nature of the offence ... and the degree of persecution feared'[48]. The emergence of the human rights prohibition of inhuman return, a concept which did not exist when the 1951 Refugee Convention was drafted, must influence such balancing. If it is true that knowing surrender of a fugitive to another State which will torture or ill-treat him or her 'would hardly be compatible with the underlying values'[49] of human rights Conventions, then utmost restriction is necessary in the application of articles 1F(b) and 33(2) of the 1951 Refugee Convention. In other words: The human rights character of the 1951 Refugee Convention[50] would require that in cases of a danger of torture or ill-treatment, the provisions excluding refugees from any refugee protection would only be applied in the most extreme cases.

44. Mr. Soering was suspected of having brutally murdered the parents of his girl-friend.
45. Soering case, supra note 5, para. 88. Emphasis added.
46. Chahal case, supra note 7, para. 80; Ahmed case, supra note 22, para. 41.
47. See Chahal case, supra note 7, para. 76; Ahmed case, supra note 22, paras. 12 - 16.
48. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1972, para. 156 regarding the application of article 1F(b). State practice recognized that a balancing test is also required under article 33(2): see, e.g., R. v. Secretary of State for the Home Department, ex parte Chahal (1994), Immigrations Appeals Reports, p. 107, quoted in the Chahal Judgement, supra note 7, para. 41; Swiss Federal Council (Bundesrat), Decision of 23 August 1989 in the case of O.V., in: ASYL 1989/4, p. 15; Hoge Raad der Nederlande (Supreme Court of the Netherlands), Stat der Nederlanden v. Vastiampillai, 13 May 1988, abstract in 1 IJRL (1989) at 113.
49. Soering case, supra note 5, para. 88. Emphasis added.
50. See Introduction, supra.

2 Relevance for the Interpretation of the Refugee Definition

As discussed above, articles 3 of the ECHR, 3 of the CAT and 7 of the CCPR also protect persons who are fleeing serious persecution but who are not granted asylum because of a restrictive interpretation of the notion of refugee. This is especially true for victims of political and similarly motivated persecution by non-governmental groups or entities. Such persons may be denied asylum but they cannot be returned to the country of origin if the article 3 protection applies. Human rights law is also applicable to all refugees who are not granted asylum on the basis of provisions of domestic law excluding them from asylum despite their refugee status (e.g. exclusion of refugees 'sur place' with subjective post-flight reasons; application of safe-third-country principles even in situations where return to a third country is not possible).

In all these cases, States are obliged to make sure that the person concerned is not returned to the country of origin. As it is often impossible to send such persons to a third country, it is necessary to admit them to the country of refuge and to grant them a permission to stay for as long as the danger lasts[51]. Whether such decisions are made by the asylum authorities or in a separate procedure following the rejection of the asylum claim depends on the procedural law of the country concerned.

The latter reflects the minimum required by international law. It seems to me that the time has come to consider the fact that the 1951 Refugee Convention is a human rights instrument in itself more seriously and to interpret, as much as possible, the refugee definition in light of modern human rights doctrine. In this regard, a strong argument can be made for a liberal application of the refugee definition to persons fleeing civil war and situations of similar violence where the government is unable to provide protection against non-state actors[52]. Case law on the prohibition of inhuman return recognizes that persons fleeing very serious human rights violations are in need of *international* protection by the country of refuge even if they are threatened by non-state actors. Furthermore, this jurisprudence emphasizes that granting such protection is a matter of the international responsibility by the country of refuge and not a question of generosity. In the long run, it is hardly convincing to stress that under the 1951 Refugee Convention only persecution carried out or tolerated by state actors creates the need for an international approach to human rights violations (based on the idea of protection abroad) if the opposite position is taken under human rights law. What is necessary is to harmonize refugee law with modern human rights law and, therefore, to opt for a liberal interpretation of the refugee definition in cases of non-state persecution[53].

51. Many countries have created a specific legal status for such persons such as 'B-Status' or 'admission provisoire' etc.
52. On the possibility of such an interpretation of article 1A(2) of the 1951 Refugee Convention, see the article by Frédéric Tiberghien in this book p. 105-122.
53. See also, Walter Kälin, Refugees and Civil Wars: Only a Matter of Interpretation?, 3 IJRL (1991) 435 at 449-50.

3 Consequences for the Asylum Procedure

a *Right to Appeal in Asylum Matters*

Thus far, human rights have had only a very minor impact on the procedural aspects of refugee status determination. There is a simple reason for this: Apart from the provisions regarding cases of deprivation of liberty[54] and criminal charges[55], human rights conventions limit their procedural guarantees to procedures involving the determination of 'civil rights and obligations'[56] or of 'rights and obligations in a suit at law'[57] Both the European Commission of Human Rights and the Human Rights Committee have taken the position that refugee status determination does not belong to these categories[58] [59].

Human rights conventions, nevertheless, have become relevant, at least for some procedural aspects, as a consequence of the human rights protection against inhuman return. Article 13 of the ECHR requires States Parties to grant 'an effective remedy before a national authority' to '[e]veryone whose rights and freedoms as set forth in this Convention are violated.' The same guarantee is enshrined in article 2(3)(a) of the CCPR. It is true, that article 13 of the ECHR does not apply in every case where an individual invokes the ECHR but only in cases of an 'arguable claim'[60]. The Commission has defined 'arguable' as requiring that the facts of the particular case concern a right guaranteed by the Convention, that the claim is not wholly unsubstantiated on the facts and that it should raise a *prima facie* issue under the ECHR[61]. The Court has declined to give such an abstract definition[62] but has held that a claim could be arguable even though the Commission might, after an examination, come to the conclusion that the application is 'manifestly unfounded'[63]. This seems to indicate that the *prima facie* test of the Commission is the correct one[64].

Appeals fall under article 13 of the ECHR in those countries where the decision on the expulsion or deportation of rejected asylum-seekers is part of the asylum procedure or where

54. Articles 5, ECHR and 9, CCPR.
55. Article 6, ECHR and article 14, CCPR.
56. Article 6(1), ECHR.
57. Article 14(1), CCPR.
58. See, e.g., European Commission of Human Rights, Application 7729/76, Agee v. UK, 7 D & R 164, and Human Rights Committee, Communication 236/1987, V.R.M.B. v. Canada, Annual Report 1988 (UN Doc A/43/40) at 258.
59. It is true that in 1991 the Human Rights Committee, in its discussion of Canada's state report under article 40 of the CCPR, raised a question regarding guarantees for the independence of immigration and asylum judges (Annual Report 1991 (UN Doc A/45/40), 71). However, this passing remark has not had any consequences thus far.
60. Judgments of the Court in: Silver case, Series A, No. 61, para. 113; Boyle and Rice, Series A, No. 131, para. 52; Plattform 'Ärzte für den Frieden', Series A, No. 139, para. 25.
61. Boyle and Rice Case, supra note 60, Annex, Opinion of the Commission as expressed in the Commissions report of 7 May 1986, para. 74.
62. Plattform case, supra note 60, para. 25.
63. Powell and Rayner v. UK, Judgement of 21 February 1990, Series A, no. 172, para. 33.
64. For a more detailed discussion of the relevance of Article 13 for asylum-seekers, see Einarsen, supra note 3, at 376-382.

a negative asylum-decision is, to a large extent, the determining factor in the decision of the alien authorities with regard to return of such person to the country of origin. In these cases, there is an obligation to apply the relevant provisions of human rights conventions prohibiting inhuman return or their equivalents in domestic law.

The European Court of Human Rights has recognized that in asylum cases involving an issue under article 3 of the ECHR, States are required, by virtue of article 13 of the ECHR, to give asylum-seekers access to an effective remedy if there is an arguable claim. In the *Vilvarajah* judgment, the Court ruled that a remedy allowing review of the decision of an administrative authority refusing asylum was effective as the English courts 'could rule it unlawful on the grounds that it was tainted with illegality, irrationality or procedural impropriety' and had 'jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment'[65]. In its *Chahal* judgment, the Court acknowledged that article 13 does not require access to a court but stressed that because of the 'irreversible nature of the harm that might occur if the risk of ill-treatment materialized ..., the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to article 3'[66]. The Court also critically pointed out that in one of the procedures in question 'sufficient procedural safeguards for the purposes of Article 13' were lacking as the applicant, *inter alia*, 'was not entitled ... to legal representation [and] he was only given an outline of the grounds for the notice of intention to deport'[67]. This means that an effective remedy not only requires access to an appeals authority having the power to effectively review the rejection of the asylum request but also the existence of minimal procedural rights and safeguards.

b *Suspensive Effect*

One important aspect of the effectiveness of a remedy is its suspensive effect, at least in situations where, as in deportation cases under article 3 of the ECHR, the expected harm is irreversible. The Commission, in several cases, examined whether a remedy had suspensive effect when examining deportation or extradition cases in the light of article 13[68]. The Court, in the Soering case, concluded that there was no breach of article 13 because 'there is no suggestion that in practice a fugitive would ever be surrendered' before his remedies would have been examined[69] [70].

65. Chahal case, supra note 7, para. 148, summarizing Vilvarajah, supra note 7, paras. 122-126.
66. Chahal case, supra note 7, paras. 151-152.
67. Id., para. 154.
68. See, e.g., application 10564/83, X. v. Germany, 8 European Human Rights Reports pp. 262-4 (1986); application 9856/82, 10 European Human Rights Reports, p. 554, (1988).
69. Soering case, supra note 5, paras. 123-124.
70. For a similar reasoning in asylum cases see Syed Jubair c/Etat belge, 18 Feb. 1991, Tribunal de première instance de Bruxelles, No. 50.302; (UNHCR REFCAS/BEL/033); Tribunal civil, Bruxelles, 30 Oct 1991, Revue du droit des étrangers, 1991, p. 376 (REFCAS/BEL/038).

c *Relevance of Belated Evidence*

Another important procedural issue is the question of how to deal with belated submissions of imminent torture in the country of origin. Is it necessary, to examine such submissions or can they be rejected as they have been advanced too late? International organs have taken an approach which considers the seriousness and irreversibility of torture seriously; The European Court of Human Rights, in the Chahal case, stated that the time of its own consideration of the case is relevant for the examination of the risk of torture and that, therefore, 'the Court will assess all the material placed before it and, if necessary, material obtained of its own motion'[71]. Likewise, the European Commission of Human Rights, in a recent case, did not hear the argument of the government that the applicant had not met the deadline set by the appeals body and came to the conclusion that article 3 was violated, *inter alia*, because of the high evidentiary value of the documents submitted too late[72]. In its decision on the admissibility, the Commission accepted 'for the sake of efficiency and in order to avoid abuse of administrative or judicial proceedings, the necessity of legal provisions which entitle decision-making bodies to declare a request or appeal inadmissible when procedural rules have not been complied with' but, at the same time, considered the existence of 'special circumstances' in the particular case[73]. This means that a State Party cannot escape responsibility under article 3 of the ECHR simply by not taking into account evidence offered at a very late stage if this evidence is relevant. In this respect, the Swiss Asylum Recourse Commission has decided that submissions which are belated have to be taken into account, on the basis of article 3 of the ECHR, if it is obvious that the applicant would face persecution or inhuman treatment in the country of origin[74].

IV CONCLUSIONS

It is the task of doctrine as well as of practitioners on all levels to better coordinate existing norms of refugee law with the guarantees of human rights law. As Prof. Kimminich has pointed out already some time ago, the acknowledgment that refugee-flows are most often rooted in the disregard of basic human rights has implications which go beyond the simple proposition that one should not primarily work for those who already have been forced to flee but for the universal respect for human rights in order to eliminate the main causes of the refugee problem; recognition of the fact that refugees are victims of human rights violations requires that their legal protection be regarded as a touchstone for the viability and for-

71. Chahal case, supra note 7, paras. 97 and 86.
72. Application No. 25894/94, Bahaddar v. Netherlands, report of the Commission of 13 September 1996.
73. Application No. 25894/94, Bahaddar v. Netherlands, decision of the Commission of 22 May 1995. The Commission did not explain what the special circumstances were but presumably referred to the difficulties of obtaining them in time in the country of origin and to their high evidentiary value.
74. Judgment of the Commission de Recours en Matière d'Asile, of 16 May 1995, S.N. (Turquie), JICRA (Jurisprudence et informations de la Commission Suisse de Recours en Matière d'Asile) 1995/9, at 83-90.

ce of the human rights doctrine[75]. In order to reconcile refugee and human rights law, it is necessary to integrate the modern developments regarding human rights into the application of refugee law, including the 1951 Refugee Convention. The European Human Rights Convention has been described by the European Court of Human Rights as 'a living instrument which must be interpreted in the light of present-day conditions'[76]: Such a characterization applies equally to the 1951 Refugee Convention signifying that the time has come to interpret many of its provisions in light of human rights law.

75. Otto Kimminich, Die Entwicklung des internationalen Flüchtlingsrechts - faktischer und rechtsdogmatischer Rahmen, 20 Archiv des Völkerrechts (1982), at 405.
76. Tyrer Case, Judgment of 25 April 1978, Series A, No. 26, para 31.

The Harmonised Application of the Definition of the Term 'Refugee' in the European Union

Prof. Dr Roel Fernhout*

I JOINT POSITION

1. On 4 March 1996 the Council of the European Union adopted on the basis of Article K.3 of the Treaty on European Union a joint position on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees[1] (see annex).
This joint position - the first of its kind - deserves some consideration as to its genesis (II), its form (III), its content (IV) and its perspectives (V).

II GENESIS

1991 Workprogramme

2. In December 1991, the European Council, meeting in Maastricht, adopted a very ambitious work programme aimed at the harmonisation of the asylum and immigration policies of the Member States. Among the necessary subjects for harmonisation the 1991 work programme gave priority to the harmonisation of substantive asylum law. With some optimism the work programme indicated that its subjects for harmonisation should be dealt with between its adoption and the entry into force of the TEU, although 'if necessary, this work should be continued after that date'[2].

3. According to the work programme, two subjects need to be given preferential treatment when harmonising substantive asylum law 'viz. the principle of first host country and interpretation of the concept of 'clearly unjustified applications for asylum'' The Ministers responsible for Immigration were able to adopt common texts on both subjects within a relatively short period of time. After one year of preparation they agreed during their London meeting of 30 November 1992 on a 'Resolution on manifestly unfounded applications for asylum' and on a 'Resolution on a harmonised approach to questions concerning host third countries'[3]. Harmonisation of the hard core of substantive asylum law, the definition of refugee, proved to be more difficult. Despite the Declaration on asylum[4], appended to the Fi-

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1. OJ No. L063,13/03/96, p. 2 ff.
2. WGI 930, pp. 4/5.
3. WGI 1282 and 1283. See for a substantive critique on both resolutions: H. Meijers, R. Fernhout, Asylum, in: H. Meijers et al., A new immigration law for Europe? The 1992 London and 1993 Copenhagen Rules on Immigration, Utrecht 1993, p. 8-25.
4. Declaration No. 31.

nal Act of the Treaty on European Union in which an appeal is made to the Council to give priority to matters relating to asylum and to adopt a 'joint action' by the beginning of 1993 a 'joint position' could not be concluded until the beginning of 1996. Although the first drafts already circulated in 1993 lengthy negotiations were necessary to reach a minimum of consensus on a common interpretation of the definition of refugee.

Still a need for harmonisation?

4. It seems as if the need for harmonisation of substantive asylum law has diminished. In the 1991 work programme harmonisation of asylum policy was seen as the only way to overcome the asylum crisis of those days. And the choice for priority to substantive harmonisation was a deliberate one: 'If, in harmonising asylum law, too much emphasis were put on uniform procedures in the (...) Member States, the harmonisation process could become bogged down quite simply through the complexity of the issue'. Actually, the complexity of substantive asylum law slowed down the harmonisation process to an almost stand still. Nevertheless, despite this lack of results on an European level the Member States succeeded in overcoming the asylum crisis. In most Member States the number of asylum applications has dropped considerably, mainly through new asylum legislation reducing the accessibility of the asylum procedure at the border and introducing accelerated procedures for inadmissible or manifestly unfounded asylum applications. The new legislation may be inspired by the above mentioned London resolutions, but came into being quite independently from any European instrument. It had more to do with 'copying one's neighbour's more restrictive legislation' than with implementing a harmonised European standard[5]. From the perspective of the Member States individually restrictive national procedures proved to be a better instrument to overcome the crisis than a harmonised asylum policy.

5. Is there still a need for the harmonisation of substantive asylum law? A fair and real harmonisation of substantive asylum law is still important for two reasons. Firstly - in the words of the 1991 work programme - to 'guarantee that, irrespective of how the procedure is organised in each Member State, the outcome will be the same everywhere'. In particular, in the 'one chance only system' of the Schengen Implementation Agreement and the Dublin Convention this aim has its own merit. Secondly, not only national legislators are copying one's neighbour's more restrictive legislation, but also national judges are involved in copying one's neighbour's more restrictive jurisprudence. A striking example can be found in the decision of the Council of State of the Netherlands of 6 November 1995[6], in which the Council of State ruled as follows in a case concerning a Somalian asylum applicant:

> 'According to the present interpretation of the Council of State there can be no question of persecution, if in the country of origin of the applicant there is no government. This view is in accordance with the case law of central administrative judicial authorities in France and Germany, both of which are a Party to the Schengen Agreements'[7].

5. See Cornelis D. de Jong, Is there a need for a European asylum policy in the absence of an asylum crisis?, paper for the Conference on Refugee Rights and Realities, University of Nottingham, 30 November 1996.
6. Rechtspraak Vreemdelingenrecht 1995, 4.
7. See also Roel Fernhout, Thomas Spijkerboer, Ben Vermeulen, Vervolging zonder overheid: vluchtelingschap of niet?, Nederlands Juristenblad 1996, p. 347-353.

A harmonised European standard should prevent that this process of copying reflects the common lowest denominator.

III FORM

Joint position

6. As is clear from the different drafts the legal form of the harmonisation was subject of lengthy debates. Some delegations wanted the document to take the form of a resolution only. Others wanted a more binding instrument. Therefore, several drafts are presented as joint actions. But finally in November 1995, without express justification, the choice was made to use the form of a joint position. In contrast to the second pillar, the third pillar of the Treaty on European Union is not clear as to the extent to which a joint position is binding[8]. Publication in the L series nevertheless suggests that a joint position is more binding that a resolution of the Council which is published in the C series. The Netherlands adopted the view that the wording used is the determining factor in this regard[9]. In this case the use of the wording 'guidelines' already indicates that the joint position is not legally binding. Furthermore, the joint position specifies in its preamble that these guidelines may inspire the administrative bodies responsible for recognition of refugee status 'without prejudice to the Member States' caselaw on asylum matters'. The joint position 'shall not bind the legal authorities or affect decisions of the judicial authorities of the Member States'. Without any doubt the joint position belongs to the 'soft law' domain only.

Not legally binding

7. Its form and its non binding character are severely criticised. According to De Jong 'this is a most unfortunate provision that questions the harmonisation principle itself'[10]. Others are of the opinion that the Council should have opted for a convention rather than a joint position. A convention is binding for the Member States and a convention offers the possibility to place the area in question under the jurisdiction of the Court of Justice of the European Communities in accordance with Article K.3.2.c, last paragraph, of the Treaty[11]. The European Council on Refugees and Exiles (ECRE) too is of the opinion that non-binding guidelines are a doubtful instrument to achieve the necessary harmonisation, as it does not require any change in the national law or practice of the Member States. According to ECRE a harmonised interpretation of the refugee definition requires the gradual adaptation to a common norm, which could only be achieved through supra-national judicial supervision[12]. Comparable criticism is expressed by Elspeth Guild. According to her 'the choice of a non-non-judiciable, 'soft law' medium for harmonisation is the result of the deep political

8. According to Article J.2, para. 2, Member States shall ensure that their national policies conform to the common positions.
9. Second Chamber of Parliament, 1993-1994, 23 490, No. 8.
10. Cornelis. D de Jong, o.c., p. 7.
11. See Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann, Carlos Pena Galiano (Eds.), Who is a refugee?, Appendix, Kluwer Law International 1997, p. 720.
12. ECRE's Note on the Harmonisation of the Interpretation of Article 1 of the 1951 Geneva Convention, June 1995.

divide among the Member States between those Member States who seek to achieve an actual union of the Member States and those which wish to travel the road but never arrive'. At the moment the joint position constitutes soft law in that there is no enforcement mechanism and no judicial body competent to interpret it[13].

8. In my opinion the individual responsibility of the Member States under the Geneva Convention may constitute a legal obstacle for harmonisation through a normative act of the Council. All the Member States are Party to the Geneva Convention and are individually obliged to ensure compliance with this convention. With reason the joint position re-affirms the primacy of the Geneva Convention in asylum determination work. As long as the European Community is not a Party to the Geneva Convention and as long as the Community lacks competence in the field of status determination, the determination of refugee status is an exclusive responsibility of the Member States.
A more legal political obstacle can be found in the fear that due to the fact that the European Union is a major receiving region a binding interpretation and harmonisation through the Court of Justice of the European Communities will automatically reflect a downward trend, which may interfere with more liberal interpretations in others parts of the world.
A third objection to harmonisation of the interpretation of the refugee definition through a normative act of the Council has to do with the lengthy delays of asylum procedures in all the Member States caused by a simple request for a preliminary ruling of one court in one Member State.
The above does not mean that I am against Community competence on asylum. On the contrary[14], but Community competence with regard to asylum policy should be used for the communitarisation of the Schengen and Dublin criteria and mechanisms for determining which Member State is responisble for an application for asylum, etc., but not for the communitarisation of the interpretation of the refugee definition. According to international law - the Geneva Convention - the responsibility in this respect still rests with the Member States individually.

9. Unfortunately, the Geneva Convention itself lacks a realistic mechanism for uniformity of interpretation. The provision of Article 38 (recourse to the International Court of Justice) could provide some uniformity, but is never used. Article 35 (co-operation with the UNHCR) could have formed a basis for adequate supervision by the UNHCR, but UNHCR has always been reluctant to use its supervisory powers, particularly in an European context. Subsequently UNHCR is always very reluctant as well to receive individual complaints[15].

13. Elspeth Guild, The impetus to Harmonise: Asylum Policy in the European Union, paper for the Conference on Refugee Rights and Realities, University of Nottingham, 30 November 1996.
14. See R. Fernhout, Justice and Home Affairs: Immigration and Asylum Policy. From JHA co-operation to communitarisation, in: Jan A. Winter et al. (Eds), Reforming the Treaty on European Union, The Legal Debate, Kluwer Law International 1996, p. 396 ff.
15. Even in instances where UNHCR is explicitly designated for the reception and consideration of individual complaints (Article 11 of the UN-Convention on the reduction of statelessness), it has always discouraged the use of this right, see A. Takkenberg, The Status of Palestinian Refugees in International Law, Nijmegen 1997, par. 249 and 250.

Due to their common origin in the Universal Declaration of Human Rights the right to asylum and the other civil and political rights are closely connected. Nevertheless, elaboration in different periods of time and in separate conventions has caused considerable differences in supervision. In my opinion the link between refugee protection and human rights protection should be restored. A supervision mechanism within the Refugee Convention comparable with the Human Rights Committee of the International Covenant on Civil and Political Rights (including its role under the first Optional Protocol), the CERD-committee or the Committee against Torture needs further consideration. The same is true at a regional European level. From the perspective of human rights protection in general a role for the European Court of Human Rights concerning refugee protection is more obvious than a role for the EC Court of Justice in this respect.

10. Nevertheless, to encourage a more uniform application of the refugee definition the UNHCR-Executive Committee has requested the Office of the High Commissioner in 1977 'to consider the possibility of issuing - for the guidance of Governments - a handbook relating to procedures and criteria for determining refugee status...'[16]. The UNHCR Office was able to publish within a time period of only two years its famous Handbook on Procedures and Criteria for Determining Refugee Status. The Handbook reflects the information compiled by the High Commissioner's Office on national practices and literature on this subject. The Handbook undoubtedly lacks binding force, but even the status of guidelines for the national administrative bodies responsible for the recognition of refugee status is questionable. Such a status of guidelines for the national determination procedure requires the explicit consent of the Governments involved. And as far as I know such a consent is lacking in all Member States. Therefore, the original intent of the UNHCR-Office and its EXCOM to offer a guideline for governments is not materialised while the governments did not accept the Handbook as a guideline. In the administrative practices of the Member States the Handbook is only taken into consideration when requests for admission as a refugee are assessed, but not regarded as decisive[17]. In accordance with general principles of administrative law guidelines are more binding for the administrative bodies, than this consideration role assigned to the Handbook. In principle an administrative body is committed to act in conformity with a published guideline, although exceptional circumstances may urge that body to deviate[18].

Binding as guidelines

11. I have some doubts concerning the meaning of the joint position in this respect. Should it be considered automatically as a guideline in the above meaning? To answer this question it will be relevant to notice that the Council opted for a joint position and not for the wea-

16. Conclusion No. 8 (XXVIII), sub g. See Conclusions on the International Protection of Refugees, Adopted by the Executive Committee of the UNHCR Programme, UNHCR, Geneva 1980..
17. According to the Dutch Minister for Foreign Affairs 'the Handbook should be taken into consideration, but not regarded as decisive when requests for admission as a refugee are assessed', quoted in the decision of the Council of State of 23 August 1984, Rechtspraak Vreemdelingenrecht 1984, 4.
18. This inherent power to deviate constitutes the difference between a published guideline and a normative act, but the binding force of published guidelines is nevertheless strong.

ker instrument of a resolution or a recommendation. If compared with common positions under the second pillar 'Member States shall ensure that their national policies conform to the (joint) position'[19]. In my opinion this implies that the joint position has not automatically the status of guideline according to national law, but the Member States are nevertheless under the strict obligation to transform the joint position into national guidelines, in order to ensure that their national policies are in conformity with the joint position. The wording of the joint position 'These guidelines shall be notified to the administrative bodies responsible for recognition of refugee status' points in the same direction[20].

12. Concluding on its form: if incorporated the joint position is more binding for the administrative authorities than the UNHCR-Handbook, but less binding than normative acts. The reference in the Preamble of the joint position to the Handbook resembles this position. The Handbook is 'a valuable aid to the Member States in determining refugee status'. The wording changed in the course of time from 'important instrument' via 'useful instrument' to 'valuable aid' only. The administrative authorities of the Member States are still free to take tbe Handbook into consideration (as before), but it is only a (supplementary) aid, not a decisive instrument of interpretation. In case of contradiction between the Handbook and the joint position, the joint position prevails.
The binding character of the joint position for the administrative practices of the Member States makes the joint position to an important instrument for harmonisation. I doubt if from the perspective of harmonisation of administrative practices there is any need for a more legally binding instrument. Therefore, I do not share the above quoted scepticism in this respect of several authors. On the contrary, the national judiciary is fully equipped to enforce this joint position in order to prevent a national interpretation of the refugee definition below the standards of this joint position.

Meaning for the national judiciary

13. Therefore, I do not agree with De Jong where he states that the non-binding character for the judicial authorities means 'that judges should not use the guidelines as a source of inspiration and that in case of conflict between existing caselaw and the guidelines, the national authorities should not implement the guidelines'[21]. The relationship is more complex. In my opinion the meaning of the joint position for the national judiciary is as follows:

- In case the interpretation of the refugee definition by the national authorities falls below the standards of the joint position the national courts should in principle follow the joint position.
- On the other hand the joint position is not a normative act. The only legally binding norm for the judiciary is still Article 1 of the Geneva Convention itself. If the harmonisation laid down in the joint position and the subsequent national practice conflicts

19. Compare Article J.2, para 2, TEU.
20. This implicates for example for the Dutch practice that the guidelines of the joint position should be incorporated in the 'Vreemdelingencirculaire' (Aliens circular), four volumes of guidelines for the immigration authorities.
21. Cornelis D. de Jong, l.c.

with the generally accepted interpretation of Article 1 of the Geneva Convention, the latter prevails. In their assessment of the generally valid interpretation of the refugee definition the national courts are free, but they should be guided by the drafting history of the Convention, the international literature on the subject, significant decisions on the determination of refugee status by foreign courts, etc. Also the UNHCR-Handbook can still play an important, although not a decisive role in this respect.

- If its existing caselaw is in line with general accepted principles as reflected in the UNHCR-Handbook, but contrary to the joint position a national court should be rather reluctant to adapt its caselaw to the joint position. In such circumstances the joint position could easily be not in conformity with accepted refugee law standards.
- Although the joint position does not affect existing caselaw, a national court should nevertheless reconsider its position if its caselaw deviates in the negative from one of the standards of the joint position. As a common interpretation of the refugee definition by fifteen Contracting States to the Geneva Convention a specific provision of the joint position may reflect the meaning of Article 1 of the Geneva Convention better than its former caselaw.

Conclusion

14. Answering the two questions put forward above (no. 5): by its form the joint position could be a useful instrument for the harmonisation of the interpretation of the refugee definition by the relevant administrative bodies in the Member States. If properly enforced, it helps that the outcome of the national determination procedures 'will be the same everywhere'. But a similar outcome in whichever Member State is unlikely to be achieved, however, solely by a harmonised interpretation of the refugee definition since the outcome of a determination procedure mainly depends on the assessment of facts and circumstances surrounding every asylum claim. The joint position in itself does not harmonise the practical examination of the situations in the countries of origin.

Whether the joint position really helps to avoid a too restrictive national interpretation and jurisprudence depends on its content. Does it really reflect a higher level of harmonisation than the common lowest denominator?

IV CONTENT

Liberal elements

15. On substance, I would describe the joint position in some areas as relatively liberal and in line with the UNHCR-Handbook. In this respect, I would point to the following.

In para. 2 the joint position recognises in line with the UNHCR-Handbook[22] the possibility of persecution of entire groups. Although the principle of individual determination is upheld and the term 'group determination' is avoided, the individual determination has a rather limited nature in such circumstances. On the other hand, the joint action does not pro-

22. UNHCR-Handbook, para. 44.

vide a definition of group persecution. Member States will be rather reluctant to consider a situation as a situation of group persecution.

In para. 3 is important that the joint position recognises the 'fear of persecution' as the 'determining factor' for the notion of refugee. Also the role in this paragraph of the 'benefit of the doubt' given to the asylum seeker whose declarations are credible is in line with the UNHCR-Handbook[23].

The link between persecution and violation of human rights in para. 4 represents as well a rather liberal interpretation[24]. Whether or not the acts suffered or feared indeed constitute persecution should according to the same paragraph be measured by 'their nature or their repetition'. A minor act, which in itself does not constitute persecution, may amount to actual persecution if repeated. On the importance of a repetition the joint position is even more explicit than the Handbook.

Also on the issue of attributed persecution grounds the joint position is more explicit than the Handbook, which only recognises an attributed political opinion as a ground of persecution[25]. In this respect is it important that para. 4 considers the question of whether the grounds put forward by the asylum-seeker are 'genuine or simply attributed to the person concerned by the persecutor' as 'immaterial'[26]. Similarly, an attributed political opinion is considered as a persecution ground (para. 7.4) and also 'membership of a social group may simply be attributed to the victimised person or group by the persecutor' (para. 7.5).

The open-ended definition of social group in para. 7.5 too resembles a liberal stand. The same is true for the broad definition of religion in para. 7.2. To end this list of liberal elements reference should be made to para. 5.1.2 about discriminatory prosecution and punishment, which wording is still in line with the UNHCR-Handbook[27].

Diverging elements

16. Although UNHCR welcomed the EU harmonisation effort and supports many aspects of the joint position, it expressed an unprecedented sharp criticism on one of the core elements of the joint position: para. 5.2 concerning 'Persecution by third parties'. In principle, persecution by third parties is only accepted if 'it is encouraged or permitted by the authorities'. UNHCR's main concern is that this position 'will allow states to avoid recognising as refugees people persecuted by 'non state agents' such as rebel groups or extremist organisations'. According to UNHCR 'This interpretation creates an anomalous situation in which someone targeted by the government in a civil conflict could gain asylum abroad, but not

23. UNHCR-Handbook, para. 196.
24. Compare UNHCR-Handbook, para. 51.
25. UNHCR-Handbook, para. 80.
26. The joint position is in this respect more explicit than the Handbook, which only recognises an attributed political opinion (UNHCR-Handbook, para. 80).
27. UNHCR-Handbook, para. 57 ff.

an equally innocent civilian persecuted by the opposition, as has been the case with many Algerians'. And continues UNHCR 'if governmental authority collapses altogether - as has happened recently in Somalia or Liberia - no one might qualify for refugee status'. It believes that the joint position in this respect 'erodes refugee principles and could leave large numbers of refugees without adequate protection'[28].

Persecution by third parties

17. The wording of this paragraph changed considerably in the course of time. In a fall 1994 draft persecution by third parties was accepted if 'the government encourages, permits or deliberately tolerates such persecution', but also - in line with the UNHCR-Handbook[29] - if 'the public authorities are unable to provide adequate protection'[30]. Gradually, the liberal wording changed dramatically. In a February 1995 draft persecution by third parties is deemed to stem from the State itself 'where it is encouraged or permitted by the authorities. In other cases, persecution is the act of persons or groups acting autonomously. As a general rule, such action does not in itself warrant the grant of refugee status. However, the State may be held responsible where the authorities tolerate such persecution knowingly or fail to act upon it although they are able to provide protection. Refugee status may be recognised under such conditions'[31]. A September 1995 draft is even more restrictive. I only have a German version, which may be rather indicative for the origin of the restrictive attitude. In this draft persecution by third parties is in addition to 'encouraged or tolerated' ('fördern oder billigen') only accepted 'wenn der Urheber der Verfolgung sich in einer Position befindet, aufgründ deren eine Unterbindung oder schwere Störung der normaler Tätigkeit der öffentlichen Stellen die für de Schutz der Bürger zuständig sind, gegeben ist'[32].
Its is clear from the footnotes and reservations to the text that persecution by third parties was one of the main stumbling blocks. To avoid a complete failure of the negotiations on the harmonisation of the refugee definition France presented a compromise during an informal JHA-Council at La Gomera on 14 and 15 October 1995. The final wording of para. 5.2 is based on this compromise.

18. Its long and turbulent history requires a careful consideration of the text of para. 5.2. To the position that persecution by third parties is only accepted if 'it is encouraged or permitted by the authorities' three reservations are made.
First, a State's failure to act should give rise to 'individual examination of each application (...) in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate'. In other words, in accordance with the principle of respect

28. Press Release 'UNHCR expresses reservation over E.U. Asylum Policy', 24 November 1995.
29. UNHCR-Handbook, para. 65.
30. 6675/94, ASIM 90.
31. 4245/1/95, ASIM 8.
32. 8628/2/95, ASIM 209, which means that the persecution by a third party is accepted as persecution in the meaning of the refugee definition in a situation in which the normal activities of the public authorities responsible for the protection of citizens are disintegrated or heavily disturbed.

of national jurisprudence as mentioned above (no. 6), Member States are free to follow their own national judicial practice in this respect[33].
Secondly, persons who are the victim of third party persecution 'may be eligible in any event for appropriate forms of protection under national law'. Also in other paragraphs of the joint position reference is made to 'other forms' of protection under national legislation. But the stronger wording 'in any event' and 'adequate protection' in para. 5.2 may indicate that nothing inhibits the Member States from offering in the context of persecution by third parties protection as indicated by the Geneva Convention[34].
Thirdly, the Swedish delegation made in an annex an express statement for the Council minutes, considering that persecution by third parties 'may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection'.
These explicit reservations to the position that persecution by third parties is only accepted if it is 'encouraged or permitted by the authorities' indicates that the issue whether or not the inability to offer protection also constitutes persecution, is deliberately left outside the harmonisation process. Member States who considered in the past persecution by third parties as persecution if the authorities prove unable to offer effective protection are expressis verbis permitted to continue this practice.

Civil war

19. The provision of para. 6 on 'Civil war and other internal or generalised armed conflicts' should be read in connection with para. 5.2. The wording has not changed since February 1995. In a civil war '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 national protection'. In my opinion consistent interpretation requires that the reservations of para. 5.2 are also applicable to persecution by third parties in the context of a civil war or other internal armed conflicts.
Interesting as well is the fact that persecution by de facto authorities is considered as persecution in the meaning of the Geneva convention if they are 'in control of part of the territory within which the State cannot afford its national protection'. Nevertheless this reference to de facto authorities still leaves many questions open. What will be the joint position in a situation in which there is no government anymore? The use of the word 'State' in this context instead of 'legal authorities' as in the first part of the sentence may be deliberate. State is a rather formal expression, legal authorities a more factual one. One could argue that in a situation in which no government, no legal authority, anymore exists, there is still a State but this State cannot afford its protection. In such a situation the de facto authorities may be held responsible directly. Such an interpretation would be in line with the idea of protec-

33. For the Netherlands this means that the *inability* to offer protection may also fall within the scope of the refugee definition; see for example Council of State 6 November 1995, Rechtspraak Vreemdelingenrecht 1995, 4: 'The term 'persecution' has been interpreted by the Council in constant caselaw in such a way, that this has to be understood as: persecution by some government agent, or by others, against which the government is unwilling or unable to provide sufficient protection'.
34. See Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann, Carlos Pena Galiano (Eds.), Who is a refugee?, Appendix, o.c., p. 721.

tion as the central theme of the Refugee Convention, irrespective of the 'de facto' or 'legal' origin of the persecution. To exclude the applicability of the Refugee Convention in situations in which no government exists, degrades the Refugee Convention to an *intergovernmental* agreement only and denies its origin as international instrument for the protection of human rights. In international human rights law not only the States but also individuals have subjective rights, independently of the State of their nationality, even with international protection against that State. The same is true for the refugee as a subject of international refugee law, with subjective rights independently of the State of nationality, who is entitled to protection against that State, irrespective of the fact whether in the State of nationality still a legal government exists or not.

Relocation within the country of origin

20. According to several authors the availability of an internal or domestic flight alternative is now generally accepted in para. 8 of the joint position as a condition allowing authorities to refuse refugee status[35]. Although I want to stress, firstly, that the wording of para. 8 is rather cautious ('it may be necessary ...') secondly, that the persecution should be 'clearly' confined to a specific part, and thirdly that the protection that may be found in another part should be 'effective', the joint position differs nevertheless from the UNHCR-Handbook in this respect[36]. Both have the cautious language in common, but the UNHCR-Handbook limits the application of an internal flight alternative to situations of ethnic clashes, in other words to situation in which the persecution does not emanate from the central public authorities themselves. Earlier drafts of the joint position contained a comparable restriction. According to these drafts there is only room for an internal flight exception 'Where it appears that the persecution is clearly confined to a specific part of a country's territory or is attributable not to the central authorities but to local or regional authorities'[37]. But again, in my September 1995 German draft[38] and in the final version this restriction is deleted. Therefore, despite its cautious wording para. 8 of the joint position could easily end in an application of the internal flight exception contrary to the spirit of the Geneva Convention as expressed in the UNHCR-Handbook.

Conscientious objection

21. Finally, to end this list of the main diverging elements, I will mention para. 10 on 'Conscientious objection, absence without leave and desertion', in particular concerning cases of punishment of conscientious objection or deliberate absence without leave and desertion on grounds of conscience. From its drafting history it is obvious that para. 10 in this respect harmonises the administrative practices of the Member States deliberately on a lower level as suggested in the UNHCR-Handbook[39].

35. See for instance Jean-Yves Carlies, et al., o.c., p. 721 and Elspeth Guild, o.c.
36. UNHCR-Handbook para. 91.
37. See the drafts of November 1994 (6675/94, ASIM 90) and February 1995 (4245/1/95, ASIM 8).
38. 8628/2/95, ASIM 209.
39. Compare UNHCR-Handbook paragraphs 167 ff.

The original wording in the November 1994 draft was still rather close to the Handbook: 'Deliberate refusal to perform military service or desertion will in any event be deemed acceptable and will constitute grounds for fear of persecution if it can be plausibly shown that they represent a conscious refusal to participate in military action of a kind which is condemned by the international community because of its inhumane nature or in accordance with generally applicable norms under international law'. This sentence clearly reflects para. 171 of the Handbook. Since February 1995 this reference to para. 171 of the Handbook is deleted and replaced by the present wording. Grounds of conscience are now accepted as a sole ground for a claim to refugee status 'if the performance of his military duties were to have the effect of leading the person concerned to participate in acts falling under the exclusion clauses in Article 1F of the Geneva Convention'. Without any doubt, acts falling under the exclusion clauses in Article 1F are a violation of international humanitarian law and therefore covered by para. 171 of the Handbook. But at first sight, the intent of para. 171 of the Handbook with its reference to military actions condemned by the international community as contrary to basic rules of human conduct seems broader. Moreover, the present wording of the joint position creates an anomaly. The 1F-character of a military action with which an individual does not wish to be associated, is a sufficient reason for recognition as a refugee, on the other hand even a temporary involvement in such an action excludes the person concerned form the protection of the Refugee Convention.

Conclusion

22. In concluding on its content and answering the question whether the joint position will help to avoid a too restrictive national interpretation I am rather ambivalent. On the one hand the joint position takes on many issues a liberal stand. Certainly, the joint position can not be characterised in general as the common lowest denominator. On the other hand, on very important aspects of the refugee definition (agents of persecution, civil war, internal flight alternative and conscientious objections) - typically involving the majority of the present day claims - its wording is ambiguous, to say the least. The harmonisation on these aspects is below the level of the UNHCR-Handbook and only tempered by the reservations made in the text of the joint position itself. Therefore it is extremely important that by its form the joint position leaves full freedom to the national courts and emphasises their independent role in determining refugee status.

V PERSPECTIVES

Review

23. According to the preamble of the joint position, 'the Council shall review the application of these guidelines once a year and, if appropriate, adapt them to developments in asylum applications'. As far as I know such a review has not been materialised yet, although the joint position was already adopted in March 1996. Most probably the 1996-Intergovernmental Conference on the re-negotiation of the Treaty on European Union has caused the delay.

Intergovernmental Conference

24. In the framework of the Intergovernmental Conference the Irish Presidency proposed in its Dublin II Outline a new Title on free movement of persons, asylum and immigration.

According to Article C.1.c. of this new title the Council should have competence to adopt among others 'common rules with respect to the qualification of third country nationals as refugees'. The issue whether this new title should be brought under the First or under the Third pillar was left open deliberately.
The Addendum of the Dutch Presidency contained a similar provision on common rules, but inserted the new title in the Treaty establishing the European Community, thereby transferring the issue from the Third to the First Pillar[40]. According to the original wording of the Dutch Draft the guidelines of the joint position needed to be translated within a period of five years in 'common rules' under the First Pillar, which should have implied the conversion of the joint position in legally binding instrument.
As the analysis above clearly indicates a conversion of the joint position into a legally binding instrument would create the risk that the interpretation of the 1951 Convention in Community law would differ from the interpretation of that convention by the UNHCR. International law does not allow a certain number of States, parties to a convention, to agree upon a more restrictive interpretation of that convention among themselves. If the EU Member States would like to revise the Refugee Convention, they should have recourse to Article 45 of the said convention and address the Secretary General of the United Nation.

Treaty of Amsterdam

25. In line with the proposals of the Dutch Presidency the draft Treaty of Amsterdam contains a new tile in the Treaty establishing the European Community on 'Free movement of persons, asylum and immigration' with a very elaborated provision on asylum policy (Article C). Compared with the Addendum Article C differs in one important aspect from the original draft. Article C.1.c. now reads: '(c) *minimum standards* with respect to the qualification of third country nationals as refugees;' (italics added)[41]. The Council is not any longer under the obligation to adopt 'common rules' for a harmonised application of the definition of the term 'refugee', 'minimum standards' will suffice. As in the fields of consumers protec-

40. Draft Article C TEC of the Addendum of the Dutch Presidency: 'The Council, acting in accordance with the procedures referred to in Article G, shall, within a period of five years after the entry into force of this Treaty adopt:
1. Measures on asylum, in accordance with the Convention of 28 July 1951 and the Protocol of 16 December 1966 relating to the Status of Refugees, within the following areas:
(a) criteria and mechanism for determining which Member State is responsible for considering an application for asylum submitted by a third country national in one of the Member States;
(b) minimum standards on the reception of asylum seekers in Member States;
(c) common rules with respect to the qualification of third country nationals as refugees;
(d) minimum standards on procedures in Member States for granting or withdrawing refugee status.'

41. The use of the term 'third country nationals' is deliberately. The so called Aznar-Protocol limits the circumstances where an asylum claim made by an EU-national can be considered admissible in another Member State. EU Member States are to be regarded as 'safe countries of origin'. An asylum application made by an EU national is to be presumed manifestly unfounded. According to UNHCR this Protocol introduces an geographical restriction which is 'not fully consistent with the international responsibilities assumed by States which ratified the Convention' (Press release 20 June 1997) . Only one Member State, Belgium made a Declaration of its intention to receive and consider all asylum applications, irrespective of their country of origin.

tion, environmental policy and labour law[42] the Treaty of Amsterdam introduces a minimum harmonisation concerning the application of the definition of refugee. The Member States are free to apply a higher level of protection than incorporated in the minimum standards. Through a conversion of the joint position into a minimum standards directive interference with the individual responsibility of the Member States under the Geneva Convention is less likely than through a directive on the subject with common rules. If the minimum standards agreed upon by the Council represent a too restrictive interpretation of the refugee definition Member States are still able to exercise their individual responsibility under the Geneva Convention and to determine refugee status in conformity with generally accepted refugee law standards. A conversion of the joint position into legally binding 'common rules' of Community law would have created the risk that on certain aspects - in particular concerning persecution by third parties, civil war, internal flight alternative and conscientious objectors - the Member States should have been obliged to apply an EU-interpretation of the 1951 Convention which differs from the interpretation of that convention by UNHCR.

26. A harmonisation of the application of the refugee definition through 'minimum standards' only diminishes the objections for harmonisation through a normative act of the Council as mentioned above (see no. 8). Minimum standards leave the individual responsibility of the Member States intact. It will not invoke a binding interpretation and harmonisation of the refugee definition through the Court of Justice. Through its preliminary rulings the Court will be able to supervise the adherence of the Member States to the minimum standards, but will not frustrate the application of higher standards by the Members States. And finally, the number of requests for preliminary rulings will be less than in case of a harmonisation through 'common rules'. Common rules should have evoked requests for preliminary rulings in all instances in which the national interpretation of the refugee definition differs from the 'common rules', irrespective whether the national interpretation applies a higher standard or a lower standard than the common rules. Minimum standards will only urge a national court to request a preliminary ruling if it is of the opinion that the national interpretation is below the minimum standards. At the same time Article H of the new title contributes to a reduction of the number of preliminary requests while according to this article only the national courts 'against whose decision there is no judicial remedy under national law' shall request the Courts of Justice to give a preliminary ruling on questions concerning the interpretation of the new title on free movement of persons, asylum and immigration and of the acts based on this title.

27. Nevertheless, it will be rather unrealistic to presume that individual Member States shall easily apply a higher standard of protection than embodied in a minimum standards directive. Even a minimum standards directive enshrines the risk of an actual harmonisation on the level of the lowest common denominator, in particular when the joint position will be converted into such a minimum standards directive. The limitations to the Convention as

42. Article 118A TEC.

already implied in the joint position, will get more importance when laid down in a legally binding measure of Community law. Others can easily follow this EU example, which could weaken the universality of the Convention as an instrument for the international protection of refugees. Therefore, it would have been better if Article C.1.c was deleted from the title on free movement of persons, asylum and immigration so that the present status of the joint position as guidelines not needed to be changed.

Annex

JOINT POSITION

of 4 March 1996

defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees

(96/196/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.3 (2) (a) thereof,

Whereas under Article K.1 of the Treaty, asylum policy is regarded as a matter of common interest;

Whereas the European Council, meeting in Strasbourg on 8 and 9 December 1990, set the objective of harmonizing Member States' asylum policies, which was further developed by the European Council in Maastricht on 9 and 10 December 1991 and in Brussels on 10 and 11 December 1993, and in the Commission communication on immigration and asylum policies of 23 February 1994;

Emphasizing, in keeping with the Member States' common humanitarian tradition, the importance of guaranteeing appropriate protection for refugees in accordance with the provisions of the Geneva Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967, hereafter referred to as the 'Geneva Convention';

Having established that the Handbook of the United Nations High Commissioner for Refugees (UNHCR) is a valuable aid to Member States in determining refugee status;

Whereas harmonized application of the criteria for determining refugee status is essential for the harmonization of asylum policies in the Member States,

HAS ADOPTED THIS JOINT POSITION:

- The guidelines set out below for the application of criteria for recognition and admission as a refugee are hereby approved.

- These guidelines shall be notified to the administrative bodies responsible for recognition of refugee status, which are hereby requested to take them as a basis, without prejudice to Member States' caselaw on asylum matters and their relevant constitutional positions.

- This joint position is adopted within the limits of the constitutional powers of the Governments of the Member States; it shall not bind the legislative authorities or affect decisions of the judicial authorities of the Member States.

- The Council shall review the application of these guidelines once a year and, if appropriate, adapt them to developments in asylum applications.

1. Recognition as a refugee

Determination of the status of refugee is based on criteria according to which the competent national bodies decide to grant an asylum-seeker the protection provided for in the Geneva Convention. This document relates to implementation of the criteria as defined in Article 1 of that Convention. It in no way affects the conditions under which a Member State may, according to its domestic law, permit a person to remain in its territory if his safety or physical integrity would be endangered if he were to return to his country because of circumstances which are not covered by the Geneva Convention but which constitute a reason for not returning him to his country of origin.

2. Individual or collective determination of refugee status

Each application for asylum is examined on the basis of the facts and circumstances put forward in each individual case and taking account of the objective situation prevailing in the country of origin.

In practice it may be that a whole group of people are exposed to persecution. In such cases, too, applications will be examined individually, although in specific cases this examination may be limited to determining whether the individual belongs to the group in question.

3. Establishment of the evidence required for granting refugee status

The determining factor for granting refugee status in accordance with the Geneva Convention is the existence of a well-founded fear of persecution on grounds of race, religion, nationality, political opinions or membership of a particular social group. The question of whether fear of persecution is well-founded must be appreciated in the light of the circumstances of each case. It is for the asylum-seeker to submit the evidence needed to assess the veracity of the facts and circumstances put forward. It should be understood that once the credibility of the asylum-seeker's statements has been sufficiently established, it will not be necessary to seek detailed confirmation of the facts put forward and the asylum-seeker should, unless there are good reasons to the contrary, be given the benefit of the doubt.

The fact that an individual has already been subject to persecution or to direct threats of persecution is a serious indication of the risk of persecution, unless a radical change of conditions has taken place since then in his country of origin or in his relations with his country of origin.

The fact that an individual, prior to his departure from his country of origin, was not subject to persecution or directly threatened with persecution does not per se mean that he cannot in asylum proceedings claim a well-founded fear of persecution.

4. 'Persecution' within the meaning of Article 1A of the Geneva Convention

The term 'persecution' as it is used in this document is taken from Article 1A of the Geneva Convention.

The term is not defined in the Convention. Nor is a universally accepted definition to be found either in the conclusions of the UNHCR Executive Committee or in legal literature on the subject. The guidelines in this document do not constitute a definition.

However, it is generally agreed that, in order to constitue 'persecution' within the meaning of Article 1A, acts suffered or feared must:

- be sufficiently serious, by their nature or their repetition: they must either constitute a basic attack on human rights, for example, life, freedom or physical integrity, or, in the light of all the facts of the case, manifestly preclude the person who has suffered them from continuing to live in his country of origin[43], and

- be based on one of the grounds mentioned in Article 1A: race, religion, nationality, membership of a particular social group or political opinions. Grounds of persecution may overlap and several will often be applicable to the same person. The fact that these grounds are genuine or simply attributed to the person concerned by the persecutor is immaterial.

Several types of persecution may occur together and the combination of events each of which, taken separately, does not constitute persecution may, depending on the circumstances, amount to actual persecution or be regarded as a serious ground for fear of persecution.

In the following guiding principles, the term 'persecution' is to be understood with reference to this section.

43. This wording is without prejudice to point 8: 'whether the person concerned cannot find effective protection in another part of his country ..'.

5. Origins of persecution

5.1. Persecution by the State

Persecution is generally the act of a State organ (central State or federal States, regional and local authorities) whatever its status in international law, or of parties or organizations controlling the State.

In addition to cases in which persecution takes the form of the use of brute force, it may also take the form of administrative and/or judicial measures which either have the appearance of legality and are misused for the purposes of persecution, or are carried out in breach of the law.

5.1.1. *Legal, administrative and police measures*

(a) General measures

The official authorities of a country are sometimes moved to take general measures to maintain public order, safeguard State security, preserve public health, etc. As required, such measures may include restrictions on the exercise of certain freedoms. They may also be accompanied by the use of force, but such restrictions or use of force do not in themselves constitute sufficient grounds for granting refugee status to the individuals against whom the measures are directed. However, if it emerges that such measures are being implemented in a discriminatory manner on one or more of the grounds mentioned in Article 1A of the Geneva Convention and may have sufficiently serious consequences, they may give rise to a well-founded fear of persecution on the part of individuals who are victims of their improper application. Such is the case, in particular, where general measures are used to camouflage individual measures taken against persons who, for the reasons mentioned in Article 1A, are likely to be threatened by their authorities.

(b) Measures directed against certain categories

Measures directed against one or more specific categories of the population may be legitimate in a society, even when they impose particular constraints or restrictions on certain freedoms.

However, they may be considered as justifying fears of persecution, in particular where the aim which they pursue has been condemned by the international community, or where they are manifestly disproportionate to the end sought, or where their implementation leads to serious abuses aimed at treating a certain group differently and less favourably than the population as a whole.

(c) Individual measures

Any administrative measure taken against an individual, leaving aside any consideration of general interest referred to above, on one of the grounds mentioned in Article 1A, which is sufficiently severe in the light of the criteria referred to in section 4 of this Joint Position, may be regarded as persecution, in particular where it is intentional, systematic and lasting.

It is important, therefore, to take account of all the circumstances surrounding the individual measure reported by the asylum-seeker, in order to assess whether his fears of persecution are well-founded.

In all the cases referred to above, consideration must be given to whether there is an effective remedy or remedies which would put an end to the situation of abuse. As a general rule, persecution will be indicated by the fact that no redress exists or, if there are means of redress, that the individual or individuals concerned are deprived of the opportunity of having access to them or by the fact that the decisions of the competent authority are not impartial (see 5.1.2) or have no effect.

5.1.2. *Prosecution*

Whilst appearing to be lawful, prosecution or court sentences may amount to persecution where they include a discriminatory element and where they are sufficiently severe in the light of the criteria referred to in section 4 of this Joint Position. This is particularly true in the event of:

(a) Discriminatory prosecution

This concerns a situation in which the criminal law provision is applicable to all but where only certain persons are prosecuted on grounds of characteristics likely to lead to the award of refugee status. It is therefore the discriminatory element in the implementation of prosecution policy which is essential for recognizing a person as a refugee.

(b) Discriminatory punishment

Punishment or the threat thereof on the basis of a universally applicable criminal law provision will be discriminatory if persons who breach the law are punished but certain persons are subject to more severe punishment on account of characteristics likely to lead to the award of refugee status. The discriminatory element in the punishment imposed is essential. Persecution may be deemed to exist in the event of a disproportionate sentence, provided that there is a link with one of the grounds of persecution referred to in Article 1A.

(c) Breach of a criminal law provision on account of the grounds of persecution

Intentional breach of a criminal law provision - whether applicable universally or to certain categories of persons - on account of the grounds of persecution must be clearly the result of pronouncements or participation in certain activities in the country of origin or be the objective consequence of characteristics of the asylum-seeker liable to lead to the grant of refugee status. The deciding factors are the nature of the punishment, the severity of the punishment in relation to the offence committed, the legal system and the human rights situation in the country of origin. Consideration should be given to whether the intentional breach of the criminal law provision can be deemed unavoidable in the light of the individual circumstances of the person involved and the situation in the country of origin.

5.2. Persecution by third parties

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 of that Convention, 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.

6. Civil war and other internal or generalized armed conflicts

Reference to a civil war or internal or generalized 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 of the Geneva Convention 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.
In principle, use of the armed forces does not constitute persecution where it is in accordance with international rules of war and internationally recognized practice; however, it becomes persecution where, for instance, authority is established over a particular area and its attacks on opponents or on the population fulfil the criteria in section 4.

In other cases, other forms of protection may be provided under national legislation.

7. Grounds of persecution

7.1. Race

The concept of race should be understood in the broad sense and include membership of different ethnic groups. As a general rule, persecution should be deemed to be founded on

racial grounds where the persecutor regards the victim of his persecution as belonging to a racial group other than his own, by reason of a real or supposed difference, and this forms the grounds for his action.

7.2. Religion

The concept of religion may be understood in the broad sense and include theistic, non-theistic and atheistic beliefs.

Persecution on religious grounds may take various forms, such as a total ban on worship and religious instruction, or severe discriminatory measures against persons belonging to a particular religious group. For persecution to occur, the interference and impairment suffered must be sufficiently severe in the light of the criteria referred to in section 4 of this Joint Position. This may apply where, over and above measures essential to maintain public order, the State also prohibits or penalizes religious activity even in private life.

Persecution on religious grounds may also occur where such interference targets a person who does not wish to profess any religion, refuses to take up a particular religion or does not wish to comply with all or part of the rites and customs relating to a religion.

7.3. Nationality

This should not be confined exclusively to the idea of citizenship but should also include membership of a group determined by its cultural or linguistic identity or its relationship with the population of another State.

7.4. Political opinions

Holding political opinions different from those of the government is not in itself a sufficient ground for securing refugee status; the applicant must show that:
- the authorities know about his political opinions or attribute them to him,
- those opinions are not tolerated by the authorities,
- given the situation in his country he would be likely to be persecuted for holding such opinions.

7.5. Social group

A specific social group normally comprises persons from the same background, with the same customs or the same social status, etc.

Fear of persecution cited under this heading may frequently overlap with fear of persecution on other grounds, for example race, religion or nationality.
Membership of a social group may simply be attributed to the victimized person or group by the persecutor.

In some cases, the social group may not have existed previously but may be determined by the common characteristics of the victimized persons because the persecutor sees them as an obstacle to achieving his aims.

8. Relocation within the country of origin

Where it appears that persecution is clearly confined to a specific part of a country's territory, it may be necessary, in order to check that the condition laid down in Article 1A of the Geneva Convention has been fulfilled, namely that the person concerned 'is unable or, owing to such fear (of persecution), is unwilling to avail himself of the protection of that country', to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may reasonably be expected to move.

9. Refugee *sur place*

The fear of persecution need not necessarily have existed at the time of an asylum-seeker's departure from his country of origin. An individual who had no reason to fear persecution on leaving his country of origin may subsequently become a refugee sur place. A well-founded fear of persecution may be based on the fact that the situation in his country of origin has changed since his departure, with serious consequences for him, or on his own actions.

In any event the asylum-related characteristics of the individual should be such that the authorities in the country of origin know or could come to know of them before the individual's fear of persecution can be justified.

9.1. Fear arising from a new situation in the country of origin after departure

Political changes in the country of origin may justify fear of persecution, but only if the asylum-seeker can demonstrate that as a result of those changes he would personally have grounds to fear persecution if he returned.

9.2. Fear on account of activities outside the country of origin

Refugee status may be granted if the activities which gave rise to the asylum-seeker's fear of persecution constitute the expression and continuation of convictions which he had held in his country of origin or can objectively be regarded as the consequence of the asylum-related characteristics of the individual. However, such continuity must not be a requirement where the person concerned was not yet able to establish convictions because of age.

On the other hand, if it is clear that he expresses his convictions mainly for the purpose of creating the necessary conditions for being admitted as a refugee, his activities cannot in principle furnish grounds for admission as a refugee; this does not prejudice his right not to be returned to a country where his life, physical integrity or freedom would be in danger.

10. Conscientious objection, absence without leave and desertion

The fear of punishment for conscientious objection, absence without leave or desertion is investigated on an individual basis. It should in itself be insufficient to justify recognition of refugee status. The penalty must be assessed in particular in accordance with the principles set out in point 5.

In cases of absence without leave or desertion, the person concerned must be accorded refugee status if the conditions under which military duties are performed themselves constitute persecution.

Similarly, refugee status may be granted, in the light of all the other requirements of the definition, in cases of punishment of conscientious objection or deliberate absence without leave and desertion on grounds of conscience if the performance of his military duties were to have the effect of leading the person concerned to participate in acts falling under the exclusion clauses in Article 1F of the Geneva Convention.

11. Cessation of refugee status (Article 1C)

Whether or not refugee status may be withdrawn on the basis of Article 1C of the Geneva Convention is always investigated on an individual basis.

The Member States should make every effort, by exchanging information, to harmonize their practice with regard to the application of the cessation clauses of Article 1C wherever possible.

The circumstances in which the cessation clause in Article 1C may be applied should be of a fundamental nature and should be determined in an objective an verifiable manner. Information provided by the Centre for Information, Discussion and Exchange on Asylum (Cirea) and the UNHCR may be of considerable relevance here.

12. Article 1D of the Geneva Convention

Any person who deliberately removes himself from the protection and assistance referred to in Article 1D of the Geneva Convention is no longer automatically covered by that Convention. In such cases, refugee status is in principle to be determined in accordance with Article 1A.

13. Article 1F of the Geneva Convention

The clauses in Article 1F of the Geneva Convention are designed to exclude from protection under that Convention persons who cannot enjoy international protection because of the seriousness of the crimes which they have committed.

The may also be applied where the acts become known after the grant of refugee status (see point 11).

In view of the serious consequences of such a decision for the asylum-seeker, Article 1F must be used with care and after thorough consideration, and in accordance with the procedures laid down in national law.

13.1. Article 1F (a)

The crimes referred to in Article 1F (a) are those defined in international instruments to which the Member States have acceded, and in resolutions adopted by the United Nations or other international or regional organizations to the extent that they have been accepted by the Member States.

13.2. Article 1F (b)

The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected.

Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators.

13.3. Article 1F (c)

The purposes and principles referred to in Article 1F (c) are in the first instance those laid down in the Charter of the United Nations, which determines the obligations of the States party to it in their mutual relations, particularly for the purpose of maintaining peace, and with regard to human rights and fundamental freedoms.

Article 1F (c) applies to cases in which those principles have been breached and is directed notably at persons in senior positions in the State who, by virtue of their responsibilities, have ordered or lent their authority to action at variance with those purposes and principles as well as at persons who, as members of the security forces, have been prompted to assume personal responsibility for the performance of such action.

In order to determine whether an action may be deemed contrary to the purposes and principles of the United Nations, Member States should take account of the conventions and resolutions adopted in this connection under the auspices of the United Nations.

Done at Brussels, 4 March 1996.

For the Council
The President

P. BARATTA

The Way Ahead

United Kingdom Case Law on the 'Internal Flight Alternative' (IFA)

Dr Hugo Storey*

International jurisprudence on asylum recognises the 'Internal Flight Alternative' or 'IFA' as an integral and prominent part of the definition of refugee as contained in Art 1A(2) of the 1951 Convention on the Status of Refugees. In the United Kingdom case law, however, it is only recently that one finds everyday reference made to it. The relatively undeveloped state of the U.K. case law is somewhat curious, in that the international jurisprudence on IFA regularly cites certain U.K. decisions as key historical reference points, with the biblical-sounding case of *ex parte Jonah* [1985] *Imm AR* 7 being seen as one of the very first cases to establish basic IFA principles. Equally curious is the fact that in one respect *Jonah* appears to embody an approach only now coming to the fore.

This article explores the U.K. case law on the IFA and then seeks briefly to compare and contrast it with international jurisprudence. It is hoped that by forming a clearer picture of its distinctive features, more attention can be given to areas in which it might learn from international jurisprudence and also possibly contribute to the development of a more consistent and coherent international interpretation of the Convention.

I U.K. CASE LAW ON THE IFA

Treatment by the courts

The 1985 case *ex parte Jonah*[1] concerned a claim by a former trade union leader who feared persecution upon return to Ghana. Nolan J rejected as 'going much too far' the proposition that 'if a person has to refrain from political activity in order to avoid persecution he has to qualify for political asylum'. This case also essayed a working definition of persecution and further stated that the issue of persecution was 'one of fact and degree', a maxim which all subsequent case law has reiterated. Notwithstanding the strict terms in which he had dealt with the general issue of a person's political activity, Nolan J went on to make a favourable finding on the particular case before him. Despite there being no material risk to Jonah if he was to live in a remote village, he would there be separated from his wife and unable also to pursue employment as a trade union official which he had carried out for some 30 years. The likely consequence of his removal from the U.K., Nolan J concluded, would be that Jonah would be persecuted. If, up to the present, it has been the blunt principles set out in

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1. *Ex parte Jonah* [1985] Imm AR 7,

Jonah that have been seen as authoritative whereas his actual decision has been seen as somewhat eccentric, there are signs that recent case law may attach more significance to the latter.

The next case of note was *ex parte Yurekli* [1990] *Imm AR 334* in which Otton J endorsed the approach enjoined in *ex parte Jonah* of seeing the issue as hinging essentially on the issue of persecution as one of fact and degree in every particular case. *Yurekli* concerned a Turkish Alevi Kurd who had been persecuted in his home village and had lived peacefully albeit not without difficulties in Istanbul since. In reviewing the Secretary of State's decision refusing his claim to refugee status, Otton J stated that:

> 'The basis of the [the Home Secretary's] decision was the fact that he was able and had been shown to be able to live in his country for a period of two years a substantial period of time in a part where he was not persecuted in the way that he was when he was living at home. It is true that this meant that he lived away from the family and that he was unable to obtain regular employment when he was discovered to be a Kurd...'[2]

But, he concluded, the latter was a factor which the Home Secretary was entitled to take account of without that causing him to fall into error in concluding he was not in fear of persecution. The Court of Appeal in its treatment of this same case upheld his judgment, although Neil LJ did state initially that 'this aspect of the matter troubled me'.
Yurekli v Secretary of State for the Home Department [1991] *Imm AR 153(CA).*

The 1991 case of *ex parte Gunes* [1991] *Imm AR 278* gave approval to reference to para 91 of the 1979 Handbook on Procedures and Criteria for Determining Refugee Status (hereafter the 'Handbook') as a helpful guide in operating the test. In this case Simon Brown J (as he then was) was faced with another case involving an asylum claim by a Turkish Kurd in which the Secretary of State had concluded that the applicant could live in safety in Turkey *anywhere* save only in his original village. Approving *ex parte Jonah*, Simon Brown J resoundingly rejected the contention of the applicant that proof of a localised fear of persecution was sufficient to entitle him to refugee status. However, in the course of his short disposal of this contention, Brown J sought support from the text of para 91 of the Handbook in the following terms:

'Implicit in that final clause is this. If in all the circumstances it would be reasonable to expect someone to return to another part of his country of nationality then that is a matter that can properly found an adverse decision on a claim to refugee status' (p. 282)[3].

This comment reflected a readiness to treat *reasonableness* as a test of safety elsewhere, without the need for much analysis of the meaning of the term.

2. *Ex parte Yurekli* [1990] Imm AR 334.
3. *Ex parte Gunes* [1991] Imm AR 278.

In a 1992 judgment of Roch, J in the Divisional Court, *ex parte Vigna* [1993] *Imm AR 93*, the same approach was taken, although no authorities were cited. The judge in that case was unreceptive to the further argument adduced by Counsel which relied on guidance given by the UNHCR in a confidential memorandum sent to governments to the effect that '...although the Colombo area is not an area generally affected by armed conflict, a person could not be expected to return there in safety and dignity unless that person had close relatives living there or, alternatively, had lived there himself for some time prior to leaving Sri Lanka or had worked in that area for some time prior to leaving Sri Lanka'.

In a 1993 case, *El-Tanoukhi v Secretary of State for the Home Department* [1993] *Imm AR 71*, the Court of Appeal again confirmed and applied the *ex parte Gunes* approach to the case of a citizen of the Lebanon whose original claim rested on a fear of return to Israeli-occupied parts of southern Lebanon. It rejected an argument that this approach misconstrued Article 1A(2) read in the light of 1C(4) and Article 33 which (so ran the argument) treated 'territories' and 'country' as indivisible concepts. Such an argument would entail, the Court of Appeal noted, upholding a claim to refugee status on the strength of well-founded fear of persecution 'in any part of the country in question, no matter how small'. The Court of Appeal could not accept that construction. Lloyd LJ also emphasised the importance in analysing an IFA of examining the general situation in a country, noting that: '...the Home Secretary is ... entitled to take into account conditions in the country as a whole in deciding whether it is safe to return the applicant to the Lebanon under article 33'. He added that that was 'entirely consistent with para 91 of the Handbook'

Confirmation that the courts continue to adhere closely to the IFA test as contained within the Convention so as to afford no general relaxation of the requirement of proving fear country-wide has recently been demonstrated by the Court of Appeal in another Sri Lankan Tamil case *R v Secretary of State for the Home Department ex parte Niyaz*, judgment of 30 November 1995 (FC3 95/7419/D). It clarified that it would not automatically bring into play para 91 of the Handbook just because the country of origin had a civil war going on. In concluding that there was a reasonable guarantee of safety for the claimant concerned in the south and the west of Sri Lanka both in 1993 and now, Henry LJ added that:

> 'It is complained on behalf of the applicant that the internal alternative was not highlighted sufficiently at the [adjudicator] hearing. The onus in these matters is on the applicant. The internal flight alternative is always present wheneffectively there is a civil war going on, but that civil war is only in certain parts of the country'.

This statement reflected scant concern to ensure judicial harmony with the approach set out at para 91 of the Handbook.

What is apparent from the present state of treatment of the IFA at court level is that despite seeing the IFA as an essential element of the Convention schema there has been little sign that U.K. judges have either welcomed or seen the necessity for decisionmakers either to analyse it or to apply it themselves within a clear or settled framework of reference. One sign that this may soon change was posted in a March 1996 judgment of the Court of Appeal, *Anandanadarajah*, in the course of which Hobhouse LJ cited with approval the observation of Tuckey J in the Divisional Court that 'The question is how far and wide the con-

cept of reasonableness goes. That may be a matter which these courts have to consider'[4].

In the meantime, however there continue to be occasions on which the courts are ready to endorse decisions that omit clear reasoning showing that the reasonableness criterion has been applied. Thus in *ex parte Robinson*, a May 1996 judgment by Mr Justice Popplewell, albeit recognising that '[T]he questions of safety and reasonableness are ... two separate matters', concluded thus:

> 'The fact that [an alternative place] is safe does not necessarily mean that it is reasonable. On the other hand, if the only matter which the applicant puts forward is that it will not be safe to go to a place A but there is no suggestion on *his* behalf that it would be otherwise unreasonable to go to place A, it is not incumbent upon the Adjudicator to go out of his way to consider the question of reasonableness if the only question that is being put by (sic)him is one of safety'[5].

Treatment by the Immigration Appeal Tribunal

Below the level of the UK courts, the body that seeks to establish precedent on asylum and immigration matters is the Immigration Appeal Tribunal. By and large, and as one might thus expect, early treatment given of the IFA by this body has largely moved in step with that fashioned over time by the courts. This is reflected in early cases such as *Boutari* (7349), and *Bhatj* (7084). One enduring feature of the IAT approach is a concern to view assessment of the test of internal safety as being a highly circumstantial one. This has resulted in adjudicators and Tribunal members sometimes reaching dissimilar conclusions on roughly similar types of cases, a good instance being Sikhs in the Punjab area of India during the period of high conflict between militant Sikhs and the Indian government during the early 1990s. Thus in *Gill* (11748) the Tribunal found that the appellant could not achieve safety by relocating elsewhere in India in view of the evidence before it that Punjabi police could mount covert operations outside their own state. A more recent case, that of *Charanjit Singh* (13375) came to a similar conclusion. But other Tribunal and adjudicator cases dealing with very similar situations involving a Sikh militant have reached a different conclusion[6].

Studying the chronology of U.K. Tribunal cases it is noticeable that the IFA issue became markedly introverted at that point -in July 1993- when the U.K. Government introduced a rule (HC725 para 180L; see now HC395 para 343) which stated that an application *may* be refused 'if there is a part of the country from which the applicant claims to be a refugee in which he would not have a well-founded fear of persecution and to which it would be reasonable to expect him to go'.

4. *Anandanadarajah*, judgment 4 March 1996 (CA) FC3/5416/D, pp. 9-10.
5. R v IAT *ex parte Robinson*, judgment of 10 May 1996 CO/1495/96.
6. Details of relevant cases should be available shortly through the E.I.N. (Electronic Immigration Network), albeit it should be noted that any future determinations on "Sikh militant" cases are likely to be influenced by the recent judgment by the European Court of Human Rights in the *Chahal Family v U.K.* judgment of 15 November 1996.

Whether the intent of those drafting this rule was simply to reflect Convention case law on IFA or to ensure that decision-makers took account of para 91 of the Handbook or to relax the IFA test - or all three - it was inevitable at some point that the Tribunal would have to devote close attention to its meaning and effect. Did it mean that in U.K. law an asylum claim in which one part of the country was not safe could still succeed if return to any other was unreasonable?

*The **Dupovac** case*

An in-depth analysis of this and related issues arose eventually (if not solitarily)in the case of *Dupovac* (R 11846). This was a case involving consideration of the Bosnian conflict as matters stood in 1992 and 1993 . The Chairman in that case was Professor Jackson. In his own analysis given in his subsequent book, *Immigration Law and Practice*, he summarised this determination as follows:

> 'In *Dupovac* the Tribunal held that a successful claimant required the applicant to establish persecution in all parts of the country to which it was 'practical' to return. Otherwise it is not shown as required by the Convention that due to fear of persecution there is an inability or unwillingness to return to 'that country'. So, held the Tribunal, para 91 of the Handbook confuses asylum and non-asylum grounds for non-return' .

Dupovac decided, Jackson's analysis added, that the question of non-return to an area in respect of which persecution was not established was a matter of discretion. In the United Kingdom this was exercised through the discretionary machinery of exceptional leave. Jackson did note as a further aside, however, that it might well be argued ('a point not taken in *Dupovac*') that the reflection of the Handbook in the immigration rules indicates that persecution in the whole country is not required: 'If so the unreasonableness must surely be objectively shown. Whatever the reason for non-return (Convention or non-Convention) the ultimate burden rests on the applicant to make the case.' (p. 370)

By way of a footnote Jackson adds that 'if it is sufficient to establish asylum only in one part it still remains for the applicant to establish that it would not be reasonable to return to any other part - and where there is uncertainty for the asylum decision to be 'suspended' through the grant of exceptional leave (see Dupovac)'[7].

Whilst to be welcomed for its efforts to elucidate the IFA test and clarify the reference to it as stated in the immigration rules as revised in 1993, *Dupovac* raised more questions than it answered and did not take the opportunity of seeking to supply a clear framework for analysis for use by future decision-makers.

Post-*Dupovac* the Tribunal has taken a very empirical approach to questions of safety, seeking to maintain the same firm approach as that adopted by the courts. A typical example is

7. D. Jackson, *Immigration Law and Practice*, London Sweet & Maxwell 1996, p. 370 (infra n. 78).

the December 1995 Tribunal determination in the case of *Montiero-Figuerda* (12785), a case involving a citizen of Angola who was accepted to have suffered injuries after being identified by MPLA sympathisers as a UNITA supporter. The Tribunal found, inter alia, that:

> 'it has not been shown to us that there is a serious possibility that in all parts of Angola the appellant would be perceived to be a UNITA supporter and because of that would be likely to suffer the kind of injuries or harm which he has suffered in the past. The appellant was randomly targeted by a group on the look-out for persons of certain political inclinations. There is no evidence of a serious possibility of this occurring again to the appellant save once again as a random attack. The evidence simply does not demonstrate in relation to all parts of the country the serious possibility of such attacks nor any degree of risk of the appellant suffering from such an attack to amount to persecution.'

Senga (11821) and *Farhat* (12956) are two further examples of cases endorsing and applying the test as one requiring robust and manifest realism.

In more recent times, however, the Tribunal has shown more signs of a dual effort to create on the one hand some visible framework of analysis and on the other hand, as part of this endeavour, to more solidly identify specific relevant factors as seen to obtain in relation to specific country situations. That might almost be characterised as invention born out of necessity in the face of the growing volume of cases dealing with several countries in particular. But the contrast between the somewhat ad hoc approach to Sikh militant 'Punjab' cases and the more recent treatment of Tamil 'Colombo' cases is very striking. In the latter instance there is now a far more evident concern shown to achieve some *consistency of criteria* to be applied in judicial treatment of the cases involved. Sensibly, however, this has not been seen as requiring adjudicators and Tribunal panels to always reach similar conclusions on the facts. On the contrary it is stressed that conclusions on individual claims will necessarily vary on a case-by-case basis. However, there is more evidence here of the Tribunal (and adjudicators) approaching decisions against the background of more diverse and well-researched background materials and of paying closer regard to contemporaneous changes in political events. This is especially evident in cases such as *Vinayagamoorthy* (13224), which reached a conclusion favourable to the applicant, and in *Jayashanker* (13880) a determination of 9 September 1996 and earlier Tribunal determinations *Baveenthiran* (13510), *Anantharajah* (13631) and *Paraniroopasingham* (13482) - all of which had identified Colombo as a safe IFA. In *Jayashankar* the Tribunal placed considerable but not sole reliance upon updated 1996 UNHCR advice on the situation in Colombo which concluded that under current circumstances it could '...be presumed [that] persons claiming problems with the LTTE may avail themselves of the protection of the Government outside the LTTE controlled area.'

The corresponding new interest in furnishing better analytical tools is well-illustrated in *Ashokanathan* (13294) Chaired by Mr. G. Warr, the Tribunal in that case saw para 343 of HC395 as 'echo[ing]' para 91 of the UNHCR Handbook and legitimising the following schema:

> 'Where an appellant is found to be a Convention refugee but it is suggested that it is safe to return him to a particular part of the country to which he fears to return, it appears to us that an adjudicator needs to ask two questions:
>
> 1. Is the appellant at risk there for a Convention reason?

2. If he is not, is it nevertheless reasonable to return him there having regard to all circumstances of the case?'

Leaving aside the fact that the analysis that ensued appeared to rely on a somewhat nebulous concept of reasonableness, the decision went on to indicate that it saw this as being the appropriate analysis to be applied under rule 343 of the rules, a rule in which 'the Secretary of State may have gone further than was strictly necessary to comply with the 1951 Convention'. Very correctly in this writer's view Mr Warr noted that 'there is nothing in [the U.K. legislation] to prevent the rules giving a humanitarian gloss to the United Kingdom's strict Treaty obligations'. But by virtue of situating his framework of analysis squarely in the context of para 343, he not only lost an opportunity to clarify the framework appropriate under the Convention itself but left the relationship between the two wholly unclear. *Ashokanathan*, however, did proceed, in the course of answering the second question it posed earlier, to see reasonableness as requiring in this instance assessment of the particular 'ordeals' the appellant had experienced in Colombo before departure (it appeared to have in mind such factors as 'whether the appellant could support himself in Colombo, whether he had family in the area to whom he could turn to for support, his maltreatment in custody in Colombo prior to being released, and the relatively short period he had spent in Colombo all of it 'in hiding' except for when he was in custody'). The conclusion reached was that *'The cumulative effect of these ordeals was that life in Colombo became intolerable for the appellant'* (emphasis added).

In *Sulosan* (12543), a more recent Tribunal treatment of IFA in which again in the context was once again a Colombo IFA issue, one notices the same concern to particularise factors, over and above the mere status of the appellant as a young Tamil, that might help decide whether Colombo was safe or unsafe for him. In reviewing other Tamil cases in which Colombo was concluded to be unsafe, the Tribunal Chairman on this occasion (Mr G. Care, former acting chief adjudicator), noted that in them other circumstances had been present: in one he had no papers; in another he had been in the police force.

Apparent also in recent case law is greater perception of the need to focus when appropriate on the specific issue of *access* to areas thought to be safe (what is often described in the international jurisprudence as one of two 'prongs' or 'limbs' of the IFA test). Thus in *Baglan* (12620) the Tribunal decided to uphold a decision by an adjudicator allowing the appeal of a Turkish citizen of Kurdish origin, bearing in mind Home Office proposals to fly him back to Istanbul. The tribunal held that 'there is a serious possibility that Mr Baglan would not get further than the airport or if he did that he would be identified simply through having to live in Istanbul and requiring papers for that purpose'.

> Pressure on the Tribunal to further foster a more sophisticated approach to IFA issues, in order to cast off any hit-or-miss image, is likely to increase as decision-makers and representatives alike become increasingly familiar with and comfortable about making use of international jurisprudence. In this respect the courts have already set the tone in recent asylum jurisprudence on a number of key issues. Hitherto the Tribunal has tended to see reference to international jurisprudence as a matter best left to the courts (if to anyone). But as awareness has grown that, when interpreting and applying the Con-

vention, they are under a duty authorised by national legislation to adopt international principles of interpretation and application, resistance has receded. The *Sulosan* case mentioned earlier exemplifies the new approach. In that case the Tribunal saw fit to clarify its approach to the IFA test by reference to the very detailed analysis given in *Re RS No 135/92* by the New Zealand Refugee Status Appeals Authority, whose approach, as we have already noted, was to reduce the test to two questions:

a) Can the claimant obtain *meaningful protection* in the country; and

b) Is it *reasonable* to expect him to relocate?

Whilst reference to the very detailed and authoritative treatment given of the 'IFA' or relocation test in this New Zealand case is to be welcomed, it would be unfortunate if the pattern of Tribunal reference to key overseas cases were not to be accompanied by some analysis as to why that treatment is thought to be cogent (although this is not debated in this article, there are grounds for considering that *Re:RS* does not sufficiently retain a link between the principle of internal protection and the continuing need to show that there remains a real risk of persecution).

Sulosan also clarified its view of the position as regards the *procedural fairness* of an IFA issue being relied upon for the first time at an adjudicator or Tribunal level:

> 'We have some sympathy for the general reluctance of parties to address matters at Adjudicator level which have not been taken into consideration by the Home Office but we venture to suggest that in asylum appeals it is not always realistic nor would it necessarily be unfair for an adjudicator to deal with such matters as internal relocation for the very first time before him provided the Appellant has had a real opportunity to address the Adjudicator and bring evidence on the matter before him. This may well require an adjournment but it does not require a reference back to the Home Office. We draw some assistance from the recent decision of the Tribunal in *Oga* (122172).'

On this point the Tribunal's conclusion was in similar terms to that expressed in *Nooh* (13102) and in *Muhubo Aden Ahmed* (13371), a determination dated 15 May 1996. In the former case the Tribunal confirmed that internal flight can be considered even if it had not been be raised by the Secretary of State in the reasons for refusal; in the latter case the conclusion reached was that it was entirely compatible with Convention principles for an IFA point to be raised for the first time even as late as the Tribunal level.

Even further on from that the Tribunal now sees it as appropriate on occasions to remit a case in which an adjudicator appears not have considered or made clear findings on the IFA issue to remit a case back to the same adjudicator for that to be done. So ruled a Tribunal chaired by Mr G Care in a case concerning an asylum-seeker from China, a case which also linked the IFA test more overtly with established human rights criteria. The case concerned was *Yang* (13952) a determination dated 15 October 1996. The Tribunal concluded that 'On the background evidence available to us it seems that China administratively controls where its citizens may live and there is therefore no freedom of internal movement without consent... The Adjudicator did not consider whether it was reasonable for the appellant to live elsewhere in China when she concluded [that there would be other places in China where he could go with safety]'. The Tribunal also commended to the adjudicator the 'valuable survey' of the 'relocation' issue found in the New Zealand decision of the *Re:RS*

523/92 RSAA at p. 27 et seq. In *Ismail Das* (13492), a Tribunal chaired by Mr A.F. Hatt, a remittal was made to a different special adjudicator so that '...both the appellant and the respondent should be given further opportunity to call evidence and make submissions on the question of the appellant's fear of persecution in Northern Cyprus and in relation to the internal flight concept'.

Unfortunately it cannot be said to date that these new moves at Tribunal level have led to greater uniformity or consistency of approach. In *Manivannan* (12876), for example, the Tribunal pronounced that the issue of whether an appellant would be persecuted in Colombo or whether it was unreasonable for him to go there was regarded as 'largely a distinction without a difference'. Such an approach, if followed, apart from being at variance with that taken in the courts, would appear to collapse the test back into too undifferentiated an appraisal of circumstances, albeit this particular decision did go on to endorse in lucid terms the need for such assessment to entail a two-fold test of the personal circumstances of the appellant and the general situation obtaining in the country as a whole.

At the time of writing it must be reported that whilst there are signs of U.K. case law seeking to operate the reasonableness test with more finesse, and some promising innovation urging more recourse to internationally known cases, both the IAT and the courts have not succeeded in establishing any definite framework for analysis. Furthermore, both the IAT and the courts appear to remain embroiled in IFA issues as they are seen to arise within the immigration rules - the para 343 problem. Attempting to resolve its precise ambit and effect has involved further -inevitably forensic- layers of interpretation. The question has become in critical need of judicial clarification. What precisely is at the heart of the para 343 conundrum can only be outlined here.

The para 343 issue

Can it be said that either the courts or the IAT have resolved para 343 problems? On the evidence of very recent court cases, for example that of *Anandanadarajah* and that of *Robinson*[8], the most that can be said is that they have kept an open mind about it. At the Tribunal level the present state of case law has if anything deepened obscurity.

In a recent Tribunal case, that of Muhubo Aden *Ahmed* (13371), a determination already cited, Professor Jackson as Chairman reconfirmed the view he took in the earlier case of *Dupovac* that (what was now) paragraph 343 of HC 395 represents a relaxation of the Convention IFA test to be applied as a matter of discretion for the original decision-maker. Controversially, however, he further found that this did *not* leave it open to the *appellate authorities* to relax the IFA test by reference to para 343 discretion. In his view that route of interpretation had been cut off by the enactment of the 1993 Act. His reasoning was as follows:

8. Supra n. 5.

'The problem which ensues on appeal, however, is that on any appeal under the 1993 Act it will not be open to an adjudicator to consider this exercise of discretion - the sole issue under that Act on appeal is whether removal would be contrary to the Refugee Convention (see section 8 [of the 1993 Act]). Just as discretion to consider an asylum application despite the existence of a third safe country is contained in the rules but is not a matter for consideration on appeal under the 1993 Act, so is the discretion under para 343 of HC 395 excluded from consideration (see for the ambit of the 1993 Act appeal R v Secretary of State *ex parte Mehari* [1994] *Imm AR 151*, *Munchula* (12986) [see now [1996] *Imm AR 344*]).'

Whether this view is upheld by the courts remains to be seen. The analysis given in *Mehari* by Laws J is very rigorous. But on the evidence of *Anandanadarajah* the Court of Appeal appears to have proceeded on the opposite premise and considered para 343 discretion as one which can be exercised by adjudicators and the Tribunal. Furthermore, in *Ikhlaq* (13679), a closely reasoned determination dated 15th July 1996 with Judge D.S. Pearl as Chairman, the Tribunal dissented 'reluctant[ly]' from the conclusions drawn in the differently constituted Tribunal chaired by Professor Jackson in the case of *Ahmed* (13371). The reasons for not following the latter's conclusions were stated as follows:
'For our part, we cannot see how the discretion under para 343 of HC 395 is excluded from consideration by an adjudicator and, on appeal, by the Tribunal. We do not see how *Mehari* ... supports the exclusion of jurisdiction; indeed the reverse, because Laws J [in *Mehari*] made it clear that the HC Rules ...is analogous to (though not identical with) that of a statutory instrument which may be prayed in aid to construe main legislation, where it is clear that the two are intended to form an overall code' [the Tribunal goes on the reject the analogy drawn with third country cases].

Whatever light is shed by future case law, it is sorely to be hoped that it will clearly demarcate (1) the IFA (including the reasonableness criterion) as part of the Convention, and (2) the additional implications (if any) of para 343 discretion.

It should not be counted upon, however, that Parliament will necessarily cease to blur lines between Convention criteria and national criteria. Indeed, on the showing of the Asylum and Immigration Act 1996, more overlapping has already arisen. The new subparagraph added in to para 5 of Schedule 2 of the 1993 Act, which relates to certificated ('fast-track') appeals states that:

'(5) This sub-paragraph applies to a claim if the evidence adduced in its support establishes a reasonable likelihood that the appellant has been tortured in the country or territory to which he is to be sent.'

This provision does not require that torture has been inflicted by agents of persecution or for a Convention reason.

II CONTRAST AND COMPARISON BETWEEN THE INTERNATIONAL JURISPRUDENCE AND U.K. CASE LAW

It has been shown that the U.K. jurisprudence on the IFA has had a chequered history, with relatively little close analysis of it attempted until quite recently. Nonetheless it is very clear that since 1985 at least the U.K. courts and tribunals have applied the IFA test robustly, even though for some considerable period they did not see any need to refer to it by name (IFA or otherwise) or to identify it expressly as a Convention 'test'.

It is outside the scope of this article to cover the international jurisprudence on the IFA as such (this issue is the subject of an article for forthcoming publication by the present writer). Nevertheless, in view of the growing concern within the U.K. to achieve a more unified international interpretation of the Convention, some brief overview of how the national case law converges or diverges is in order.

In common with the international jurisprudence, U.K. courts and tribunals have adhered fairly strictly to the test as being one requiring a claimant to prove persecution countrywide. They have unhesitatingly seen the onus of proof to lie upon the claimant to prove no IFA exists.

Approach to the reasonableness criterion

In contrast to some of the international jurisprudence (and one isolated IAT determination), the courts for a long time have been content to treat para 91 of the Handbook as helpful and unproblematic guidance on interpretation of the IFA test and to adopt wholesale its criterion of 'reasonableness', without seeking to define that criterion more precisely. They have generally resisted, however, any interpretation of that criterion as an 'override' such that, in the absence of meaningful protection somewhere else in the country of nationality, a claimant's well-founded fear of persecution can sometimes be localised only (Thus they have not taken the New Zealand road on this issue, as articulated in the leading case decided by the New Zealand Refugee Status Appeals Authority in *Re RS No 135/92* in a 17 March 1995 decision at pp. 29-32; although some Tribunal determinations have cited this decision approvingly).

Point in time at which the IFA test is to be applied

One point in the U.K. case law which has lacked clear treatment concerns the proper point in time at which the IFA test is to be applied. In the current (4th) edition of *Macdonald's Immigration Law and Practice*, the view is expressed that the discrete point in time for application of the IFA test is when the claimant departs from his country of origin. This argument has some underlying rationale, in that it may be thought harsh for a claimant who can show a well-founded fear at the time of departure from the country of origin to have to then go on to prove grounds for a continuing fear, since that would place additional burdens on him, in having in particular to furnish less direct evidence of subsequent changes in his country of nationality. But it has not been the view taken in the bulk of the modern international jurisprudence, which has come to treat the crucial point in time as being the date

of the hearing.
Nevertheless one may say that the 1995 English Court of Appeal judgment in *Ravichandran* [1996] *Imm AR 97* (which came after appearance of Macdonalds' 4th edition) has indirectly resolved this issue. In that case the distinct but overlapping issue of whether the test of whether a person qualifies as a refugee is at the date of (original) decision or at the date of hearing, was resolved by the Court deciding it is the latter. That plainly necessitates that *primary* focus at least be fixed squarely on the IFA test also as being one concerning whether a claimant has an IFA at the date of the hearing. The reasons why a claimant did not seek an IFA prior to his date of departure remain, of course, relevant as part of his overall circumstances, past and present. They remain valid, thereby, as a secondary point of focus. This approach is able to embrace cases ranging from those where internal flight was left as a *hypothetical* option, through to those where it was *in fact attempted* by way of movement on to one or more other places inside the country of nationality (for example by Sri Lankan Tamils moving to Colombo). But essentially the test concerns the issue of whether a claimant *upon return* and *now* could avoid real risk of persecution by relocating in one or more other parts of his country of nationality, away from his home locality or region.

The U.K. jurisprudence has rarely strayed from the approach of treating personal factors and general country background factors as *both* being essential in assessing a claimant's overall situation in relation to internal flight. In this respect it fully reflects the strong consensus in the international case law about the need for such a two-dimensional approach.

A general survey of U.K. asylum case law shows that it favours a circumstantial, flexible, practical and realistic approach to the IFA test. In the face of criticism that different adjudicators or Tribunal panel members or judges frequently reach dissimilar conclusions about IFAs on cases concerning claimants from the same countries and in similar situations, they have held reasonably firm to the belief that such outcomes are an inevitable and proper consequence of deciding each case on its particular circumstances, not according to some blanket approach to different categories or nationalities of claimants.

As these are all key features seen in the international case law as crucial to sound operation of the test, it might appear that the U.K. jurisprudence was in good health. This would be to overlook the equally apparent fact, however, that, viewed overall, the U.K. judicial decision-making sometimes displays an eclectic, ad hoc character. In contrast to the jurisprudence in countries that have also been active in hearing asylum claims for some time, it has avoided clarification of such sub-issues as the invalidity of comparative assessments or risk of persecution, of country 'normalcy' as an improper benchmark, and of what should be common variables or indices that have to be considered in many cases.

There are however some signs of a change in the direction of engaging more with the international case law on IFA, particularly where U.K. jurisprudence is silent or tentative or equivocal. This reflects a more international approach to asylum law generally. More regular reference is being made in particular to diverse, well-researched sources of data about general country situations. Even though the very limited resources available to the U.K. Immigration Appellate Authority have not enabled it to ensure its own comprehensive IFA reports on key countries where IFA is often a key issue, greater sharing of information between the

U.K. and other countries has meant that research done elsewhere is being drawn upon here. A case in point has been the use made of a document entitled 'Sri Lanka: Internal Flight Alternative - An Update', a publication of the Research Directorate, Documentation, Information and Research Branch, Immigration and Refugee Board Ottawa, Canada, March 1995 which is publicly available through the UNHCR REFWORLD July 1996 - Country Information CD Rom.

Human rights interlinking

As the U.K. approach has become decidedly more internationalist, more linkages of IFA issues to international human rights norms are beginning to be attempted. The latter development goes wider of course than issues relating to IFA. But it is interesting to note that the same Tribunal chairman, Mr G. Care, whose determination in the *Gashi* (13695) case has raised general human rights issues under the Convention saw fit in the *Yang* case cited earlier to link testing of IFA to the human rights provision of freedom of movement. These developments remain, however, extremely tentative.

In sharp contrast to the very active concern given within U.K. case law to some of the key issues of Convention jurisprudence, for example on the question of the definitions of persecution, and of agents of persecution, there remains a visible lack of any clear framework of analysis in the light of which the IFA test is conducted. U.K. case law still lacks any decisive judgments at court level which analyse the test in comparable depth to *Thirunavukkarasu v Canada* (Minister of Employment and Immigration) [1994] 1 FC 589, (FC:CA), *Randhawa* (1994) 124 ALR 265 (in Australia), *Re:RS No.523/93* (a decision of the Refugee Status Appeals Authority, New Zealand 17th March 1995) and the 1996 decision of the German Federal Constitutional Court (Bundesverfassungsgericht) BverwG C 45.92 IJRL vol 8 1996, 207 - to name several leading international cases on the IFA test.

One factor which must be seen to account in part for this lacuna is the inevitable confusion that arose in relation to the IFA test by virtue of the changes in the immigration rules first introduced in 1993. This has lead to considerable equivocation at adjudicator, Tribunal and court level as to what powers the appellate authorities have in 1) applying the IFA test solely under the Convention schema; and 2) applying it under the immigration rule schema (now para 343) which authorises a discretion exercisable *within* the rules. That has plunged case law into an introverted phase from which it is unlikely to emerge unless and until the courts or fresh legislation resolve the issue in more decisive fashion. Taking a more sanguine view, one could say that if U.K. jurisprudence has yet to make furnish a thorough treatment of the IFA test, its late entrance into this area of case law could afford it a golden opportunity to synthesise some of the 'interpretational divergencies' on this subject identified certainly within the European jurisprudence by Thomas Spijkerboer in his study, 'A Bird's Eye View of Asylum Law in Eight European Countries', Amsterdam Dutch Refugee Council 1993 and by Helene Lambert in her book *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (1995, Kluwer Academic Publishers, pp. 88-90, 51).

Procedural Fairness

In terms of standards of procedural fairness, the U.K. position is very much in line with that adopted in New Zealand, for example in the *Re:RS No.523/93* decision cited earlier, which avoids heavily formal protection of natural justice safeguards as is required under Canadian law and practice. As in New Zealand, judicial bodies here have applied a more 'common sense', factual approach geared primarily to avoiding a claimant being taken by surprise by the raising of an IFA issue at any stage of proceedings up until completion of a hearing. It remains to be seen, however, whether such an approach will prove adequate to protect asylum claimants under the 'expanded fast track' provisions and related changes in procedural rules arising from the 1996 Asylum and Immigration Act (Consider the issue, for example, of a person who is served with a direction to furnish fuller particulars of his evidence and to supply relevant case law and skeleton arguments; but who is not informed at the same time that IFA may be a specific and central issue in his case).

Substantive Fairness

In relation to what may for convenience be termed issues of 'substantive fairness', the current U.K. position appears to strongly favour treating IFA as an issue to be addressed only after an appellant has made out his claim to localised persecution. Cases in which it has been operated as a stand-alone or first hurdle test are still unusual. They tend to be confined to those in which the claimant himself admits the existence of a safe and accessible alternative internal location and no other evidence suggests anything to the contrary. Whether, again, this stance will not alter in consequence of those provisions of the 1996 legislation aimed at further speeding up the determination of appeals, is far from certain. If it does, it may become more important for judicial decisions to relate assessment of IFAs to country-specific, background reports on IFAs, as well as to country-specific state reports made under the supervision of major human rights treaty bodies which address state performance in relation to the right of freedom of movement of persons internally as well as in relation to other human rights they guarantee that have relevance to IFA issues.

Another factor which is likely to cause U.K. jurisprudence to reappraise its current approaches to the IFA test is the emergence of a new source of international jurisprudence emanating not from the traditional amalgam of national case law, state practice, UNHCR standard-setting and academic authorities, but from international judicial bodies who supervise human rights treaties. It is beyond the scope of this article to dwell on the importance in this regard of the case law of the U.N. Convention against Torture's Committee against Torture (CAT) and of the Council of Europe's 'Strasbourg' ECHR organs in particular. It is salient, however, to note that in both instances there are now leading cases in which the IFA issues has been central to the decisions reached. In *Ismail Alan v Switzerland*, Communication No.21/(CAT/C/16/D/211995) the Committee against Torture (CAT), in reaching a finding of a violation by Switzerland of Article 3 noted, inter alia: '[that] ... the author already had to leave his native area, that Izmir did not prove secure for him either, and that, since there are indications that the police are looking for him, it is not likely that a 'safe' area exists in Turkey. In the circumstances, the Committee finds that the author has sufficiently substantiated that he personally is at risk of being subjected to torture if returned to Turkey' (IRLJ

vol 8 No.3,440).

Grounds for viewing the approach to the relocation test taken by CAT in this case as being more liberal than that taken elsewhere in the international jurisprudence have been strengthened by the similar approach taken by another international judicial body, the European Court of Human Rights judgment in its landmark judgment on the case of *Chahal Family v U.K.*, judgment of 15 November 1996. Much of the decision reached by the majority of the Court in this case turned crucially on the issue of whether the principal applicant, a Sikh militant who had become involved in the struggles for a separate Sikh homeland in the Punjab, could avoid a real risk of torture or inhuman and degrading treatment contrary to Article 3 of the ECHR by living elsewhere in India. What is particularly significant about the Court's careful and detailed treatment of this issue is the emphasis it placed on the need, when deciding whether safety could be found through relocation, for satisfactory evidence that the authorities of the state, in this case the Indian police force and security forces in particular, would be able to afford protection to its citizens throughout Indian in accordance with fundamental guarantees of civil and political human rights standards; see paras 100, 102, 103, 104, 107. This judgment will obviously fuel arguments to the effect that no safe IFA can obtain unless the risk of persecution in an IFA is only avoidable if a claimant does not seek to enjoy or exercise fundamental human rights, the right to freedom of expression being one example.

Arguably the approach to be adopted when assessing the degree of risk of persecution of persecution under 1951 Convention criteria should not be any different, simply because the fear being tested is not of inhuman and degrading treatment as such but a well-founded fear of persecution for a Convention reason.

If more regular human rights linkages do become one of the features of U.K. jurisprudence on the IFA in the late 1990s, then in one way it might be seen to have come full circle from the first famous IFA decision in *ex parte Jonah*[9]. The decision of Mr Justice Nolan (as he then was) not to consider that a viable IFA in a remote isolated village in Ghana would exist for a prominent trade unionist, may prove, in longer-term historical perspective, more in tune with future judicial and executive rethinking.

9. *Ex parte Jonah*, supra n. 1.

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