

JUDICIAL INTERPRETATION OF REFUGEEHOOD:
A CRITICAL COMPARATIVE ANALYSIS WITH SPECIAL REFERENCE TO
CONTEMPORARY BRITISH, FRENCH AND GERMAN JURISPRUDENCE

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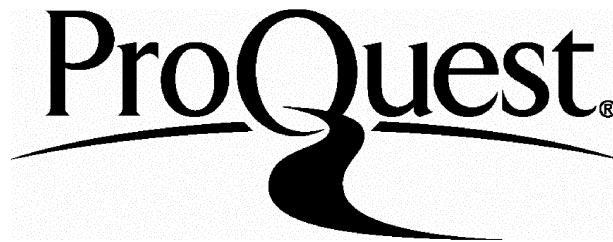
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ABSTRACT

The subject matter of the present thesis is the substantive law of refugee status as applied and, consequently, interpreted by the competent domestic courts of three specific European states: the United Kingdom, France and the Federal Republic of Germany. The critical comparative research and analysis have focused solely on the judicial interpretation of the refugee status inclusion clauses which determine the substantive aspects of refugeehood and the individual eligibility for refugee status. Apart from the definitional provision of the 1951/1967 Convention Relating to the Status of Refugees, the basic legal prism of refugeehood determination in the UK and in France, regard has also been had, in the case of German case law, to the German constitutional asylum provision. The first Part of the thesis consists of an examination and analysis of the position and character of the legal conceptualisation of refugeehood in contemporary international law, and in the theoretical context of its judicial interpretation, with particular reference made to the role that the contemporary law of treaty interpretation may well play in the development of a principled, modern refugee status adjudication. Part Two of the present thesis concentrates on the comparative judicial interpretation of the notion of persecution in the framework of the established international legal concept of refugeehood, stressing in particular the following constitutive elements of persecution: the principle of refugee exodus, and the element of causation between persecution and flight; the rule of the subsidiarity of internal and external asylum; the substance, role and forms of persecution, especially in a human rights law perspective; the polymorphous nature of the agents of persecution, and, finally, the judicial prognosis of persecution in refugee status law. The third and final Part of the thesis consists of a comparative analytical examination of British, French and German judicial interpretation regarding the aetiological framework of refugee persecution, viz. the fundamental and internationally established grounds for persecution: ethnic origin, religion, political opinion and the refugee's membership in a particular social group. The thesis concludes with a critical overview and evaluation of the potential role that a contemporary, principled European domestic judicial interpretation of the legal concept of refugeehood may and should play, especially in the context of the developing common legal system relating to refugee protection in Europe.

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*

IN MEMORY OF

my grandparents Maria and Nikolaos.

Also, to every other refugee from Asia Minor, with gratitude for all they did bring across.

TABLE OF ABBREVIATIONS

ADPILC: Annual Digest of Public International Law Cases
 ADRPILC: Annual Digest and Reports of Public International Law Cases
 AFDI: Annuaire Français de Droit International
 AJIL: American Journal of International Law
 All ER: All England Law Reports
 ASIL: American Society of International Law
 ASILS ILJ: Association of Student International Law Societies International Law Journal
 AYIL: Australian Yearbook of International Law
 BVerfGE: Entscheidungen des Bundesverfassungsgerichts
 BVerwGE: Entscheidungen des Bundesverwaltungsgerichts
 BYIL: British Yearbook of International Law
 CE: Judgment of the French Conseil d'Etat
 CRR: Decision of the French Commission des Recours des Réfugiés
 DVBl: Deutsches Verwaltungsblatt
 F.2d: Federal Reporter, 2d Series
 EXCOM: Executive Committee of the UNHCR Programme
 HarvILJ: Harvard International Law Journal
 HRQ: Human Rights Quarterly
 ICJ: International Court of Justice
 ICLQ: International and Comparative Law Quarterly
 IJRL: International Journal of Refugee Law
 ILM: International Legal Materials
 ILR: International Law Reports
 IMR: International Migration Review
 Imm AR: Immigration Appeals
 InfAuslR: Informationsbrief Ausländerrecht
 JDI: Journal du Droit International
 JAIL: Japanese Annual of International Law
 L Ed 2d: US Supreme Court Reports, Lawyer's Edition, 2d Series
 LNOJ: League of Nations Official Journal
 LNTS: League of Nations Treaty Series
 NILR: Netherlands International Law Review
 NTIR: Nordisk Tidsskrift for International Ret
 NVwZ: Neue Zeitschrift für Verwaltungsrecht
 NYIL: Netherlands Yearbook of International Law
 OASTS: Organization of American States Treaty Series
 RBDI: Revue Belge de Droit International
 Recueil des Cours: Recueil des Cours de l'Académie de Droit International
 RGDIP: Revue Générale de Droit International Public
 UN Doc.: United Nations Document
 UN ECOSOC: United Nations Economic and Social Council
 UN GA: United Nations General Assembly
 UNHCR: United Nations High Commissioner for Refugees
 UNTS: United Nations Treaty Series
 VaJIL: Virginia Journal of International Law
 ZaöRV: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
 ZAR: Zeitschrift für Ausländerrecht und Ausländerpolitik

INTRODUCTION TO SUBJECT MATTER AND RESEARCH METHODOLOGY

1. Delimitation of subject matter

The subject matter of the present doctoral thesis is the substantive law of refugee status as applied and, consequently, concurrently interpreted by the competent domestic courts and tribunals of three specific European countries: the United Kingdom, France, and the Federal Republic of Germany. What has been of particular interest to the research carried out is the comparative judicial application/interpretation of the legal refugee status inclusion clauses that determine who may be regarded by the states and, consequently, protected by them as a refugee and who may not. The basic legal prism through which such a judicial refugee status determination process has been examined, as far as the first two above-mentioned countries are concerned, is the definitional provision of the 1951/1967 United Nations Convention Relating to the Status of Refugees¹.

¹Convention Relating to the Status of Refugees, Geneva, 28 July 1951, 189 UNTS 137, as amended by the Protocol Relating to the Status of Refugees, New York, 31 January 1967, 606 UNTS 267. Article 1 A.(2) of the 1951/1967 Refugee Convention contains the following basic legal definition of a refugee: ['For the purposes of the present Convention, the term "refugee" shall apply to any person who'] 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.' According to the French Constitution of 1958, the Preamble of the French Constitution of 1946 forms a part of the former. The 1946 Preamble prescribes that 'Any man persecuted because of his activities in the cause of freedom has the right of asylum within the territories of the Republic', see text in Bermann, G.A. et al. (eds.), French Law Constitution and

In the case of the third country under consideration, that is, the Federal Republic of Germany, the above international legal framework of refugee status has been overshadowed, greatly influenced and, thus, to a great extent, delimited on the national level by Article 16 of the German Basic Law (Grundgesetz). This provision provides, *inter alia*, for the enjoyment of a right to asylum by individuals 'persecuted on political grounds' ('Politisch Verfolgte'), and has thus played, as will be demonstrated later in the main corpus of the present work, a predominant role in the refugee protection

Selective Legislation, ^{New York,} Parker School of Foreign and Comparative Law, Columbia University, 1992, at 2-3. Text of the 1958 Constitution of France in Blaustein, A.P., Flanz, G.H., Constitutions of the Countries of the World, Dobbs Ferry, New York, Oceana, 1988. The 1946 constitutional preamble regarding asylum is to be read in conjunction with the new Article 53-1 of the November 1993 constitutional law which amended the French Constitution, in response to the developments relating to (mainly procedural) territorial asylum inside the states of the European Union; see Loi constitutionnelle no 93-1256 du 25 novembre 1993 relative aux accords internationaux en matière de droit d'asile, 16296 Journal Officiel de la République Française, 26 novembre 1993, reprinted in Documentation-Réfuégiés, No 230, 23 Novembre/6 Décembre 1993, at 13; see also, *inter alia*, Luchaire, F., 'Le droit d'asile et la révision de la Constitution', 110 Revue du Droit Public (1994) 5 *infra*, Teitgen-Colly, C., 'Le droit d'asile: la fin des illusions', Actualité juridique-Droit administratif, 20 février 1994, 97, at 109 *et seq.* Despite its validity, the above provision of the 1946 Constitution has not played, so far, any actual interpretational role in the asylum adjudication process in France, as will be shown in the following chapters. See Tiberghien, F., La Protection des Réfuégiés en France, 2e édition, Paris, Economica, 1988, at 60-65, Norek, C., Doumic-Doulet, F., Le Droit d'Asile en France, Paris, Presses Universitaires de France, 1989, at 35-38, Teitgen-Colly, C., *ibid.* at 108-9, and at 114, Alland, D., 'Jurisprudence française en matière de droit international public', 98 RGDIP (1994) 205, at 212-4. See also *infra* Chapter II, Section 3.

process in Germany².

The particular interest of the present thesis in the above three west European states is not at all haphazard. The European continent, as will be shown in the first chapter below, has been a refugee-producing and receiving area of the

²See German Constitution in Blaustein, A.P., Flanz, G.H. (eds.), Constitutions of the Countries of the World, Vol. VI, Dobbs Ferry, New York, Oceana, 1991. On the post-World War II preparatory work on the asylum provision see Kreuzberg, H., Wahrendorf, V., Grundrecht auf Asyl Materialien zur Entstehungsgeschichte, Köln etc., Carl Heymanns Verlag KG, 1992. Similarly to France, in 1993 Article 16 of the German Constitution was amended, and the (qualified) right to asylum is now regulated by Article 16 a, a provision that reflects the legal developments regarding the determination of refugee status by EU states. Article 16 a (1) retained, however, the asylum provision which reads: 'Politisch Verfolgte genießen Asylrecht' ('Persons persecuted on political grounds shall enjoy the right of asylum'), see text of Art. 16 a in Kommentar zum Bonner Grundgesetz, Band 3. On the issues arising out of this constitutional development see, inter alia, Gusy, Ch., 'Neuregelung des Asylrechts-Grundrecht oder Grundrechts-verhinderungsrecht?', 15 Juristische Ausbildung (1993) 505, Huber, B., 'Das Asylrecht nach der Grundgesetz-änderung', 12 NVwZ (1993) 736, Horn, H.-D., 'Das neue Asylrecht auf dem Prüfstand', 44 Politische Studien (1993) 60, Bierwirth, Ch., Göbel-Zimmermann, R., 'Handlungsspielräume und Grenzen einer Änderung des Asylrechts', 25 Zeitschrift für Rechtspolitik (1992) 470, Wollenschläger, M., Becker, U., 'Harmonisierung des Asylrechts in der EG und Art. 16 Abs.2 S.2 GG', 17 Europäische Grundrechte Zeitschrift (1990) 1, Zimmermann, A., 'Asylum law in the Federal Republic of Germany in the context of international law', 53 ZaÖRV (1993) 49, Gibney, M. J., 'Crisis of constraint: the Federal Republic of Germany's current refugee imbroglio', 28 Government and Opposition (1993) 372, Neuman, G.L., 'Buffer zones against refugees: Dublin, Schengen, and the German asylum amendment', 33 VaJIL (1993) 503, Kanstroom, D., 'Wer sind wir wieder? Laws of asylum, immigration, and citizenship in the struggle for the soul of the new Germany', 18 Yale Journal of International Law (1993) 155, Blay, S., Zimmermann, A., 'Recent changes in German refugee law: A critical assessment', 88 AJIL (1994) 361. See also Münch, U., Asylpolitik in der Bundesrepublik Deutschland, 2. Auflage, Opladen, Leske und Budrich, 1993, esp. at 141-154, Bleckmann, A., Verfassungsrechtliche Probleme einer Beschränkung des Asylrechts, Köln etc., Carl Heymanns Verlag KG, 1992.

globe throughout the course of the 20th century. Nonetheless, since the late 1970s Europe, and especially the state members of the European Union, has experienced a significant rise in the inflow of asylum-seekers, a fact that has put the question of territorial asylum once again in this century high on the European political agenda³. As far as the above three targeted European countries are concerned, they represent the three main states of western Europe that have not only been receiving the majority of asylum applications⁴ on the European continent, but have concurrently, de facto, taken and played the protagonistic roles in the current pan-west European (i.e. European Union) inter-state movement towards harmonisation of asylum law⁵, and in the latter's inevitable development on the international plane.

The focus of the present thesis on the judicial interpretation of refugeehood, that is, on substantive refugee status law, touches one of the key questions that the EU states are faced with, and must solve, in order to achieve their already prioritised goal, i.e., an actual common asylum policy⁶. It is clear that no joint European asylum policy may be regarded as effective if it has not been able to transcend the procedural

³See following Chapter I in fine.

⁴'(Territorial) asylum applications' and 'refugee status applications' are terms used interchangeably for the purposes of the present thesis.

⁵See supra n. 3.

⁶See Article K.1, and Declaration on Asylum of the 1992 Maastricht Treaty on European Union and Final Act, in 31 ILM (1992) 247, at 327, and 373, respectively.

aspects of asylum law, already covered by the 1990 Schengen⁷ and Dublin⁸ Convention, and regulate the substantive, and much more complex, issue regarding a harmonised application of the legal concept of refugeehood in all the EU states⁹. Such a substantive harmonisation of territorial asylum may be based on nothing but a critical comparative evaluation of the domestic refugee status jurisprudence already developed in European states. The UK, France and Germany represent three major European states whose very substantial refugee status jurisprudence, albeit not uniform, may indeed provide the theoretical and practical groundwork for the future creation and establishment of a substantive European law of asylum.

⁷See Belgium-France-FRG-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at their Common Borders and the Convention Applying the Agreement, in 30 ILM (1991) 68.

⁸Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, in 30 ILM (1991) 425.

⁹This has been expressly recognised by the EU; see Report from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy, unpublished document of the Ad Hoc Group Immigration, Brussels, 3 December 1991, SN 4038/91 (WGI 930), at 33; see also Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on the right of asylum, Brussels, 11 October 1991, SEC (91) 1857 final (unpublished), at 6; see also European Parliament, Report of the Committee on Civil Liberties and Internal Affairs on the harmonization within the European Communities of Asylum Law and Policies, Rapporteur: Mr P. Cooney, Part B, 5 November 1992, A3-0337/92/PART B, at 3. See also, inter alia, Hailbronner, K., 'Perspectives for a harmonization of the law of asylum after the Maastricht Summit', 29 Common Market Law Review (1992) 917, at 928-31, Tomuschat, Ch., 'A right to asylum in Europe', 13 Human Rights Law Journal (1992) 257, at 263-4; see also Zolberg, A.R., 'Are the industrial countries under siege?', in Luciani, G. (ed.), Migration Policies in Europe and the United States, Dordrecht etc., Kluwer, 1993, 53, at 74.

Consequently, the challenge lying ahead for the EU states is, in effect, the 'management of the complexity'¹⁰ of the European legal pluralism that has created the present substantive legal framework of refugee protection. The significant substantive asylum law of the above three European states (not uniform, but, as will be demonstrated, with substantial similarities) provides a legal paradigm with many serious defects relating to the core question of judicial interpretation of the extremely complex legal concept of refugeehood by domestic courts. The purpose of the present thesis is to expose these serious and chronic jurisprudential drawbacks, and propose a firm and ruled legal interpretational background in which contemporary and future European refugee status law may be confidently grounded, and thus function effectively.

2. Case law material on which the present thesis is based

The British refugee status case law examined for the present thesis was basically that of the Immigration Appeal Tribunal, and the House of Lords. In the case of French refugee status jurisprudence, the cases examined originated from the Commission des Recours des Réfugiés and the Conseil d'Etat. Finally, the German case law was based on the relevant judgments of the two Federal Supreme Courts, the Bundesverfassungsgericht (Federal Constitutional Court) and the

¹⁰On the question of management of the European legal complexity in the framework of the European unification efforts see Arnaud, A-J, Pour une Pensée Juridique Européenne, Paris, Presses Universitaires de France, 1991, at 241 et seq.

Bundesverwaltungsgericht (Federal Administrative Court)¹¹. The main focus of the research has been on contemporary refugee status case law, that is, case law basically from the middle of the 1980s up to the first half of the year 1994, although important decisions of previous years have been also inevitably taken into account and analysed. Finally, a large part of the actual case law examined and discussed in the present thesis is unreported. This case law was consulted by the author during his research in documentation centres and libraries in the above-mentioned three different European countries.

3. Comparative research methodology

The above introductory thoughts and facts provide the basis on which the methodology of the present doctoral research is founded. The methodology is a comparative one, not only by necessity, given the special interest of the research in three different European states and their refugee status jurisprudence, but also because comparative research and analysis is the author's conscious methodological choice.

Comparative law (Rechtsvergleichung) has been one of the best methods by which a process of harmonisation, or even unification of laws, may not only clarify its scope, aims and

¹¹The translation of French and German case law into English has been done by the author.

limits, but also reach the completion¹². In the contemporary EU context of legal and political harmonisation/unification efforts, especially with reference to the questions of territorial asylum and the law of refugee status, comparative research takes on a particular significance. The special interest of the present research in comparative European refugee status case law is grounded in the significant role played by the judicial decision-making process, not only in the making and development of law in general¹³ but also in the creation and evolution of the law of refugee status at the international level par excellence¹⁴. Indeed, that law has not

¹²See Butler, W.E., 'Comparative approaches to international law', 190 Recueil des Cours (1985) I, 9 at 36; see also Cappelletti, M., 'The "mighty problem" of judicial review and the contribution of comparative analysis', 53 Southern California Law Review (1980) 409 at 412, Kamba, W.J., 'Comparative law: A theoretical framework', 23 ICLO (1974) 485 at 501-4, Kahn-Freund, O., 'On uses and misuses of comparative law', 37 Modern Law Review (1974) 1, at 1-2, Gutteridge, H.C., Comparative Law An Introduction to the Comparative Method of Legal Study and Research, Cambridge, Cambridge University Press, 1949, reprinted 1971, London, Wildy & Sons Ltd, at 6; see also Junker, A., 'Rechtsvergleichung als Grundlagenfach', 49 Juristen Zeitung (1994) 921, at 924 et seq.

¹³See McDougal, M.S., 'The comparative study of law for policy purposes: value clarification as an instrument of democratic world order', in Butler, W.E. (ed.), International Law in Comparative Perspective, Alphen aan den Rijn, Sijthoff & Noordhoff, 1980, 191 at 194; Grossfeld, B., The Strength and Weakness of Comparative Law, Oxford, Clarendon Press, 1990, at 12, 13; see also Cappelletti, M., Le Pouvoir des Juges, Paris, Economica, 1990, at 25 infra, Gutteridge, H.C., op. cit. supra n. 12, at 88 et seq.

¹⁴See Baskin, Iu.Ia., Feldman, D.I., 'Comparative legal research and international law', in Butler, W.E. (ed.), op. cit. supra n. 13, 91 at 93. See also Markesinis, B., 'Comparative law-A subject in search of an audience', 53 Modern Law Review (1990) 1 infra. Significant refugee case law of foreign courts has also been comparatively used in many important cases in domestic jurisdictions. See e.g. House of Lords, 16 December 1987, R v. Secretary of State for the Home

only been 'open' to (quasi-) judicial interpretation by its own nature, but has also been subjected to serious challenges for a long time now in the international, and especially European, socio-political context of modern sovereign economically developed states¹⁵. The lack or the presence of flexibility in the refugee status law vis-à-vis the morphology and challenges of the contemporary refugeeism is tested on a permanent basis nowadays before the various courts and tribunals of the European states, fora upon which depend, literally in most cases, human lives of persecuted disfranchised individuals, and also, to a great extent, the future legal, and, consequently, cultural and political foundations of the European Union itself. /enf

Consequently, the immediate aim of the present work is the

Department, ex parte Sivakumaran and conjoined appeals (UNHCR), [1988] 1 AllER 193 at 197-8, Bundesverwaltungsgericht (FRG), judgment of 15 March 1988, BVerwG 9 C 278.86, 79 BVerwGE 143 at 150-1, Supreme Court of Canada, 30 June 1993, Canada (Attorney General) v. Ward, 153 National Reporter (1993) 321 at 373, 389-390. In all three cases US refugee case law has been utilised by the above national Supreme Courts. See also Mössner, J.M., 'Rechtsvergleichung und Verfassungsrechtsprechung', 99 Archiv des öffentlichen Rechts (1974) 193 at 228 et seq., esp. 233-4. Seminal academic contributions to the field of refugee law have also been of a comparative nature: Grahl-Madsen, A., The Status of Refugees in International Law, Vol. I, Leyden, Sijthoff, 1966, Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983. See also Helton, A.C., 'The use of comparative law and practice under the international refugee treaties', in Bhabha, J., Coll, G. (eds.), Asylum Law and Practice in Europe and North America, Washington DC, Federal Publications Inc., 1992, 9-13, Helton, A.C., 'Resistance to military conscription or forced recruitment by insurgents as a basis for refugee protection: A comparative perspective', 29 San Diego Law Review (1992) 581 infra.

¹⁵See Shacknove, A., 'From asylum to containment', 5 IJRL (1993) 516 infra.

provision of a thorough research-based answer, by critical examination and analysis of the case law of refugee status in the three above-mentioned European states, to the question/problem of inter-compatibility of the substantive refugee status case law developed in these European states, with a view to its inevitable future harmonisation or even unification. From this perspective, the present comparative research has been a 'Problemlösungsvergleich'¹⁶. The answer to the above question is of great significance, given not only the current developments of asylum law in the area of the European Union states, but also the fact that the refugee status case law under consideration has been the product of three different European jurisdictions, despite their common basic characteristics.

Bearing in mind that there are no strict norms for a comparative legal methodology that should be followed in every particular case of research¹⁷, the comparative research of the present thesis has been an applied comparative research, that is, a comparative research that extends beyond the limited scope of a descriptive process, and endeavours to analyse and expose the very morphological substance of the legal set of

¹⁶That is, a comparative work whose aim is to provide a solution to a problem; see Mössner, J.M., 'Rechtsvergleichung und Verfassungsrechtsprechung', 99 Archiv des öffentlichen Rechts (1974) 193 at 197.

¹⁷Kamba, W.J., 'Comparative law: a theoretical framework', 23 ICLQ (1974) 485 at 486. See also Zweigert, K., Kötz, H., An Introduction to Comparative Law, Second edition, Oxford, Clarendon Press, 1992, 29; Kahn-Freund, O., 'Comparative law as an academic subject', 82 Law Quarterly Review (1966) 40 at 41, McDougal, M.S., loc. cit. supra n. 13, at 193-4.

questions under consideration¹⁸.

It is to be noted that the present comparative research represents a combination of macrocomparison and micro-comparison¹⁹. On the one hand, it is concerned, in effect, with a specific international legal institution, that of territorial asylum in the form of the provision/recognition of refugee status by states, and the manner in which domestic European jurisprudence has dealt with it (microcomparison). On the other hand, the present work concurrently bears characteristics of a macrocomparison in the sense that the above examination, albeit limited, by necessity, as far as its subject matter is concerned, has also been viewed, where appropriate, from the angle of the 'spirit and style' of the national legal systems of the three European states under consideration, the 'spirit and style' that have inexorably been influencing the 'method of thought'²⁰ of the competent judicial bodies adjudicating on refugee status cases.

As far as the practical methodology of the research is

¹⁸On the differences between descriptive and applied comparative law see Gutteridge, H.C., op. cit. supra n.12, at 8-9; Baskin, Iu.Ia., Fel'dman, D.I., 'Comparative legal research and international law', in Butler, W.E. (ed.), op. cit. supra n. 13, 91 at 92. See also Bothe, M., Röss, G., 'The comparative method and public international law' in Butler, W.E. (ed.), op. cit. supra n. 13, 49 at 50.

¹⁹On macro- and microcomparison see Zweigert, K., Kötz, H., op. cit. supra n. 17 at 4-5. See also Constantinesco, L.J., Traité de Droit Comparé, Tome I, Paris, LGDJ, 1972, 209-210.

²⁰See Zweigert, K., Kötz, H., op. cit. supra n. 17, at 4.

concerned, the methodological basis has been that provided by L.-J. Constantinesco in his Traité de Droit Comparé²¹. Constantinesco has divided the whole process of legal comparative work into three phases which are, in practice, interdependent and not at all easily separated²². The first phase of legal comparative work concerns knowledge of the legal terms that are subject to comparison ('la connaissance des termes à comparer'). The second phase consists of the understanding of the above terms ('la compréhension du terme à comparer'). The third and final step of the comparative legal work is the actual comparison ('la comparaison') which is, in fact, the synthetic work of the researcher carried out on the basis of the data from the two previous phases of comparison. In his effort to establish a serious, deontological and consistent legal comparative methodology, Constantinesco has indeed provided a useful methodological framework, of great aid to any kind of legal comparative endeavour. This is particularly true of the important foundation rules laid down by this scholar for the first phase, concerning the knowledge or acquaintance of the comparative subject matter by the researcher, as well as to the second phase of comprehension of the object of legal comparison.

²¹Constantinesco, L.-J., Traité de Droit Comparé, Tome II, Paris, LGDJ, 1974, 125 et seq.

²²Ibid. at 239: 'la division du processus méthodologique en trois phases répond au besoin d'analyse de la méthode. En réalité, ces trois phases ne sont ni complètement distinctes, ni totalement séparées'.

The first rule concerning knowledge of the comparative subject matter is the need to examine it as it stands in its national context of application²³. In the present research this rule has been of vital importance and has been strictly followed, since the actual research sources consisted basically of the refugee status case law and doctrine developed by the competent national courts and tribunals, and by scholars respectively in the above-mentioned three European states. The second methodological rule is to examine the legal term under comparison in its original sources²⁴. This rule has been a guidance to the whole of the present research. All case law in the U.K., France and the F.R.G. was studied, examined and analysed on the basis of its original sources, aided, as mentioned, by the concurrent study of any important relevant doctrine developed at a national level. Finally, the third rule employed in the present research in the course of the first phase of knowledge of the subject matter was that which requires examination of the subject matter taking into consideration the complexity of all the relevant legal sources²⁵. Indeed, during the examination of the inclusive law of refugee status in the above three states all the existing relevant legal framework was taken into account. For German law, particular regard was paid, as mentioned, to the constitutional provision on asylum which has played, in conjunction

²³Ibid. at 135 et seq.

²⁴Ibid. at 138 et seq.

²⁵Ibid. at 156 et seq.

with secondary legislation, a predominant role in the effective refugee protection process in that country.

For the second phase of comparison, which refers to the comprehension of the comparative subject, the basic rule established by Constantinesco in his Treatise was the need, or obligation, to restore the subject of legal comparative research to its legal order. What is stressed by this rule is the need to take into account and examine in the course of this type of legal research not merely the narrow legal rules that provide the strict legal basis for existence of the subject matter, but also socio-political factors beyond stricto-sensu law, provided they have played a substantial role in the formation, existence and operation of the compared legal subject²⁶. In the case of the substantive law of refugee status, the general socio-political background that has been considered, as shown in the following chapters, consists of two basic components. The first is an international parameter concerning the international political and consequent legal developments of the 20th century that have provided the basic and fundamental background for the development and evolution of the law of refugee status. The second component has been that of the respective national legal framework concerning the law of refugee status in the three states under consideration.

²⁶Ibid. at 199 et seq. See also Kahn-Freund, O., loc. cit. supra n.12 at 27; McDougal, M.S., loc. cit. supra n.13, at 193, Bernhardt, R., 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', 24 ZaöRV (1964) 431 at 435; Strebel, H., 'Vergleichung und vergleichende Methode im öffentlichen Recht', 24 ZaöRV (1964) 405 at 409-411.

In the case of these three European states, particular reference also had to be made to the asylum law developments which, as already mentioned, have taken place in the context of the state members of the European Union, especially since the late 1980s.

Finally, it is important to clarify the ultimate meaning and purpose of this kind of comparative method and analysis used in such a particularly sensitive field of law. The law of refugee status constitutes a legal field directly related to (but in no case whatsoever identified with) the international legal system regarding the protection of fundamental human rights of the individual²⁷ and, consequently, connected with global as well as with regional politics. The granting of state protection by an administrative organ to an asylum seeker does not represent, consequently, merely a legal technical process through which a 'door to a new life' potentially opens, on a temporary or even, occasionally, permanent basis, to an individual human being threatened with

²⁷See, inter alia, Aga Khan, S., Study on Human Rights and Massive Exoduses, UN, ECOSOC, UN Doc. E/CN.4/1503, 31 December 1981, Goodwin-Gill, G.S., op. cit. supra n. 14, at 38 et seq., Köfner, G., Nicolaus, P., Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Band 1, Mainz, München, Grünewald/Kaiser, 1986 at 75 et seq., Marx, R., Eine menschenrechtliche Begründung des Asylrechts, Baden-Baden, Nomos, 1984, at 149-79, Zolberg, A.R., Suhrke, A., Aguayo, S., Escape from Violence, New York, Oxford, Oxford University Press, 1989, at 258 et seq., Hathaway, J.C., 'Reconceiving refugee law as human rights protection', 4 Journal of Refugee Studies (1991) 113 infra, Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 135-141, Gibney, M., et al., 'Refugee flows, the internally displaced and political violence: An exploratory analysis', IRAP paper, Refugee Studies Programme, University of Oxford, January 1994, esp. at para. 6.

persecution in her/his country of origin. The legal system regulating the recognition of refugee status and subsequent effective protection in the territory of a particular state or group of states has crucial concurrent ramifications relating to political developments in the corpus of a national, intra-national and, by extension, the 'international society'²⁸. The present research has targeted only one, albeit crucial, aspect of the legal refugee protection system: the one concerning the judicial inclusion of a persecuted individual in the protective legal mechanism of a state of asylum. The existence and development of that legal framework is of great significance not only for the individual in need of protection but also for the democratic nature and the sensitivity of the political society of the state (or potential group of states) from which protective action is sought. This is due to the strong humanitarian and human rights protection-related character of any kind of state act that results in the granting of asylum and, consequently, in the effective

²⁸On the generally accepted opinion shared among the international law scholars that the contemporary world constitutes actually a society rather than a community in the sense of a tightly-knit group of nations, see Detter, I., The Concept of International Law, Second Edition, Stockholm, Norstedts Juridik, 1993, at 24-25. See also Schachter, O., International Law in Theory and Practice, Dordrecht etc., Martinus Nijhoff Publishers, 1991, at 18-31, Cassese, A., International Law in a Divided World, Oxford, Clarendon Press, 1986, at 9-33, Carty, A., The Decay of International Law?, Manchester, Manchester University Press, 1986, at 108 et seq., Chen, L.-C., An Introduction to Contemporary International Law, New Haven, London, Yale University Press, 1989, at 25-49, Mosler, H., The International Society as a Legal Community, Alphen aan den Rijn etc., Sijthoff & Noordhoff, 1980, at 1-28. See also Brierly, J.L., The Law of Nations, Sixth Edition, Oxford, Clarendon Press, 1963, at 41-45, Schwarzenberger, G., The Frontiers of International Law, London, Stevens & Sons Ltd, 1962 at 21 et seq.

protection of the individual refugee from external persecution. The formation, existence and development of the above crucial aspect of the legal refugee protection system, analysed and clarified by comparative legal research, could well be one of the main factors contributing to the democratic sensitisation of the intra-national society, at a regional or an international level²⁹; it is towards the realisation of this objective, that the present work of legal comparative research is directed.

²⁹See McDougal, M.S., 'The comparative study of law for policy purposes: value clarification as an instrument of democratic world order', 1 American Journal of Comparative Law (1952) 24 at 29-31, 34; Yntema, H.E., 'Comparative research and unification of law', 41 Michigan Law Review (1942) 261 at 263; Kahn-Freund, O., loc. cit. supra n. 12, Kahn-Freund, O., loc. cit. supra n. 17 at 61. See also Steinberger, H., 'Comparative jurisprudence and judicial protection of the individual against the executive: A method for ascertaining international law?', in Mosler, H. (ed.), Gerichtsschutz gegen die Executive Judicial Protection against the Executive, Vol. 3, Köln, Berlin etc., Carl Heymanns Verlag KG, 1971, 269-279. See also Kaiser, J.H., 'Vergleichung im öffentlichen Recht', 24 ZaöRV (1964) 391, at 398-9, Tunc, A., 'Comparative law, peace and justice', in Nadelman, K.H. et al. (eds.), XXth Century Comparative and Conflicts Law Legal Essays in Honor of H.E. Yntema, Leyden, A.W. Sythoff, 1961, 80, at 82.

PART ONETHE POSITION AND CHARACTER OF THE LEGAL CONCEPT OF REFUGEEHOOD
IN THE CONTEXT OF CONTEMPORARY INTERNATIONAL LAW AND OF THE
DOMESTIC JUDICIAL INTERPRETATION

CHAPTER I

REFUGEEHOOD IN CONTEMPORARY INTERNATIONAL LAW: AN EXEMPLARY
ADAPTATION OF A LEGAL NOTION TO CONTINUOUSLY CHANGING GLOBAL
AND REGIONAL CONTEXTSForeword

The international society of the twentieth century -the century of the extremely violent emergence of nation-states- has been characteristically and continually shocked by events generating great numbers of forced migrants, including refugees, who, whether or not stateless, have tried to escape from persecution in their countries of origin, and to find refuge on territories of other, neighbouring or far away, states¹. Refugees, i.e., lato sensu, individuals whose

¹See Aga Khan, S., 'Legal problems relating to refugees and displaced persons', 149 Recueil des Cours (1976) I, 287 at 293 et seq., Balogh, E., 'World peace and the refugee problem', 75 Recueil des Cours (1949) II, 363 at 379 et seq., Arendt, H., The Origins of Totalitarianism, New York, Harcourt, Brace & World, Inc., 1966, at 290: 'Since the Peace Treaties of 1919 and 1920 the refugees and the stateless have attached themselves like a curse to all the newly established states on earth which were created in the image of the nation-state'. See also Zolberg, A.R., 'The formation of new states as a refugee-generating process', The Annals of the American Academy of Political and Social Science, 467, May 1983, at 24 infra, Zolberg, A.R., 'Contemporary transnational migrations in historical perspective: patterns and dilemmas', in Kritz, M.M. (ed.), U.S. Immigration And Refugee Policy Global and Domestic Issues, Lexington MA, Lexington Books, 1983, 15 at 20 et seq., Ferris, E.G., 'Overview: Refugees and world politics', in Ferris, E.G. (ed.), Refugees and World Politics, New York, Praeger, 1985, 1985, 1, at 2-7, Grahl-Madsen, A., 'Protection of refugees by their country of origin', 11 Yale Journal of International Law (1986) 362, at 373-5, Shacknove,

allegiance bond with their state has broken, and who, consequently, have to flee their country of origin, have acquired throughout the twentieth century an unenviable high profile on the global socio-political scene, especially since the end of the Great War.

The response of the state members of the international society willing to regularise the legal status of, and protect refugees has been of an unprecedented force and scale. It was in the twentieth century that the individual refugee for the first time escaped from the protective constraints of customary international law². International agreements and treaties started to define refugeehood, and to grant refugees rights, concomitant with duties, both being essential for the continuation of their lives in the country of temporary, or even permanent, refuge. The modern evolution of the law of refugee status commenced with the structurally/institutionally rather primitive international Arrangements of the 1920s providing only for the juridical normalisation of the refugee's life through the issue of travel documents, and for

A.E., 'Who is a refugee?', 95 Ethics (1985) 274, at 277-281, Tomuschat, Ch., 'Menschenrechte als Mindeststandard für Menschen ohne Heimat', 4 ZAR (1984) 98 infra. See also Carens, J.H., 'States and refugees: A normative analysis', in Adelman, H. (ed.), Refugee Policy Canada and the United States, Toronto, York Lanes Press, 1991, 18, at 23, Dirks, G.E., 'Regulating the refugee flows: Some observations', in Adelman, H., Lanphier, C.M. (eds.), Refuge or Asylum? A Choice for Canada, Toronto, York Lanes Press, 1990, 88, at 89-91.

²On refugee protection in customary international law see Greig, D.W., 'The protection of refugees and customary international law', 8 AYIL (1984) 108 infra. See also Grahl-Madsen, A., The Status of Refugees in International Law, vol. I, Leyden, A.W. Sijthoff, 1966, at 9-10.

inter-state co-operation. This international evolutionary process reached a peak in 1951, with the development and entry into force of a legally binding international instrument, the UN Convention Relating to the Status of Refugees which has been rightly called The Magna Carta for Refugees. Nonetheless, later regional developments in Africa and in the Americas have, as will be shown, gone further ahead providing the development process of the law of refugee status with a new impetus.

The evolution of the international legal concept of refugeehood during the twentieth century has gone hand in hand with regional or global historic socio-political metamorphoses. The legal concept of refugee has proved to be adaptable and subject to development by the state members of the international society that wished to cope with specific problematic refugee movements. What will be demonstrated in the present chapter is that malleability of 'refugeehood' through the ever-evolving international refugee (quasi-) legislation. It will also be shown that despite the generalised acceptance by states of the 1951 legal definition of refugeehood, the conceptualisation along with any attempts for an expansion or amendment of the legal notion of refugeehood constitute, in effect, nothing more than a reflection of states' reaction to ad hoc or, at best, medium-term pathological, basically regional, refugee flows that present the inherent potential to disturb and threaten the ever-fragile intra-national geopolitical status quo.

SECTION 1. REFUGEEHOOD FOLLOWING THE BREAKDOWN OF EAST-EUROPEAN EMPIRES, 1922-1933

1.1. THE QUESTIONS OF RUSSIAN AND ARMENIAN REFUGEES: THE 1922 ARRANGEMENT WITH REGARD TO THE ISSUE OF CERTIFICATES OF IDENTITY TO RUSSIAN REFUGEES, AND THE 1924 PLAN FOR THE ISSUE OF CERTIFICATES OF IDENTITY TO ARMENIAN REFUGEES.

Thousands of Russians fled their country following the 1917 Revolution which almost coincided with the end of the First World War. The Great War had already caused forced migration but the situation was compounded by the events of the October Revolution³. These people fled their destroyed homes in order to avoid any worse political upheavals, or in fear of persecution by the new regime. Most of them carried no valid travel document. Their situation was compounded by the Decree of the All Russian Central Executive Committee and of the Council of People's Commissars of 15 December 1921, which deprived of Russian nationality, among others, all the individuals `...having resided aboard uninterruptedly for more than five years, and not having received before the 1st June, 1922, foreign passports or corresponding certificates from representatives of the Soviet Government...', as well as those `...who left Russia after the 7th November, 1917, without the

³On the Russian Revolution see Pipes, R., The Russian Revolution 1899-1919, London, Collins Harvill, 1990. See also Holborn, L.W., Refugees: A Problem of Our Time, Vol. I, Metuchen, N.J., The Scarecrow Press, Inc., 1975 at 3-4, Hathaway, J.C., 'The evolution of refugee status in international law: 1920-1950', 33 ICLQ (1984) 348, at 350-1. See also United Nations, A Study of Statelessness, UN Doc. E/1112, New York, UN Publications, 1949, at 7.

authorization of the Soviet authorities'⁴.

The newly established international organisation, the League of Nations, could not and did not remain neutral to the plight of the Russian refugees⁵. In August 1921 Dr F. Nansen was appointed by the Council of the League of Nations High Commissioner for Russian Refugees⁶. Even though the Commissioner's primary purpose was the provision of material aid, an equally important issue was the legal protection of the Russian refugees. Following the 1921 Inter-governmental Conference on Russian Refugees, it was on Dr Nansen's initiative that another international conference was held in 1922 which was actually fruitful, producing the Arrangement with regard to the Issue of Certificates of Identity to

⁴See Williams, J.F., 'Denationalization', 8 BYIL (1927) 45 infra. By virtue of the 1921 Decree about two million Russians were stripped of their citizenship, ibid. at 46. See also Holborn, L.W., 'The legal status of political refugees, 1920-1938', 32 AJIL (1938) 680 n. 2. See also Scheftel, J., 'L'apatridie des réfugiés russes', 61 Journal du Droit International Privé (1934) 36, Hathaway, J.C., ibid., at 351. However, all these Russians who became de iure stateless in 1921 could acquire Soviet nationality by virtue of the USSR Government's Decree of 14 June, 1946 which allowed them to make a relevant declaration before a dateline in a USSR Consulate, see United Nations, ibid. at 150.

⁵See Memorandum by the Secretary-General on the question of the Russian refugees, LNOJ, March, April 1921, at 225 et seq.. On the League of Nations see Bowett, D.W., The Law Of International Institutions, Fourth Edition, London, Stevens & Sons, 1982, at 17-22.

⁶See LNOJ, May 1922, at 378 et seq.; see also General Report on the work, accomplished up to March 15th, 1922 by Dr. F. Nansen, LNOJ, May 1922, at 385 et seq.. See also United Nations, op. cit. supra n. 3 at 35. The High Commissioner's Office for Russian and Armenian Refugees functioned from 1921 until 1930, ibid. at 34. See also Holborn, L.W., op. cit. supra n. 3 at 4-6.

Russian Refugees⁷. The issue of identity certificates (widely known as 'Nansen Passports') was regarded as urgent by the contracting states⁸, due to the seriousness of the situation. The Russian refugee certificate would be a 'potential passport', providing, nonetheless, the bearer with no right to return to the state in which (s)he had obtained it, unless there existed that state's authorisation⁹, the latter having, concurrently, the right to decide not to renew the certificate if the refugee did not reside in its territory any more¹⁰. Finally, it is worth noting that the identity certificate of the Russian refugees lacked actually any kind of real international recognition. Para. (5) of the Arrangement provided third states with the discretion to consider or not the above certificates as 'containing proof of identity'¹¹.

The persecution of Armenians in the Ottoman Empire and its successor Turkish Republic, especially from 1915 onwards,

⁷Geneva, 5 July 1922, 13 LNTS 237, No. 355.

⁸See ibid. para. 9, at 239-240; see also Special Report by the High Commissioner of the League, requesting the assistance of the Governments of Members of the League in the accomplishment of his work, in LNOJ, May 1922, 396. See also Holborn, L.W., loc. cit. supra n. 4 at 683.

⁹13 LNTS 237, at 238-9, para. (3).

¹⁰Ibid. at 239, para. (4).

¹¹Ibid. at 239, para. (5): 'On presentation of the certificate, the refugee may in certain circumstances be admitted into the State which he wishes to enter, if the Government of the State of destination affixes its visa directly on the certificate, or if the State in question regards it as a document containing proof of identity...'. See also George Talma et al. v. Minister of the Interior, Council of State of Esthonia, 14 October, 1927, 8 ADPILC (1935-1937) 313, Holborn, L.W., loc. cit. supra n. 4 at 684-5.

constituted the reason for the genesis of another significant refugee outflow in the early 1920s¹². In 1924 F. Nansen's mandate was amended by the League of Nations so as to include Armenian refugees¹³. It was he who called upon the Council of the League to adopt a resolution providing for the issue of identity certificates to Armenian refugees. Thus, certificates identical to those provided to Russian refugees before, were made available to Armenian refugees by virtue of the Plan for the Issue of Certificates of Identity to Armenian Refugees¹⁴.

1.2. THE 1926 AND 1928 ARRANGEMENTS ON RUSSIAN AND ARMENIAN REFUGEES

Both the 1922 Arrangement and the 1924 Plan's identity certificate systems were regarded as having produced

¹²See Hathaway, J.C., loc. cit. supra n. 3 at 352, Holborn, L.W., loc. cit. supra n. 4. On the persecution of Armenians in an international law context see Dadrian, V.N., 'Genocide as a problem of national and international law: The World War I Armenian case and its contemporary legal ramifications', 14 Yale Journal of International Law (1989) 221. See also Nansen, F., Armenia and the Near East, London, George Allen & Unwin Ltd., 1928, Carzou, J.-M., Un Genocide Exempleire Armenie 1915, Paris, Flammarion, 1975, The Permanent Peoples' Tribunal, A Crime of Silence The Armenian Genocide, London, Zed Books Ltd., 1985, Walker, C.J., 'Armenian refugees: accidents of diplomacy or victims of ideology?', in Bramwell, A.C. (ed.), Refugees in the Age of Total War, London, Unwin Hyman, 1988, 38, Hovannisian, R.G. (ed.), The Armenian Genocide History, Politics, Ethics, London, Macmillan, 1992. There were 205,000 Armenian refugees in 1924, a number that jumped to 225,000 in 1936, see United Nations, op. cit. supra n. 3, at 7.

¹³United Nations, ibid. at 35. See also Resolution adopted by the Sixth Assembly, September 26, 1925, LNOJ October 1925, at 1535.

¹⁴League of Nations, Document CL.72 (a), 31 May, 1924; see Van Heuven Goedhart, G.J., 'The problem of refugees', 82 Recueil des Cours (1953) I, 265 at 284.

'excellent results'¹⁵. However, what lacked until 1926 was the formulation and establishment of a refugee definition widely accepted by the state members of the international society of that period. The states that finally participated in the Geneva Conference of 1926 agreed that they should regularise the system of identity certificates for Russian and Armenian refugees, as well as determine 'in a more accurate and complete manner the number and situation of [those] refugees in the various countries'¹⁶. The European states, that still formed the vast majority of the participants in Conferences like that in Geneva in 1926, had no intention to tackle the root causes of European refugeehood of that period. The states' objective was rather to control, as best as they could, the refugee flows and legally normalise the refugees' presence on their territories¹⁷. These purposes were thought to be best served at that time in the framework of an ad hoc group protection of refugees, that the European states were willing to offer by agreeing on a definition of the 'refugee' concept, viewed in a narrow, national-oriented manner, since this was the way in which the European states' interests of

¹⁵See Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements dated July 5, 1922, and May 31, 1924, Geneva, May 12, 1926, 89 LNTS 47, No. 2004 at 49.

¹⁶Idem.

¹⁷See Hathaway, J.C., 'A reconsideration of the underlying premise of refugee law', 32 HarvILJ (1990) 129, at 137-8. See also Jennings, Y., 'Some international law aspects of the refugee question', 20 BYIL (1939) 98 at 99-100.

that era could be best served¹⁸.

As a consequence, the ad hoc group-based definitions of refugees in 1926, provided basically by the European states through the 1926 Arrangement on the Russian and Armenian Refugees' Identity Certificates were the following: On the one hand, as a Russian refugee would be regarded 'Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality'¹⁹. On the other, as an Armenian refugee should be considered 'Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality'²⁰. As one may conclude on the basis of these two first international legal definitions, the refugee in 1926 was viewed as a de iure stateless person, in the sense that (s)he had no nationality (most of those refugees -that was definitely the case of all Russian refugees- had lost their own nationality). However, at the same time the above definitions included de facto stateless persons (mainly Armenians), that is, individuals who

¹⁸See Hathaway, J.C., ibid. at 134-6.

¹⁹89 LNTS 47, at 49.

²⁰Idem. See also Grahl-Madsen, A., op. cit. supra n. 2, at 126, where it is stressed, on the basis of the addition of the phrase 'formerly a subject of the Ottoman Empire' in the Armenian refugee definition, that the word 'origin' in the Armenian refugee definition has the meaning of ethnic origin, while in the case of the Russian refugee definition it means territorial origin.

following their exodus from their country of origin did not enjoy any protection or assistance from the part of the state of their origin, even though they were nominally nationals of that country²¹. The definitions of the 1926 Arrangement did not make clear the reasons for which the Russian and Armenian refugees were not protected by their states of origin any more, or the (de iure or de facto) forms the lack of state protection could acquire in their cases. Nonetheless, what is quite clear in the group-refugee definitions of 1926 is that no-one could be recognised as a refugee in a country of refuge if they had acquired the nationality of a state other than that in which they originated.

The League of Nations High Commissioner for Refugees convened another Conference in Geneva in 1928 which resulted in the Arrangement relating to the Legal Status of Russian and Armenian Refugees²². This was complementary to the 1926

²¹See United Nations, op. cit. supra n. 3, at 8-9: 'Stateless persons de iure are persons who are not nationals of any State, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one...Stateless persons de facto are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals...'. See also Convention Relating to the Status of Stateless Persons, 1954, 360 UNTS 117, whose Article 1 defines 'stateless person', from a solely de iure perspective, as 'a person who is not considered as a national by any State under the operation of its law'. See also Grahl-Madsen, A., ibid. at 123.

²²Geneva, 30 June 1928, 89 LNTS 53, No. 2005. See also Agreement Concerning the Functions of the Representatives of the League of Nation's High Commissioner for Refugees, No.

Arrangement agreement and added nothing to the specification/delimitation of the already existing refugee definition. It bears, however, many prototypical characteristics regarding the personal status of refugees in countries of asylum, which will survive and will be seen later in the post-World War II international legal framework of refugee protection²³.

1.3. THE 1928 EXTENSION ARRANGEMENT AND THE 1933 INTERNATIONAL CONVENTION ON REFUGEE STATUS

On 28 June 1928 a new conference was held in Geneva by the League of Nations, with a view to extending the protection hitherto provided to Russian and Armenian refugees to other persons placed in analogous situations. The Council of the League had already in 1926 considered the extension of protection, and following its relevant resolution the High

2126, Geneva, 30 June, 1928, 93 LNTS 377; see also In re Pecheral, Court of Appeal of Paris, 17 July, 1948, 15 ADRPILC (1948) 289, Holborn, L.W., 'The legal status of political refugees, 1920-1938', 32 AJIL (1938) 680 at 687.

²³See 89 LNTS 53 at 55-9. Compare, e.g., resolution number (2) of the 1928 Legal Status Arrangement on the determination of the refugees' personal status with Article 12 (1) of the 1951 Convention relating to the Status of Refugees. See also resolution number (4) of the 1928 Arrangement and Article 7 of the 1951 Refugee Convention, both of which regard the refugees' exemption from reciprocity; see also Clot v. Schpoliansky, Civil Tribunal of the Seine, 4 November 1930, 5 ADPILC (1929-1930) 333, at 334, Poor Persons' Procedure (Poland) Case, Polish Supreme Court, 11 December 1934, 8 ADPILC (1935-1937) 311. On the rather limited legal effect of the 1928 Arrangement on domestic law see Fidler and Poliakoff v. Cie. Immobilière du Quai de Passy, Civil Tribunal of the Seine, 23 January 1933, 7 ADPILC (1933-1934) 406, In re Kabloeff, Conseil d'Etat, 8 March 1940, 11 ADRPILC (1919-1942) 197. See also Agreement Concerning the Functions of the Representatives of the League of Nation's High Commissioner for Refugees, No. 2126, Geneva, 30 June 1928, 93 LNTS 377; see also In re Dame Pecherel, Court of Appeal of Paris, 17 July, 1948, 15 ADRPILC (1948) 289.

Commissioner for Refugees F. Nansen prepared a report suggesting the extension of protection to seven more categories, viz. Assyrians, Assyro-Chaldeans, Ruthenians, Montenegrins, Jews of Bukowina, Beassarabia and Transylvania, the 150 Turks regarded as 'Friends of the Allies', and some central European refugees, especially those of Hungarian origin²⁴. The report of the High Commissioner was considered by the Council to be over-comprehensive and, finally, the persons who would be covered by the new Arrangement concerning the Extension to other Categories of Refugees of Certain Measures Taken in favour of Russian and Armenian Refugees²⁵, were only those of Assyrian or Assyro-Chaldean, and Syrian or Kurdish origin, as well as the 150 Turks whose sojourn in and access to Turkey had been prohibited by the Turkish government following the Great War²⁶.

As a consequence, all the measures provided for by the

²⁴See Extension to Other Analogous Categories of Refugees of the Measures taken to assist Russian and Armenian Refugees: Resolution adopted by the Assembly during its Seventh Ordinary Session, LNOJ, February 1927, at 155; see also Extension to other Categories of Refugees of the Measures taken to assist Russian and Armenian Refugees, LNOJ, October 1927, at 1137-9; see also Report of the High Commissioner for Refugees, submitted to the Council on June 7th, 1928, in LNOJ, July 1928, at 1000. See also Hathaway, J.C., loc. cit. supra n. 3, at 354-5.

²⁵Geneva, 30 June 1928, 89 LNTS 63, No. 2006.

²⁶See Protocol to the Declaration of Amnesty, Lausanne, 24 July 1923, 36 LNTS 145, No. 913, at 151. See also Hathaway, J.C., ibid., at 355-7, Grahl-Madsen, A., op. cit. supra n. 2, at 128-9. On the Assyrians as a minority see Naby, E., 'The Assyrians', in Ashworth, G. (ed.), World Minorities, vol. 2, Sunbury, Middx., Quartermaine House Ltd., 1978, at 12.

previous Arrangements would be extended by the nine states in which the 1928 Extension Arrangement was in force²⁷ to the above five ethnic groups of refugees. These refugees were defined as follows: On the one hand, an individual would fall in the category of 'Assyrian, Assyro-Chaldean and assimilated Refugee' if (s)he were a 'person of Assyrian or Assyro-Chaldean origin, and also by assimilation any person of Syrian or Kurdish origin, who does not enjoy or who no longer enjoys the protection of the State to which he previously belonged and who has not acquired or does not possess another nationality'. On the other, as a 'Turkish refugee' would be considered 'Any person of Turkish origin, previously a subject of the Ottoman Empire, who under the terms of the Protocol of Lausanne of July 24, 1923, does not enjoy or no longer enjoys the protection of the Turkish Republic and who has not acquired another nationality'²⁸.

The 1933 Convention Relating to the International Status of Refugees²⁹ did not contain any more elaborate delimitation of the notion of refugeehood. Article 1 of the Convention authorised the contracting states to introduce 'modifications

²⁷See 89 LNTS 63, No. 2006, at 65.

²⁸From these definitions of refugee groups it is clear that although the Assyrian, Assyro-Chaldean and assimilated refugees' origin referred to ethnicity (cf. Russian refugee definition of the 1926 Arrangement), the Turkish refugees' definition referred rather to territorial origin ('previously a subject of the Ottoman Empire', cf. Armenian refugee definition of the 1926 Arrangement).

²⁹159 LNTS 199, No. 3663. See also Report by the Inter-Governmental Advisory Commission for Refugees on the Work of its Fourth Session, LNOJ, November 1931, 2118, at 2119.

or amplifications' in the definitions of Russian, Armenian and assimilated refugees of the 1926 and 1928 Arrangements³⁰, who were covered by the, basically refugee welfare, provisions of the 1933 Convention. The Convention in itself constituted, however, a breakthrough on the scene of the international legislative efforts of the League of Nations aiming at a more comprehensive, detailed³¹ and legally binding, unlike the earlier Arrangements³², framework relating to the personal status of the individual members of the refugee flows of that period in the countries of asylum³³.

³⁰See 159 LNTS 199, at 203.

³¹See Preamble to the Convention, 159 LNTS 199, No. 3663, at 201-203. See also United Nations, op. cit. supra n. 3, at 47-8.

³²See Hathaway, J.C., ibid. at 357. R.Y. Jennings called the Arrangements 'anomalous instruments' on the ground that 'they do not contain categorical stipulations, but merely "recommend" that a certain course of conduct be followed', in Jennings, R.Y., 'Some international law aspects of the refugee question', 20 BYIL (1939) 98 at 99 n.1. See also Krenz, F.E., 'The refugee as a subject of international law', 15 ICLQ (1966) 90 at 99.

³³See Ivanoff v. Fondation Belaieff, Court of Appeal of Paris, 25 March 1937, 8 ADPILC (1935-1937), 310, Ditte v. Joudro, French Court of Cassation, 19 January 1948, 15 ADRPILC (1948), 286, In re Galvez, Tribunal de la Seine, 27 March 1947, and Court of Appeal of Paris, 6 December 1947, 14 ADRPILC (1947) 130, Gassock v. Duguay, Civil Tribunal of the Seine, 12 July 1948, Note in 16 ADRPILC (1949) 326. See also Allahverdi v. Lanause, Court of Appeal of Paris, 20 February 1954, 21 ILR (1954) 1, Gilon v. Chmoulowky, Court of Appeal of Paris, 18 November 1940, 11 ADRPILC (1919-1942) 186. Of special interest is Article 3 of the 1933 Convention proscribing refugees' refoulement, a genuine ancestor of Articles 32 and 33 of the 1951 Refugee Convention; see Keledjian Garabed v. Public Prosecutor, Court of Appeal of Paris, 30 January 1937, 8 ADPILC (1935-1937) 305, Brozoza's Case, Court of Appeal of Toulouse, 9 June 1937, 8 ADPILC (1935-1937) 308. See also Morgenstern, F., 'The right of asylum', 26 BYIL (1949) 327 at 341.

1.4 THE INTERNATIONAL LEGAL FRAMEWORK OF REFUGEEHOOD, 1922-1933 - CONCLUSION.

From the above analysis of the 1922-1933 development of the international refugee legislation which took place on the European continent one may conclude that the response of the state members of the world society to the refugee exoduses of the early twentieth century, through the various pre-1933 international agreements and the 1933 Convention, constituted a faithful reflection not only of the dramatic situation of refugees of that time, but also of the apprehension of the, basically western European, states that could not avoid coping with the mass influxes of refugees from Russia/Soviet Union, and from the Ottoman Empire/Turkey. As we have already noted, not all the forced migrants were protected by the above-mentioned inter-governmental agreements. This is to be attributed not only to the unwillingness of the European countries to overburden themselves, but also to the lack of large funds to support financially the organs entrusted with the duty of the protection of refugees³⁴.

It is worth noting that while the European states during the 1922-1933 period were trying to cope with the refugee question on their continent on an ad hoc-group basis, American states, in a different socio-political context, elaborated treaties on 'political asylum' which did not contain any, geographically or ethnically, limited refugee definition, like the European agreements, but regulated conferment of 'political [or

³⁴See Hathaway, J.C., loc. cit. supra n. 17, at 138.

diplomatic] asylum' to 'political refugees'. These American treaties, however, originated in the desire of those states, in compliance with their own political history, to protect mainly political offenders from persecution, in the guise of prosecution, by their own states of origin³⁵.

The 1922-1933 period has been characterised as the juridical phase of international refugee law by reason of the fact that the majority of the refugees of that period were de iure unprotected by the governments of their own countries, through denationalisation or refusal of states to offer diplomatic protection to their nationals³⁶. The European states,

³⁵On the difference between European and Latin American asylum law see Dissenting Opinion by Judge Alvarez in Colombian-Peruvian asylum case, Judgment of November 20th, 1950, ICJ Reports 1950, p. 266, at 290 et seq. See also Convention fixing the Rules to be observed for the Granting of Asylum, adopted by the VIth International Conference of American States, Habana, 20 February 1928, 132 LNTS 323, OASTS, 1967, No. 34, OAS Official Records OEA/Ser.X/1, the Montevideo Convention on Political Asylum, 26 December 1933, OASTS, 1967, No. 34, OAS Official Records OEA/Ser.X/1, the Montevideo Convention on Extradition, 26 December 1933, 165 LNTS 45. See also the Montevideo Treaty on Political Asylum and Refuge, 4 August 1939, OASTS, 1967, No. 34 OAS Official Records OEA/Ser.X/1. See also Irizarry Y Puente, 'Exclusion and expulsion of aliens in Latin America', 36 AJIL (1942) 252, Shimada, Y., 'The concept of the political refugee in international law', 19 JAIL (1975) 24 at 27-9, Gros Espiell, H., American International Law on Territorial Asylum and Extradition as it relates to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (unpublished paper) Genève, HCR, Division de la Protection, 1981, at 1-19. See also Article 22.7 of the 1969 American Convention on Human Rights, 1144 UNTS 123, where it is uniquely enshrined the right of 'every person' 'to seek and be granted in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.'

³⁶See Report by the Inter-Governmental Advisory Commission attached to the High Commissioner for Refugees, September 9th 1930, LNOJ, November 1930, 1462, at 1463. See also Hathaway,

protagonists of the whole diplomatic movement that produced the above agreements and the 1933 Convention, did not provide any evidence showing that they were concerned, in fact, with addressing the real causes of the refugee flows. The reaction of those states had a temporary humanitarian character, and their objective was the avoidance of the refugee-res nullius phenomenon, as well as the refugees' facilitation of inter-state movement. The element of humanitarianism is obvious especially in the 1928 Legal Status Arrangement and the 1933 International Refugee Status Convention, where many provisions enshrined social rights in favour of, and very essential for, the well-being of the refugees in the countries of refuge. These initial international instruments have indeed paved the way for the development of a more comprehensive legal refugee protection framework that was to come later in the 20th century.

SECTION 2. THE DEVELOPMENT OF THE LEGAL REFUGEE NOTION IN THE YEARS 1935-1939: THE ERA OF THE REFUGEES FROM 'MITTELEUROPA'

In January 1935 Saarland, by virtue of a plebiscite held under the auspices of the League of Nations, was integrated into Germany. About 3,300 persons left Saarland, some because they refused to be granted German nationality, others out of fear of the totalitarian regime in Germany under the National Socialists³⁷. In order to facilitate the movement of those

J.C., loc. cit. supra n.3 at 358-9.

³⁷See 'Saar Territory: Decisions taken by the Council as a Result of the Plebiscite', LNOJ, February 1935, 133 infra; see also Letter and Aide-Mémoire, dated January 18th 1935,

people, the League of Nations drew up the Plan for the Issue of a Certificate of Identity to Refugees from the Saar on 24 May 1935. According to the Plan, the identity certificate system applied to all the pre-1935 Nansen refugees would be extended to 'persons who, having previously had the status of inhabitants of the Saar, have left the Territory on the occasion of the plebiscite and are not in possession of national passports'³⁸. The significance of the 1935 Plan for the development of the legal view of refugeehood on the international plane has been that it provided for the issue of a 'Nansen refugee document' without conditioning explicitly this issue on the de iure lack or denial of, protection of the refugee on the part of their state of origin³⁹.

The rise of Nazism in Germany was followed by persecution and denationalisation of all those persons considered to be 'undesirable' by the regime⁴⁰. This exodus from Germany had

633-4. See also Grahl-Madsen, A., 'Protection of refugees by their country of origin', 11 Yale Journal of International Law (1986) 362 at 371-2, Hathaway, J.C., ibid., at 361-2, Holborn, L.W., 'The legal status of political refugees, 1920-1938', 32 AJIL (1938) 680, at 693-4.

³⁸See LNOJ December 1935, at 1681.

³⁹See Grahl-Madsen, A., loc. cit. supra n. 37 at 372. See also Holborn, L.W., Refugees: A Problem of our Time, vol. I, Metuchen, N.J., The Scarecrow Press, Inc., 1975, at 16 et seq. See also Bernard v. Jonas, Civil Tribunal of Versailles, 23 September 1949, 16 ADRPILC (1949) 260.

⁴⁰See 'Work of the Committee on International Assistance to Refugees', LNOJ, February 1936, at 142 et seq., United Nations, op. cit. supra n. 3, at 141, Holborn, L.W., loc. cit. supra n. 37 at 691. See also Fretel v. Wertheimer, French Court of Cassation, 13 March 1948, 15 ADRPILC (1948) 287, Gunquene v. Falk, Court of Appeal of Paris, 27 March 1947, 16 ADRPILC (1949) 224. See also Polish Compensation Case, FRG

as a result at the end of 1938 a number of about 350,000 German refugees⁴¹, many of whom were de iure and others de facto stateless individuals. The outcome of the response of the League of Nations was a new conference, now on German refugees, which resulted in the 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany⁴². The new expressly statelessness-oriented approach to defining refugeehood in that Arrangement came from its Article 1 which provided that a "refugee coming from Germany" would be considered any person under three conditions: First, that person should have been settled in Germany, secondly (s)he should not possess other than German nationality, and finally it should be established that 'in law or in fact he does not enjoy the protection of the Government of the Reich'⁴³. The significance of that definition has been the explicit, for the

Federal Constitutional Court, 22 October 1974, 74 ILR (1987) 419, French Nationality Compensation Case, Oberlandesgericht, Cologne, 29 August 1973, 74 ILR (1987) 280, Refugee Compensation Claim Case, FRG Federal Supreme Court, 11 July 1968, 60 ILR (1981) 369, Mauritius Transport Case, Supreme Court of West Berlin, 13 July 1967, 60 ILR (1981) 208.

⁴¹See United Nations, ibid., at 36.

⁴²Geneva, 4 July 1936, 171 LNTS 75, No. 3952. See also LNOJ, December 1936, at 1419, Hathaway, J.C., loc. cit. supra n. 3 at 362-4, United Nations, ibid. at 43.

⁴³See also the refugee definition laid down by the Institute of International Law in 1936, according to which "..."réfugié" signifie tout individu qui, en raison d'événements politiques survenus dans son Etat d'origine, fuit le territoire de cet Etat, soit qu'il quitte le pays volontairement ou sous le coup d'une expulsion, soit que, séjournant à l'étranger, il n'y revienne pas, et qui, au surplus, n'a pas acquis d'autre nationalité et ne jouit pas de la protection diplomatique d'un autre Etat', 39 (I) Annuaire de l'Institut de Droit International (1936), Session de Bruxelles, 5 at 46.

first time, reference of an international legal instrument of refugee protection to the de facto lack of state protection that a refugee may suffer. The factual alienation of the individual from the mechanism of protection the state organs may provide has thus started to become obvious in international law. The above refugee definition was actually reiterated in the 1938 Convention concerning the Status of Refugees coming from Germany⁴⁴. Paragraph 1(a) of the first section of Article 1 of the 1938 Convention attributed three main elements to the first category of German refugees established in the Convention: First, they should possess or should have possessed German nationality, secondly, they should not possess any other nationality, and thirdly they should be proved 'not to enjoy, in law or in fact, the protection of the German Government'. The second category of German refugees in Article 1.1(b) concerned stateless persons who did not possess German nationality and bore three main characteristics: firstly, they were not covered by previous Conventions or Agreements, secondly, they left German territory after having been established therein, and finally, they were proved not to enjoy, in law or in fact, as in the first category of German refugees, the protection of the German government⁴⁵.

⁴⁴Geneva, 10 February 1938, 192 LNTS 59, No. 4461. Also in LNOJ, March-April 1938, at 269.

⁴⁵Para. 2 of Article 1 of the 1938 Convention included te exclusion clause according to which no-one who left Germany 'for persons of purely personal convenience' should be regarded as a refugee under the instrument. The clause was to survive in post-World War II refugee legislation, see Statute of the UNHCR, UN General Assembly Resolution 428 (V), 14

Following the 1938 Munich Agreement by virtue of which Sudetenland, a region of Czecho-Slovakia, was annexed to the Nazi Germany, 80,000 refugees fled the Czecho-Slovak state⁴⁶. The Council of the League of Nations did not initiate any new international agreement or convention with regard to these new refugee flows, but it simply extended the mandate of the High Commissioner's Office for Refugees to the Sudetenlander refugees. They defined them as persons who 'having possessed Czecho-Slovak nationality and not now possessing any nationality other than German, have been obliged to leave the territory which was formerly part of the Czecho-Slovak State - that is, the territory known as the Sudetenland- where they were settled and which is now incorporated in Germany'⁴⁷.

The final part of Mittleuropa refugees that provided another definition of refugeehood in the late 1930s consisted of the refugees from Austria following the 1938 Anschluß. These refugees were protected by the 1939 Additional Protocol to the

December 1950, Chapter II 6. A. (ii), in UNHCR (ed.), Collection of International Instruments Concerning Refugees, Geneva, UNHCR, 1990, 3, at 6. See also Holborn. L.W., loc. cit. supra n. 37 at 695 n.71. On the application of the 1938 Convention in domestic jurisdiction see Kober v. Chollet, Court of Appeal of Paris, 18 February 1949, 16 ADRPIILC (1949) 262, Terhoch v. Daudin et Assistance Publique, Court of Appeal of Paris, 8 February 1947, 14 ADRPIILC (1947) 121, Goldstrom v. Société La Foncia, Court of Appeal of Paris, 23 January 1946, 13 ADRPIILC (1946) 142.

⁴⁶See Hathaway, J.C., loc. cit. supra n.3, at 366.

⁴⁷See 'International Assistance to Refugees: Extension to Refugees coming from Territories ceded by Czecho-Slovakia to Germany of the Powers of the High Commissioner for Refugees', LNOJ, February 1939, at 72-3.

Provisional Arrangement and to the Convention of 1936 and 1938⁴⁸. The structure of the definitional Article 1 of the 1939 Arrangement is identical with Article 1 of the 1938 Convention. It divides, on the one hand, refugees from Austria into those who have possessed Austrian nationality and not possessing any nationality other than German one, were proved not to enjoy, in law or in fact, the protection of the German government. On the other, the second category comprises those stateless persons who were not covered by any previous international instrument and having left the former Austrian Republic, after having been established therein, were proved not to enjoy, in law or in fact, the protection of the German government.

CONCLUSION

This Nazism-related period of evolution of the legal notion of refugeehood (1935-1939) bears common characteristics with the previous period of the years 1922-1933. Like the latter period's Arrangements and Convention, the former one's main concern, expressed by ad hoc (quasi-)legislative regulations of an international character, was the refugee who belonged to a particular, in fact, ethnic, group and who was forced to migrate from a specific territory at a specific period of time. The new legal refugee definition of the 1930s provided, moreover, for the granting of refugee status to victims of violent changes in political regimes in central Europe,

⁴⁸198 LNTS 141, No. 4634. On Austrian refugees see also LNOJ, May-June 1938, at 367-8.

provoked by the rise and establishment of National Socialism in Germany. Similar changes had constituted the reason for the exodus of refugees from the Soviet Union and Turkey in the 1920s. A third common characteristic is that many members of the refugee population of the 1930s were de iure stateless persons, like the majority of the refugees of the previous era. Denationalisation was practised not only by the Soviet Union in 1921 but, on an extensive scale, also by the Third Reich affecting thousands of 'undesirable' individuals.

The major difference between these two initial periods of evolution of the international refugee concept is the official, explicit state recognition of the fact that a refugee may be not only a de iure stateless person, but moreover a de facto one. Apart from the 1935 Saarland and the 1939 Sudetenland Resolutions, all the other international agreements and treaties relating to refugee victims of Nazism referred expressis verbis to, former or not, German nationals who did not enjoy any more the protection of the German government 'in law or in fact'. Thus the, until then uniquely European, contracting states made, more than ever before, evident their preparedness to provide protection to actual victims of human rights violations originating in the latter's specific countries of origin, although still on an ad hoc ethnic origin-basis contained in a European geographical context, and inextricably linked with the historic political events taking place on the European continent. The atrocious human rights violations perpetrated in central Europe in the

1930s and early 1940s⁴⁹ made the states in Europe realise that what was mostly required was not the restoring of normal legal status of refugees who were officially denationalised individuals, but the material aid and legal protection of persons who were persecuted by their state even though they were, nominally, its own nationals. As a consequence, the important criterion of objective breakdown of the bond between the state and its national⁵⁰ was emphatically added to the refugee status determination framework, and that was to play a protagonistic role in the later metamorphosis of the international legal notion of refugeehood, especially after the Second World War.

SECTION 3. THE DEVELOPMENT OF REFUGEEHOOD IN 1938-1950: A PERIOD OF TRANSITION AND AMALGAMATION

The first important step towards further development of the notion of refugeehood was made during this period by the Intergovernmental Committee on Refugees (IGCR) (1938-1947) whose initial objective was the protection of German and Austrian refugees⁵¹. In virtue of the crucial Resolution IGCR adopted on 14 July 1938, protection would be afforded by the Committee to 'Persons who have not already left their

⁴⁹See Sieghart, P., The International Law of Human Rights, Oxford, Clarendon Press, 1983, at 14-15.

⁵⁰See Grahl-Madsen, A., 'Il regime speciale dei rifugiati', 4 Affari Sociali Internazionali (1981) 179, at 183.

⁵¹See detailed historico-diplomatic analysis of IGCR in Sjöberg, T., The Powers and the Persecuted The Refugee Problem and the Intergovernmental Committee on Refugees (IGCR), 1938-1947, Lund, Lund University Press, 1991.



countries of origin (Germany including Austria), but who must emigrate on account of their political opinions, religious beliefs and racial origin', as well to persons with the above characteristics 'who have already left their country of origin and who have not yet established themselves permanently elsewhere'⁵².

Even though the refugees covered by the above 1938 Resolution were still identified with some ad hoc ethnic groups of forced migrants, the Resolution marks the move, in the international framework of refugee protection, towards the determination of refugee status on the basis of ideological or racial characteristics of the individual refugee. The second innovation of the above IGCR Resolution was the inclusion in the refugee definition of persons still residing in their country of origin, who for various reasons had not, as yet, emigrated, but their emigration was, nonetheless, imminent.

In 1943 IGCR decided to and did extend its protection to 'all persons, wherever they may be, who, as a result of events in Europe, have had to leave, or may have to leave, their countries of residence because of the danger to their lives or liberties on account of their race, religion or political

⁵²See Resolution of the Committee, ICR Document, 14 July 1938, cited in Hathaway, J.C., loc. cit. supra n. 3, at 370-1. See also Sjöberg, T., ibid., n. 50, at 39-98. It was Jewish refugees that the IGCR-founding states had basically in mind in the beginning, ibid. at 51. See also Fox, J.P., 'German and European Jewish refugees 1933-45: reflections on the Jewish condition under Hitler and the Western World's response to their expulsion and flight', in Bramwell, A.C. (ed.), op. cit. supra n. 12, at 69.

beliefs'⁵³. The express requisite that only events on the European continent would justify protection to those refugees, was a novel element of refugee status which would dominate in the international system of refugee protection for almost three decades, until the 1967 Refugee Protocol of New York.

The final notional development of refugeehood during the IGCR years was that of July 1946 when the Committee decided that its work programme should extend to 'those persons within the Committee's mandate who are unwilling or unable to return to their country of nationality or of former habitual residence'⁵⁴. The unwillingness and/or inability of the refugee to return to her/his homeland was another novel additional element of the refugee definition which remained unaffected and valid in international refugee law until the present time⁵⁵.

⁵³See Minutes of the Fourth Plenary Session of IGCR, August 15-17, 1944, AJ 43-23, cited in Sjöberg, T., op. cit. supra n. 51, at 146. See also Report submitted by the Director, ICR Document, 25 July 1944, at 2, in Hathaway, J.C., ibid., at 371.

⁵⁴Memorandum from the American Resident Representative, ICR Document, 15 August 1946, in Hathaway, J.C., ibid. at 371. See also Sjöberg, T., ibid. at 168 et seq.

⁵⁵See Article 1 A.(2) of the 1951/1967 Refugee Convention. IGCR, before its liquidation, convened in London in 1946 an international conference where it was signed the Final Act of the Intergovernmental Conference on the Adoption of a Travel Document for Refugees, 11 UNTS 73, No. 150. Article 1 of the Final Act did not add anything novel to the international law of refugee status. It provided (ibid. at 86) for a refugee travel document for refugees 'who are the concern of the Intergovernmental Committee, provided that the said refugees are stateless or do not in fact enjoy the protection of any Government, that they are staying lawfully in the territory of the Contracting Government concerned, and that they are not benefitting by the provisions regarding the issue of a travel

The creation of the United Nations Relief and Rehabilitation Administration (UNRRA) (1943-1946) marked another short-stepped development of the comprehension of refugeehood on the international plane. The initial aims of UNRRA in 1943 were to contribute to the maintenance of the people who had been displaced during the Second World War (DPs) and who were in areas under UN control, as well as to provide aid for the repatriation of these people⁵⁶. Despite the fact that one of the primary objectives of UNRRA was the DPs' repatriation, its main work finally focused on the care of those people (around 850,000 in 1946) who did not wish to return to their homes for political reasons, in view of the post-World War II changes of their countries' governments⁵⁷. It was the beginning of the Cold War period.

No international arrangement or treaty was drawn up for the regulation of the work of UNRRA, and the delimitation of the persons who would be of their concern. In 1945 an UNRRA directive laid down that it would be of concern to the organisation 'Post-war refugees...if they were displaced from their home during the war...In other words, if their internal

document contained in the Agreements of 5th July 1922, 31st May, 1924, 12th May, 1926, 30th June, 1928, 30th July, 1935, or the Convention of 28th October 1933'.

⁵⁶See Jaeger, G., 'Les Nations Unies et les réfugiés', 22 RBDI (1989) 18 at 37, Hathaway, J.C., loc. cit. supra n.3, at 372 et seq., Vernant, J., The Refugee in the Post-War World, London, George Allen & Unwin Ltd., 1953 at 30-33, Wyman, M., DP Europe's Displaced Persons, 1945-1951, London, Toronto, Associated University Presses, 1989, at 46 et seq.

⁵⁷See Carlin, J.L., The Refugee Connection, London, Macmillan, 1989, at 13, Jaeger, G., ibid. at 37-38.

displacement (i.e. displacement from their homes) occurred during the war, it is immaterial that their external displacement (i.e. displacement across international frontiers) only occurred post-war⁵⁸. This open-ended inclusion clause produced a strong reaction from state members of the international society and especially eastern European states⁵⁹ in which thousands of DPs originated. The inclusion clause of UNRRA was finally restricted in 1946 when it was decided to limit its assistance only to displaced persons that were in a position to prove with 'concrete evidence' that they were objectively victims of persecution in their countries of origin⁶⁰.

The establishment of the International Refugee Organisation (1946-1951) by the UN General Assembly⁶¹ has been another major event in the contemporary history of evolution of the notion of refugee in international law. Unlike IGCR and UNRRA,

⁵⁸UNRRA Incoming Cable No. 8855, 28 December 1945, in Hathaway, J.C., *ibid.* at 373.

⁵⁹See Woods, P.A., 'The term "refugee" in international and municipal law: An inadequate definition in light of the Cuban boatlift', 5 *ASILS ILJ* (1981) 39, at 41.

⁶⁰See UNRRA European Region Order 40 (I), 3 July 1946, in Hathaway, J.C., *ibid.* at 373. No such 'concrete evidence' of persecution was required, nonetheless, in cases of people who had suffered under 'discriminatory Nazi legislation'.

⁶¹See Constitution of IRO in 18 *UNTS* 3. On IRO see Sjöberg, T., *op. cit. supra* n. 51, at 208 *et seq.*, Jaeger, G., *loc. cit. supra* n. 56 at 38 *et seq.*, Woods, P.A., *loc. cit. supra* n. 59 at 40-43, Weis, P., 'The concept of the refugee in international law', 87 *JDI* (1960) 928 at 932-4, Hathaway, J.C., *ibid.* at 374-6, Gallagher, D., 'The evolution of the international refugee system', 23 *IMR* (1989) 579; United Nations, *op. cit. supra* n. 3, at 40.

IRO was concerned not with the repatriation of and/or material assistance to refugees, but with their resettlement⁶². It is to be stressed that IRO was determined to provide assistance only to 'bona fide refugees and displaced persons', a term which is repeatedly mentioned in the text of the organisation's Constitution⁶³. This constitutes indeed an irrefragable sign of the contracting states' willingness to support and provide aid to a selected number of individuals who had left and/or did not wish to return to their homelands only for genuine political reasons.

The refugee definition laid down by the IRO Constitution (Annex I, Part I) constitutes a rather complex pronouncement of the post-war victorious states of who would be eligible for the IRO's protection as a refugee or a displaced person. The complex structure of Part I represents an amalgamation of the, mainly pre-World War II refugee definition formulations, based on group-oriented, ad hoc, considerations, and on the individualist, or ideology-based, character of refugee status determination that has dominated in international refugee law after the end of the Second World War. The whole venture of IRO was founded on a basically ideological compromise between

⁶²See 18 UNTS 3 at 5-7, Gallagher, D., loc. cit. supra n. 61, United Nations, ibid. at 166-7 and at 40, Carlin, J.L., op. cit. supra n. 57 at 30 and 19 et seq.

⁶³See Preamble of, and para. 1 (a) of Annex I to the IRO Constitution, Preamble to Annex III (UN GA Resolution of 12 February, 1946, Doc. A/45) to the IRO Constitution, 18 UNTS at 17 et seq.

the political interests of western and eastern block states⁶⁴.

Thus, according to the refugee definition laid down by the IRO Constitution (Annex I, Part I) as a refugee would be recognised any person who has left, or is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories:

(a) victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not⁶⁵;

(b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not⁶⁶;

(c) persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion'.

The definition of Annex I of the IRO Constitution (Part I A) goes on to consider as refugees also 'persons who, having

⁶⁴See Annex I 1. (g) of IRO Constitution, 18 UNTS 3 at 17, and Hathaway, J.C., loc. cit. supra n.3, at 374.

⁶⁵On the controversy which arose out of this clause see Jaeger, G., loc. cit. supra n. 56, at 42.

⁶⁶See also Section C para. 2 of Annex I to IRO Constitution. On Spanish refugees see Marrus, M.R., The Unwanted European Refugees in the Twentieth Century, New York, Oxford University Press, 1985, at 190 et seq.

resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of Nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein', as well as any person who, 'as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality'. Finally, refugees under IRO were to be regarded also 'unaccompanied children who are war orphans or whose parents have disappeared, and who are outside their countries of origin'.

All the above individuals, except for the Spanish Republicans and the Falangist regime victims, would become of concern to IRO under two important provisos of Section C of the IRO Constitution's Annex I: either they had to be able to be repatriated and the help of IRO was required, or they had to 'have definitely, in complete freedom and after receiving full knowledge of the facts, including adequate information⁶⁷ from the Governments of their countries of nationality of former

⁶⁷See Annex I to IRO Constitution, Section C Para. 1 (b) according to which 'adequate information' was 'information regarding conditions in the countries of nationality of the refugees...communicated to them directly by representatives of the Governments of these countries, who shall be given every facility for visiting camps and assembly centres of refugees and displaced persons in order to place such information before them'.

habitual residence, expressed valid objections to returning to those countries'. These 'valid objections' of the refugees concerning their return were of great significance, since the IRO Constitution (Annex I Part I C 1. (a)) categorised them as follows:

(i) persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions, provided these opinions are not in conflict with the principles of the United Nations...

(ii) objections of a political nature judged by the Organization to be "valid"...

(iii) in the case of persons falling within the category mentioned in section A, paragraphs 1 (a) and 1 (c) compelling family reasons arising out of previous persecution, or, compelling reasons of infirmity or illness'.

CONCLUSION

The 1938-1950 period has been a transitional one in the evolutionary history of the international law of refugee status. The international society represented mainly by European states, started shifting away from the generalised ethnic group-based refugee status determination, approaching a new, novel at that time, method of viewing refugeehood.

The first move was made by IGCR in 1938, that introduced three very important causal elements of refugeehood: race, religion and political opinion were expressly considered to be sufficient grounds of refugee status, if they formed objective

bases of collision between the refugee and the executive of their country of origin. The states that concluded the various agreements of that period wished to provide protection, on the one hand, to individuals originating from specific refugee producing countries (ad hoc group basis) but, on the other, their intention started to gravitate towards an ideological, or individualist⁶⁸, perspective of the refugee plight and protection.

The framework of international refugee protection which was established by UNRRA and IRO introduced another novelty in the international definition of refugee: the notion of refugee persecution. The IRO Constitution added the element of fear of persecution on the basis of nationality, to the previous bases of race, religion and political opinion. These are all constitutive elements of the legal concept of refugeehood that was about to be established later on in international law.

The 1938-1950 period has been indeed one of amalgamation and transition. It was an era during which the concept of refugeehood on the international plane started to be more obviously politically coloured by, first, the European states that fought against Nazism, and, secondly, the state members of the post-World War II western block, willing to protect mainly persons who did not wish to return to their then eastern block countries of origin. In both cases political motives and interests of states blended with their

⁶⁸See Hathaway, J.C., loc. cit. supra n.3, at 376 et seq.

humanitarian, in many cases, ideals. The refugee concept was moulded by the above-mentioned states that dominated the world political scene in the 1930s and 1940s. As a consequence, the human rights-oriented post-World War II period of refugee protection, the premises of which would prevail in international refugee law in the years that were to come, constituted an evolution of the international refugee definition, in fact through the ideological prism of the western states' philosophy, and human rights protection considerations that were expressed in the main post-war international human rights treaties.

SECTION 4. THE POST-1950 NOTIONAL EVOLUTION OF REFUGEEHOOD:
THE EFFORTS FOR THE ESTABLISHMENT OF A COMMON INTERNATIONAL
LEGAL PERSPECTIVE

4.1. REFUGEEHOOD UNDER THE UNHCR STATUTE.

Following the liquidation of IRO, the UN felt urgently the need, in view of the growing numbers of the world's refugees, especially on the European continent, to establish a new organisation responsible for the international refugee protection⁶⁹. The Economic and Social Council (ECOSOC) of the UN expressed its determination in 1949 to create a new such UN-related organ⁷⁰, and the UN General Assembly initiated the same year the first deliberations on the structure of that

⁶⁹See UN ECOSOC Resolution 248 (IX), 6 August 1949, in UNHCR (Ed.), UN Resolutions and Decisions relating to the Office of the UNHCR, Geneva, UNHCR, 1989, II-1.

⁷⁰See UNGA Resolution 319 (IV) A, 3 December 1949, ibid. at I-1.

organisation⁷¹, the United Nations High Commissioner for Refugees (UNHCR). In accordance with the Annex to the UN General Assembly Resolution 319 (IV) of 1949⁷² persons falling under the competence of the UNHCR's office would be first, refugees and displaced persons as those were defined in the first Annex of the IRO Constitution, and secondly, 'such persons as the General Assembly may from time to time determine, including any persons brought under the jurisdiction of the High Commissioner's Office under the terms of international conventions or agreements approved by the General Assembly'.

In 1950, while the 1951 Refugee Convention was under preparation by the UN, ECOSOC drafted the Statute of the UNHCR's office and provided that UNHCR would be competent ratione personae firstly, for the protection of all the refugees as defined in Article 1 of the 1951 Refugee Convention, and secondly, for such other persons as the UN General Assembly might from time to time determine. Lastly, ECOSOC provided for a discretionary power of UNHCR, according to which the latter might 'intercede with Governments on behalf of other categories of refugees, pending consideration by the General Assembly as to whether to bring such categories within the mandate' of UNHCR⁷³. From these preliminary

⁷¹See Annex to ECOSOC Resolution 319 (XI) A, 11 August 1950, Chapter III, C, ibid. II-3, II-4.

⁷²Idem.

⁷³See Annex to ECOSOC Resolution 319 (XI) A, 11 August 1950, Chapter III, C, ibid. at II-3, II-4.

Resolutions it was more than evident that the UN were planning to create an international refugee organ with an almost catch-all competence, investing it with power to deal with refugee cases that would exceed a narrow definition of any international refugee convention, and would therefore cover situations of emergency that would call for immediate action from the part of the UN⁷⁴.

On 14 December 1950 the Statute of UNHCR was annexed to the UN General Assembly Resolution 428 (V)⁷⁵. The UNHCR Statute provides for refugee status to three basic categories of refugees ('mandate refugees')⁷⁶: First, all the 'statutory refugees', viz. the refugees of the 1926 and 1928 Arrangements, the 1933 and 1938 Conventions, the 1939 Protocol and the IRO Constitution. Secondly, 'any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the

⁷⁴See para. 8 of Annex to the UNGA Resolution 319 (IV) A, 3 December 1949, *ibid.* at I-1-2. On the evolving, from protection to assistance, character of the UNHCR's work see Kennedy, D., 'International refugee protection', 8 *HRQ* (1986) 1 at 4 *et seq.*, Gordenker, L., *Refugees in International Politics*, London, Sydney, Croom Helm, 1987, at 33 *et seq.*

⁷⁵See *supra* n. 69, at I-3 *et seq.*

⁷⁶See Chapter II, para. 6 A and B. See also Maynard, P.D., 'The legal competence of the United Nations High Commissioner for Refugees', 31 *ICLQ* (1982) 415, at 416 *et seq.* On the UNHCR Statute see also Executive Committee of the High Commissioner's Programme (EXCOM), Conclusion No. 4 (XXVIII) 'International Instruments', 1977, in UNHCR, *Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, UNHCR, Geneva, 1989, at 12.

country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it'. This second category, thus, comprised both de iure and de facto stateless individuals. The final third category comprised all the post-1 January 1950 refugees who bear the definitional characteristics of the second category described above.

The inclusion clauses of the UNHCR's Statute have provided an excellent example of the ideology-oriented character of the refugee definition that started to dominate in the post-war years. The Statute did not in fact follow the recommendations of the UN General Assembly and of the ECOSOC regarding an elastic ratione personae competence of UNHCR, according to the potential future international refugee emergencies. Every refugee, except for the statutory ones, has had to prove a well-founded fear of persecution by reason of her/his race, religion, nationality or political opinion, and lack of protection in their country of origin⁷⁷. However, the UN General Assembly, by virtue of Sections 1 and 3 of the UNHCR

⁷⁷See Aga Khan, S., 'Legal problems relating to refugees and displaced persons', 149 Recueil des Cours (1976) I, 287, at 339, Weis, P., 'The international protection of refugees', 48 AJIL (1954) 193 at 211, Grahl-Madsen, A., 'Protection of refugees by their country of origin', 11 Yale Journal of International Law (1986) 362 at 374-5.

Statute which prescribe that UNHCR act under the authority of the UN General Assembly, has extended the mandate of UNHCR in a number of cases, on an ad hoc basis, starting with the 1956 Hungarian refugee emergency⁷⁸. The term 'good offices' of UNHCR which started to be employed by the UN General Assembly from 1959 onwards was the key word that enabled UNHCR to act in unforeseen situations of forced migration which 'did not come within the competence of the United Nations'⁷⁹. The majority of these forced migrants are found today in 'Third World' countries, where they usually remain following the provision of such UNHCR dehors-the-mandate aid⁸⁰.

⁷⁸See UNGA Resolution 1006 (ES-II), 9 November 1956, UNGA Resolution 1129 (XI), 21 November 1956, UNGA Resolution 1039 (XI), 23 January 1957, in UNHCR, UN Resolutions and Decisions relating to the Office of the UNHCR, Geneva, UNHCR, 1989, I-15 et seq.. See also Aga Khan, S., ibid. n. 77 at 340, Carlin, J.L., 'Significant refugee crises since World War II and the response of the international community', 1982 Michigan Yearbook of International Legal Studies Transnational Legal Problems of Refugees, 3, at 9-10.

⁷⁹See, e.g., UNGA Resolution 1167 (XII) on Chinese Refugees in Hong Kong, 26 November 1957, in UNHCR, ibid. at I-19. See also Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 6 et seq., Jaeger, G., loc. cit. supra n. 56, at 54 et seq., Grahl-Madsen, A., 'International refugee law today and tomorrow', 20 Archiv des Völkerrechts (1982) 411, at 419, Aga Khan, S., 'Legal problems relating to refugees and displaced persons', 149 Recueil des Cours (1976) I, 287, at 338 et seq.

⁸⁰See Hathaway, J.C., loc. cit. supra n. 17, at 159 n. 4: 'Whereas the UNHCR routinely assist refugees (European and analogous groups) in securing asylum including third state resettlement, non-mandate (Third World) persons of concern to UNHCR are typically assisted in ways that localize or confine their development'. See also Drüke, L., Preventive Action for Refugee Producing Situations, Frankfurt a.M. etc., Peter Lang, 1990, at 43-46.

4.2. THE 1951/1967 UN REFUGEE CONVENTION: TOWARDS THE INTERNATIONALISATION OF A LEGAL PRISM OF REFUGEEHOOD.

Following the end of World War II, the United Nations had to cope in a comprehensive manner, through a legally binding international agreement, with the new refugee movements which had taken cataclysmic dimensions, especially in Europe. The pre-war Conventions and Arrangements dealing with the 'historical' refugees were in need of updating and adaptation to the new morphology of the refugee phenomenon. On the initiative of ECOSOC in 1948, and with the collaboration of the UN Secretary General, the UN Ad Hoc Committee on Statelessness and Related Problems, the subsequent UN Ad Hoc Committee on Statelessness and Related Problems (later renamed as Ad Hoc Committee on Refugees and Stateless Persons), and the UN General Assembly, a draft Convention relating to the Status of Refugees was concluded in August 1950⁸¹.

It was made clear from the very beginning of the Convention drafting process and the inter-governmental negotiations, that the whole enterprise that would lead to the adoption of a new international Convention on refugee status would be the

⁸¹On the history of all these consultations see Takkenberg, A., Tahbaz, Ch. C. (eds.), The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter Travaux), Volumes I, II, III, Amsterdam, Dutch Refugee Council, 1990. See also 1950 Yearbook of the United Nations, at 569 et seq., Jaeger, G., loc. cit. supra n. 56, at 71 et seq., Robinson, N., Convention Relating to the Status of Refugees: Its History, Contents and Interpretation, New York, Institute of Jewish Affairs, 1953, at 3 et seq. See also Draft Convention relating to the Status of Refugees, UN Doc. E/1850, E/AC.32/8, 25 August 1950, Travaux, vol. II, at 206 et seq.

outcome of an artful exercise of acts of compromise among the negotiating states which would always put their own interests at the top of the agenda of negotiations, despite the humanitarian character of the aims declared⁸². What emerged also from the initial negotiation stages was that the outcome in the form of a Convention would be moulded by states belonging to the then western group, especially following the withdrawal of the USSR delegate from the first meeting of the Ad Hoc Committee on Statelessness and Related Problems on 16 January 1950, followed by the Polish and Bulgarian delegates⁸³.

⁸²See Ad Hoc Committee on Statelessness and Related Problems, Memorandum by the Secretary-General, UN Doc. E/AC.32/2, 3 January 1950, at 10, Section 4, Travaux vol. I, 118, at 122: 'It would be desirable that the greatest possible number of States should become parties to the new convention. For this purpose, it is essential that the convention should not impose upon them obligations greater than those which they are prepared to accept. Nevertheless, it would be undesirable in order to gain wider accession to the convention, to adopt a rudimentary convention containing the minimum number of obligations and falling short of what some States might be prepared to grant. The solution would be to adopt a flexible system which would meet the various requirements of States.'

⁸³See UN Doc. E/AC.32/SR.1, 23 January 1950, at 4, Travaux vol. I at 154. The reason for the withdrawal, given by the Soviet delegate, was the participation in the Committee of the representative of the 'Kuomintang group'. The same reason was given by the Polish representative when he withdrew from the Committee on 14 April 1950, UN Doc. E/AC.32/L.40, 10 August 1950, at 67-8, Travaux, vol. II, at 57, where he also accused 'some Governments which cultivate artificially the 'problem of refugees' and 'statelessness' for some sinister political purposes'. See also withdrawal of the Bulgarian Representative from the same Committee, UN Doc. E/AC.32/L.40, 10 August 1950, at 69, Travaux, vol. II, at 58. See also 1950 Yearbook of the United Nations, at 577 where the representatives of Poland and Czechoslovakia in the UN General Assembly characteristically declared that the then proposed refugee definition 'was designed to enable certain countries to continue to use refugees as agents to provoke political disorder in their countries of origin'. See also Weis, P., 'The 1967 Protocol Relating to the Status of Refugees and some questions of the

The refugee definition was immediately considered to be the 'crux of the entire matter' in the Ad Hoc Committee on Statelessness⁸⁴. There were two different approaches to the question of definition⁸⁵ expressed initially during the deliberations of the Ad Hoc Committee, in the beginning of the Committee's work. The first approach was expressed and represented mainly by the French delegate who was in favour of an 'as generous as possible', rather broad and flexible to new refugee flows, definition⁸⁶, a view followed by the British delegate as well⁸⁷. On the other hand, there was the U.S. delegate, followed by the majority of the rest of the state

law of treaties', 42 BYIL (1967) 39, at 46.

⁸⁴See Mr. Rain, France, in UN Doc. E/AC.32/SR.2, 26 January 1950, at 6, Travaux, vol. I, at 158.

⁸⁵See UN Doc. E/AC.32/SR.17, 6 February 1950, Travaux, vol. I, at 268 et seq.

⁸⁶See UN Doc. E/AC.32/SR.2, at 10, Travaux, vol. I, at 160. See also UN Doc. E/AC.32/L.40, 10 August 1950, at 26 et seq., Travaux, vol. II, at 36 et seq., esp. at 37 (UN Doc. p. 27): '...a broad definition of the term "refugee" could, by itself, in no way result in involving Governments in commitments beyond those they might formally consent to undertake either by means of a clarifying reservation made at the time of signature of the Convention, or by means of a special agreement with the High Commissioner for Refugees...the essence of a broad definition would be to constitute a programme of action for the Representative of the United Nations which he should endeavour to carry out...taking due account of any changes in the situation...'.

⁸⁷See the revised draft proposal for Article 1 (E/AC.32/2), UN Doc. E/AC.32/L.2/Rev.1, 19 January 1950, Travaux, vol. I, at 358: '1. In this Convention, the expression "refugee" means, except where otherwise provided, a person who, having left the country of his ordinary residence on account of persecution or well founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is not allowed by the authorities of that country to return there and who is not a national of any other country'.

delegates to the Committee, who, even though did not favour a narrow or 'excessively restricted' refugee definition, stressed that the definition 'should simply be precise, so that the United Nations and the Governments concerned would know exactly to whom the benefits of the convention would be extended'⁸⁸. The proposal of this second group of states was actually a categorisation of refugees according to their ethnic origin, similarly to the pre-1950 international agreements and Conventions on refugees⁸⁹. The result of the negotiations in the Ad Hoc Committee on Statelessness has been the proposal of a definition representing the actual compromise of the above two state views⁹⁰.

⁸⁸See UN Doc. E/AC.32/SR.3, 26 January 1950, at 10, Travaux, vol. I, at 165.

⁸⁹See US Memorandum on the definition Article of the preliminary draft Convention relating to the Status of Refugees (and Stateless Persons) (E/AC.32/2), UN Doc. E/AC.32/L.4, 18 January 1950, Travaux, vol. I, at 359, and UN Doc. E/AC.32/L.4/Add.1, 19 January 1950, Travaux, vol. I, at 360. See also UN Doc. E/AC.32/SR.5, 30 January 1950, at 4-6, Travaux, vol. I, at 174-5, UN Doc. E/AC.32/SR.6, 26 January 1950, Travaux, vol. I, at 182 et seq.

⁹⁰See Report of the Ad Hoc Committee on Statelessness and Related Problems, 17 February 1950, UN Doc. E/1618 and Corr.1, Travaux, vol. I, 405, and Draft Convention Relating to the Status of Refugees, ibid. at 408. See also Refugees and Stateless Persons: Report of the Ad Hoc Committee on Statelessness (continued): second report of the Social Committee (E/1814), UN Doc. E/OR (XI), 274, Travaux vol. II, 10 et seq. See also French delegate in UN Doc. E/AC.32/SR.33, 20 September 1950, at 5-6, Travaux, vol. II, at 66: '...the preamble to the Convention and the definition of the term "refugee"...were two questions of a political character...The discussions in the Social Committee had brought out the absolute necessity for subordinating the legal drafting of the text to a very clear recognition of realities'. Strong objections to the Eurocentric refugee definition proposed were also expressed, see Pakistani delegate in UN. Doc. E/OR(XI), 13-7, Travaux vol. II, at 6: 'His Government could not accept the definition of the term "refugee" as given in the draft convention...the problem of refugees was not a European

In view of the fact that the final draft Convention on the Status of Refugees had been drawn up by the UN Ad Hoc Committees in the consultations of which many states had not actually participated, the UN General Assembly in December 1950 decided to convene a Conference of Plenipotentiaries in Geneva to complete the drafting and to sign the international Refugee Convention⁹¹. However, the Conference of Plenipotentiaries consisted of twenty three delegates, the majority coming from European states, while, concurrently, the absence of all eastern European states was obvious⁹². Thus, the evident geographically, historically and especially ideologically⁹³, Eurocentric character of the refugee definition that would be produced by the Geneva negotiations on the 'vital' and with 'inherent difficulties' Article 1⁹⁴ was inevitable. Indeed, west European states were not willing

problem only'.

⁹¹See UNGA Resolution 429 (V), 14 December, 1950, UN Doc. A/1751, 19 December 1950, in Travaux, vol. II, at 240.

⁹²At the first meeting of the Conference the participating states were the following: Australia, Austria, Belgium, Canada, Colombia, Denmark, Egypt, Federal Republic of Germany, France, Greece, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland (and Liechtenstein), Turkey, U.K., U.S.A., and Yugoslavia. Cuba and Iran were participating as Observers, see UN Doc. A/CONF.2/SR.1, 19 July 1951, in Travaux, vol. III, at 194.

⁹³The Travaux Préparatoires of the 1951 Geneva Conference have not, nonetheless, recorded any discussions of the Plenipotentiaries with reference to the substantive elements of the refugee definition, apart from the geographical and temporal limitations; see relevant comment of Mr. Robinson (Israel), in UN.Doc. A/CONF.2/SR.22, 26 November 1951, at 6, in Travaux, vol. III, at 406.

⁹⁴See UN Doc. A/CONF.2/SR.19, 26 November 1951, at 372, in Travaux, vol. III, at 372.

to take up conventional obligations towards refugees originating in non-European countries, a stance that, despite the state declarations of a humanitarian nature, was occasionally founded, in the course of the preparatory work, exactly on the lack of representation in the Geneva Conference of a large number of countries outside of the European continent⁹⁵.

Despite being the brainchild of the minority of world member

⁹⁵See Mr. Rochefort (France): 'Around the conference table were assembled countries which were interested in European refugees, and in those circumstances the European countries could not be expected to agree to assume responsibilities in respect of refugees from countries which were not represented.', UN Doc. A/CONF.2/SR.3, 19 November 1951, at 13, in Travaux, vol. III, at 219. See also same delegate, in UN Doc. A/CONF.2/SR.20, 13 July 1951, at 11, in Travaux, vol. III, at 390, also in UN Doc.:A/CONF.2/SR.22, 26 November 1951, at 15, in Travaux, vol. III, at 411, where, although stressing that 'Any attempt to impart a universal character to the text would be tantamount to making it an "Open Sesame"', he, admitted that 'the definition of the term "refugee" as at present incorporated in article 1 was based on the assumption of a divided world'. See contra, Mr. Herment (Belgium), UN Doc.A/CONF.2/SR.20, 26 November 1951, at 7, in Travaux, vol. III, at 388: 'Was is not, however, a matter of obligations assumed by States vis-à-vis refugees, rather than one of commitments and obligations between States?'. See also contra, Norwegian delegate, in UN Doc. A/CONF.2/SR.22, 26 November 1951, at 14, in Travaux, vol. III, at 410. See also UN Doc. A/CONF.2/SR.19, 26 November 1951, at 12, in Travaux, vol. III, at 376, where the above French delegate stressed that 'One region in the world was ripe for the treatment of the refugee problem on an international scale. That region was Europe'. See also UN Doc. A/CONF.2/SR.19, 26 November 1951, at 15, in Travaux, vol. III, at 378, where Mr. del Drago (Italy) pointed out that 'if the western countries -the only ones which would assume a specific obligation by signing the Convention- were obliged to admit the victims of national movements such as those which had recently occurred in India and the Middle East, they would be faced with very serious problems...'. See also same delegate in UN Doc. A/CONF.2/SR.21, 26 November 1951, at 4, in Travaux, vol. III, at 395; see also accord, US delegate in UN Doc. A/CONF.2/SR.21, 26 November 1951, at 14-15, in Travaux, vol. III, at 400-1.

states, the 1951 Convention Relating to the Status of Refugees⁹⁶ (the outcome of the above negotiations) constitutes the backbone of the contemporary international refugee legislation. It has acquired an internationally authoritative status with regard to the international legal aspects of the refugee protection issues it covers, having as parties over one hundred states⁹⁷. Refugees have been classified into two basic groups by Article 1 A. of the 1951 Refugee Convention: first, all the statutory refugees (pre-1940 and IRO refugees) (Article 1 A.(1)); second, any individual who 'As a result of events occurring before 1 January 1951 and owing to well-founded fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or

⁹⁶Geneva, 28 July 1951, 189 UNTS 137.

⁹⁷As of 5 July 1994, the total number of states parties to the 1951 Convention, and the 1967 Protocol was 123; the number of states parties to one or both of these instruments was 127, see 13 Refugee Survey Quarterly (1994), Nos. 2 and 3, at 220. The Executive Committee of the UNHCR's Programme (EXCOM) has repeatedly stressed the importance of the 1951 Convention as an instrument incorporating 'fundamental principles of refugee law', as well as a basic humanitarian instrument defining the legal status of refugees; see EXCOM Conclusion No. 42 (XXXVII) (1986) in UNHCR (ed.), Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Geneva, 1989, at 92, EXCOM Conclusion No. 43 (XXXVII) (1986), ibid. at 94, EXCOM Conclusion No. 57 (XL) (1989), ibid. at 132. See also Weis, P., 'The Hague Agreement relating to Refugee Seamen', 7 ICLQ (1958) 334, Turack, D.C., 'Freedom of movement and the seaman', 3 Human Rights Journal (1970) 465. S.E. Asian countries have, however, showing unwillingness to accede to the 1951 Refugee Convention, due to the particular nature of their own refugee flows, see Shearer, I.A., 'International law and refugees in South-East Asia', in Institute of International Public Law and International Relations of Thessaloniki (ed.), Thesaurus Acroasium Vol. XIII, The Refugee Problem on Universal, Regional and National Level, 1987, 425, Aledo, L-A, 'La perte du statut de réfugié en droit international public', 95 RGDIP (1991) 371, at 389.

political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality as a result of such events, is unable or, owing to such fear, is unwilling to return to it.' (Article 1 A.(2)). It is Article 1 A.(2) that constitutes currently, following its amendment through the 1967 Refugee Protocol, the classic refugee definition, adopted and applied, directly or indirectly, also by all three European states whose refugee status case law is the subject matter of the present thesis.

Two are the main noteworthy characteristics of refugeehood in the framework of the above 1951 definition, the 'key question' of the whole Convention⁹⁸. Firstly, refugeehood would be, and is currently in the actual refugee law practice, directly related to violation of civil and political rights⁹⁹, on the basis of the individual refugee's religion, race, nationality, political opinion or particular social group. Violations of

⁹⁸See UN Doc. A/CONF.2/SR.1, 19 July 1951, at 6, in Travaux, vol. III, at 196. See also Grahl-Madsen, A., 'Further development of international refugee law', 35 NTIR (1965) 159, at 160, Weis, P., 'Legal aspects of the Convention of 25 July 1951 relating to the Status of Refugees', 30 BYIL (1953) 478. No reservation to Article 1 is permitted by Article 42.1 of the 1951 Convention.

⁹⁹See Garvey, J.I., 'Towards a reformulation of international refugee law', 26 HarvILJ (1985) 483. On civil rights in contemporary international human rights law see Lillich, R.B., 'Civil rights', in Meron, Th. (ed.), Human Rights in International Law, Oxford, Clarendon Press, 1984, at 115 infra.

the economic or social rights¹⁰⁰ of the refugee were not of the concern of the drafting and contracting states of the 1951 Refugee Convention¹⁰¹. Thus, the morphology of the contemporary established refugee status is one created by

¹⁰⁰On the status of economic, social, and cultural rights in international law see Trubek, D.M., 'Economic, social, and cultural rights in the Third World: Human rights law and human needs programs', in Meron, Th. (ed.) ibid. at 205 infra.

¹⁰¹The concept of "persecution" understood by the framers of the 1951 convention was based on the nature of the twentieth century totalitarian state. The authors of the definition saw Hitlerism and Stalinism', Smyser, W.R., Refugees Extended Exile, New York etc., Praeger Publishers, 1987, at 19. 'As one who has participated in the drafting of the convention, I can say that the drafters did not have specific restrictions in mind when they used this terminology. Theirs was an effort to express in legal terms what is generally considered as a political refugee. The Convention was drafted at a time when the cold war was at its height. The drafters thought mainly of the refugees from Eastern Europe and they had no doubt that these refugees fulfilled the definition they had drafted.', Weis, P., 'Convention refugees and de facto refugees', in Melander, G., Nobel, P. (eds.), African Refugees and the Law, Uppsala, The Scandinavian Institute of African Studies, 1978, 15. 'Les motifs pouvant expliquer la crainte de persécution sont limités: race, religion, nationalité, appartenance à un certain group social, opinions politiques. Ils se rattachent à la doctrine des droits de l'homme mais toute violation des droits de l'homme n'est pas necessairement admise, par la Convention, comme motif de la crainte de persécution. En particulier, la définition ne concerne pas les "réfugiés de la faim" ou les "réfugiés de la pauvreté"...', Jaeger, G., loc. cit. supra n. 56, at 73. See also Hathaway, J.C., loc. cit. supra n. 17, at 144 et seq., Miranda, C.O., 'Toward a broader definition of refugee: 20th century development trends', 20 California Western International Law Journal (1990) 315, at 315-6. See also amendment proposed by Yugoslavia, enlarging Article 1 of the draft Refugee Convention: 'For the purposes of the present Convention the term "refugee" shall apply to any person who, as a result of persecution for defending the principles of democracy, national liberty, freedom of cultural and scientific work, political and religious opinions, or on account of his nationality or race, or owing to upheavals caused by the war or to other events giving rise to similar upheavals, has been forced to leave the State of which he is a national, or in which he was domiciled, and had sought refuge and protection in one of the States signatories to the present Convention', UN Doc. A/CONF.2/16, 3 July 1951.

'western' states in order to be used primarily for the alleviation of refugee flows taking place on the European continent, on political, lato sensu, grounds. It is an irrefragable fact, however, that the conventional formulation of the refugee concept in 1951, in the absence, in effect, of the 'east bloc' countries, was one of great political convenience for the states of the West that could, in consequence, manipulate the effects of refugee movements originating in countries of the opposite political bloc, in such a manner as to condemn and publicise the latter's civil and political rights violations as best as they were able to¹⁰². The second characteristic of the refugee definition in 1951 was its European epicentre. The travaux préparatoires of the 1951 Convention constitute, as already mentioned, clear-cut evidence of the fact that the definition, as set out finally in Article 1 A.(2), has been the product of a 'compromise reached with much difficulty'¹⁰³, between mainly

¹⁰² The general [refugee] definition must be seen as a product of the legal and political philosophy of the 18th, 19th and early 20th centuries in the western countries. The major terms of this philosophy were the State and Individual, and the respective rights of the State and the Individual. It is fairly easy to understand, therefore, that the concept of "refugee" was basically a legal concept, and that, within the duality "State vs. Individual", the refugee was essentially perceived as an unprotected alien.', Hartling, P., 'Concept and definition of "refugee"- legal and humanitarian aspects', 48 NTIR (1979) 125, at 130. See also Achour-Elmahdawi, L., L'Action Internationale en faveur des Réfugiés Politiques, Thèse pour le Doctorat d'Etat en Droit, Université de Grenoble, 1989, at 6-7.

¹⁰³ See supra n. 95. See also UN Doc. A/CONF.2/SR.22, 26 November 1951, at 5, in Travaux, vol. III, at 406. See also Arboleda, E., Hoy, I., 'The Convention refugee definition in the West: Disharmony of interpretation and application', 5 IJRL (1993) 66, at 88-9.

European states that viewed the refugee question as one exclusively of their own¹⁰⁴. That was the basic thesis that dominated and was finally established in the 1951 Geneva Conference, as well as in the final text of the Refugee Convention¹⁰⁵.

However, the morphology of refugeehood changed rapidly during the 1950s and the 1960s. Refugees, especially on the African continent, multiplied. The decolonisation period ignited the creation of new refugee movements that the international society could not help tackling. European states came to realise that their continent had lost its significance as a refugee-producing area. At the same time, the discrepancy

¹⁰⁴See observations of French delegate to the 1951 Conference, in UN Doc. A/CONF.2/SR.22, 26 November 1951, at 10-11, in Travaux, vol. III, at 408-9. See contra, comment of the Norwegian delegate: '...he was constrained to question the validity of the argument that, apart from the victims of events in Palestine and Korea, the problem of refugees was a European one...As the Netherlands representative has said, it would be more logical to extend the provisions of article 1 to all refugees, regardless of their country of origin, and to enable governments to enter reservations restricting their application of the Convention to persons coming from specific areas', ibid. at 14-15 (UN Doc.), 410-411 (Travaux, vol. III). See also Bresson, J-J, 'Heurs et malheurs de la Convention de Genève du 28 Juillet 1951 sur le Statut des Réfugiés', in Mélanges Michel Virally, Paris, Pedone, 1991, 147, at 148, Bringuier, P., 'Réfugiés et personnes déplacées', in Institut Français de Droit Humanitaire et des Droits de l'Homme (ed.), Les Réfugiés en Afrique-Situation et problèmes actuels, Les Cahiers du Droit Public, 1981, 31, at 37.

¹⁰⁵See, however, Recommendation E. of the Final Act of the 1951 UN Conference where it was expressed the wish and hope of the state participants that 'the Convention...will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.', 189 UNTS at 148.

between the international protection primarily afforded by UNHCR and that of the 1951 Refugee Convention made itself more clear¹⁰⁶. Thus, on the initiative of UNHCR¹⁰⁷ an international Colloquium on the Legal Aspects of Refugee Problems was held in Bellagio, Italy in April 1965. The objective of the Colloquium was the urgent liberalisation and adaptation of the 1951 Refugee Convention to the new refugee situations, in view of the fact that growing numbers of refugees were not covered by the 1951 UN instrument. The best solution envisaged by the Colloquium was an international Protocol to the 1951 Refugee Convention¹⁰⁸. As a consequence,

¹⁰⁶See UN General Assembly Resolutions 2040 (XX), 7 December 1965, 2197 (XXI), 16 December 1966, 2198 (XXI), 16 December 1966, in UNHCR (ed.), United Nations Resolutions and Decisions relating to the Office of the United Nations High Commissioner for Refugees, Geneva, UNHCR, 1989, I-33-I-36. See also Marrus, M.R., The Unwanted European Refugees in the Twentieth Century, New York, Oxford University Press, 1985, at 347, 348, and 364-5.

¹⁰⁷See UNHCR, EXCOM, 'Proposed measures to extend the personal scope of the Convention relating to the Status of Refugees of 28 July 1951', UN Doc. A/AC.96/346, 12 October 1966. See also Jaeger, G., loc. cit. supra n. 56, at 79. See also Holborn, L.W., Refugees: A Problem of Our Time, vol. I, Metuchen, N.J., The Scarecrow Press, Inc., 1975, at 185-6, where it is argued that UNHCR was very eager to remove the chronological limitation from the 1951 Refugee Convention, because it wanted to deter the OAU states from proceeding to the conclusion of a regional refugee protection instrument that might include no provision granting the UNHCR 'supervisory authority over the implementation of the agreement'.

¹⁰⁸See UN Doc. A/AC.96/INF.40, 5 May 1965, abstracted in UNHCR, EXCOM in Abstracts, Geneva, UNHCR, October 1990, at 72-3. See also Weis, P., 'The 1967 Protocol relating to the Status of Refugees and some questions of the law of treaties', 42 BYIL (1967) 39, at 41 et seq.. The urgency of the whole issue was reflected on the method by which the scope of the 1951 Refugee Convention was finally expanded in 1967. The 1951 Convention was not, technically, amended with the consent of all its parties, but through a new treaty to which former parties and new states interested could accede, see Weis, P.,

a draft Protocol was prepared in Bellagio in 1965, which, with the collaboration of UNHCR and various states interested in the developments, finally ended up to the 1967 Protocol Relating to the Status of Refugees¹⁰⁹. The Protocol, recognising in its Preamble that 'new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention', went on and, by virtue of Article I.2, eliminated the chronological limitation of the 1951 Refugee Convention, while paragraph 3 of the same Article eliminated, in a qualified manner, the geographical (European) limitation of the above Convention¹¹⁰.

Despite the elimination of the geographical and temporal circumscriptions of the classic 1951 refugee status definition, refugees still today, in order to enjoy full refugee status in state-members of the 1951/1967 Refugee Convention, have to provide evidence showing that they are

ibid. at 59.

¹⁰⁹New York, 31 January 1967, 606 UNTS 267. On the preparatory work leading to the Protocol, see UN Doc.A/AC.96/337-354, UN Doc. A/AC.96/346, November 1966, UN Doc. A/AC.96/346, 12 October 1966, in UNHCR, ibid. at 76-79. See also Weis, P., 'The 1967 Protocol relating to the Status of Refugees and some questions of the law of treaties', 42 BYIL (1967) 39.

¹¹⁰On these geographical and temporal limitations see Blay, S.K.N., Tsamenyi, B.M., 'Reservations and declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', 2 IJRL (1990) 527, at 537-540, Collela, A., 'Les reserves à la Convention de Genève (28 Juillet 1951) et au Protocole de New York (31 Janvier 1967) sur le Statut des Réfugiés', 35 AFDI (1989) 446, at 469 et seq.

victims of persecution for reasons directly related, in effect, to violations of their civil and political rights. However, forced migrants by reason of (civil or internationalised) war-related events, or natural disasters were not, and still are not, expressly covered by the above international instruments¹¹¹. This discrepancy between the letter of the current international refugee protection treaties and the actually larger other part of reality of the global contemporary forced migration, which has been officially recognised on some continents like Africa and the Americas, has created a rather anomalous, sui generis, type of refugees, the so-called de facto refugees. These are individuals, in general not covered by the 1951/1967 Refugee Convention, who for serious political/ideological reasons or because of serious war-related events are unable or unwilling to avail themselves of the protection officially offered by their state of origin. De facto refugees are recognised in most European countries under different names, while on the other hand the Council of Europe has officially recognised this form of refugeehood as one deserving the particular concern of the states. The Parliamentary Assembly of the

¹¹¹See Hathaway, J.C., loc. cit. supra n. 17, at 162-3: 'The adoption of the Protocol was...something of a Pyrrhic victory for the less developed world: while modern refugees from outside Europe were formally included within the international protection scheme, very few Third World refugees can in fact lay claim to the range of rights stipulated in the Convention. The retention of a fundamentally European and increasingly outmoded refugee definition as the accepted international standard for refugee protection was at the least a tacit recognition of the priority of European and analogous claims to a guarantee of basic rights within the international community.'; see also 76 ASIL Proceedings (1982), 13, 'Mass migration of refugees-Law and policy', at 16-17.

Council of Europe has actually recommended that all de facto refugees should benefit from the basic rights enshrined in the 1951 Refugee Convention, and that the state members of the Council of Europe should, thus, apply the Convention 'liberally'¹¹².

¹¹²See Council of Europe, Parliamentary Assembly Recommendation 773 (1976) on De Facto refugees, reproduced in Plender, R. (ed.), Basic Documents on International Migration Law, Dordrecht etc., Martinus Nijhoff Publishers, 1988, at 135-6; see also Recommendation of the Council of Europe's Committee of Ministers R (1984) 1, on the protection of persons not formally recognised as refugees, reproduced ibid. at 149. See also Parliamentary Assembly of the Council of Europe, Report on the situation of de facto refugees, 5 August 1975, Doc. 3642, Report on the right to territorial asylum, 23 August 1988, Doc. 5930, Recommendation 1088 (1988), 7 October 1988, on the right to territorial asylum. On de facto refugees see Weis, P., Report on the Legal Aspects of the Problems of De Facto Refugees, Working Group on Refugees and Exiles in Europe, Geneva, May 1974, Weis, P., 'Convention refugees and de facto refugees' in Melander, G., Nobel, P. (eds.), African Refugees and the Law, Uppsala, The Scandinavian Institute of African Studies, 1978, 15, Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 21-22, Melander, G., 'Further development of international refugee law', in Institute of International Public Law and International Relations of Thessaloniki (ed.), Thesaurus Acroasium vol. XIII The Refugee Problem on Universal, Regional and National Level, 1987, 469 at 486 et seq., Cels, J., 'Responses of European states to de facto refugees', in Loescher, G., Monahan, L. (eds.), Refugees and International Relations, Oxford, Clarendon Press, 1990, 187, Grahl-Madsen, A., The Emergent International Law Relating to Refugees Past-Present-Future, University of Bergen, Faculty of Law-Monographs No. 10, Bergen, 1985, at 26-27, Bodart, S., Les Autres Réfugiés. Le Statut des Réfugiés de facto en Europe, Louvain-la-Neuve, Academia, 1990, Lapenna, E., 'Les réfugiés de facto-un nouveau problème pour l'Europe', 19 Association for the Study of the World Refugee Problem Bulletin (1981) 61. See also Gottstein, M., 'Die Situation von Frauen als de-facto-Flüchtlinge vor dem Hintergrund frauenspezifischer Verfolgung', in Karnetzki, M., Thomä-Venske, H.C. (Hrsg.), Schutz für de-facto Flüchtlinge, Hamburg, E.B.-Verlag Rissen, 1988, 139, Hailbronner, K., 'Der Flüchtlingsbegriff der Genfer Flüchtlingskonvention und die Rechtsstellung von De-Facto-Flüchtlingen', 13 ZAR (1993) 3, Kälin, W., 'Protection from forcible return for de facto refugees: Approaches and principles of international law', in ELENA (ed.), The Legal Status of De Facto Refugees and Rejected Asylum Seekers, ELENA Seminar, Lisbon, 12-14 February 1988, Zürich, Swiss Central Office for Aid to Refugees, 1990,

4.3. REFUGEE STATUS UNDER THE 1969 OAU REFUGEE CONVENTION: A MAJOR SHIFT FROM THE ESTABLISHED PARADIGM

Africa has always been a continent of massive migrations due to its own peoples' societal formulations, and its colonial history linked with slavery and arbitrary boundary drawing¹¹³. The Organisation of African Unity (OAU) has always been aware and deeply concerned of the serious refugee problems faced by its continent¹¹⁴. Since the early 1960s it was more than

114, Marugg, M., Völkerrechtliche Definitionen des Ausdrucks "Flüchtling", Basel, Frankfurt a.M., Helbing & Lichtenhahn, 1990, at 181 et seq., Smith, A.J., 'Temporary safe haven for de facto refugees from war, violence and disasters', 28 VaJIL (1988) 509 infra.

¹¹³See Nobel, P., 'Refugees, law, and development in Africa', 1982 Michigan Yearbook of International Legal Studies Transnational Legal Problems of Refugees, 255, at 256-7, Rwelamira, M.R.K., 'Some reflections on the OAU Convention on Refugees: Some pending issues', 16 Comparative and International Law Journal of Southern Africa (1983) 155, at 156-7, Van Hear, N., Refugees and Displaced People in Africa, Paper, Refugee Studies Programme, University of Oxford, July 1990, at 20 et seq., UNHCR, 'The magnitude and complexity of contemporary refugee problem in Asian-African region: Humanitarian and legal response (African context)', in AALCC (ed.), AALCC-UNHCR Workshop on International Refugee and Humanitarian Law, New Delhi, 24-26 October 1991, New Delhi, AALCC, 1991, at 80 infra. See also Gorman, R.F., 'U.S. refugee policy in Africa', in Nanda, V.P. (ed.), Refugee Law and Policy, New York etc., Greenwood Press, 1989, 115, Mahiga, A.P., 'The development dimension of the refugee problem in Africa', in V., Samson, K. (eds.), Problems and Prospects of Refugee Law, Geneva, The Graduate Institute of International Studies, 1992, 73, Turpin, D., 'Aspects politico-juridiques internes de la situation des réfugiés en Afrique', in Institut Français de Droit Humanitaire et des Droits de l'Homme (ed.), Les Réfugiés en Afrique-Situation et Problèmes Actuels, Les Cahiers du Droit Public, 1986, 97, at 101-104.

¹¹⁴See 1994 Tunis OAU Declaration on the 1969 Refugee Convention, Assembly of Heads of State and Government, 13-15 June 1994, reproduced in 13 Refugee Survey Quarterly (1994), Nos. 2 and 3, at 167-8; Declaration adopted by the OAU 17th Extraordinary Session of the Commission of Fifteen on Refugees, Khartoum, 22-24 September 1990, OAU Doc. BR/COM/XV/55.90, reproduced in 3 IJRL (1991) 153. See also EXCOM Conclusion on the situation of refugees in Africa, 41st

obvious to OAU's Ad Hoc Commission on Refugee Problems in Africa, that the classic 1951 refugee definition was not in a position to cover and cope with the African morphology of the refugee phenomenon¹¹⁵. Following many years of deliberations and consultations in the context of OAU, the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa was adopted in Addis Ababa by the forty one heads of African states and governments¹¹⁶.

Session, October 1990, reprinted ibid. at 151-2, UN GA Resolution 42/107, 7 December 1987, in UN Doc. HCR/INF.49/Add.1, March 1990, at I-129. See also Report of the UNHCR to the UN General Assembly, UN Doc. A/48/12, 6 October 1993, at 23 et seq. See also Beck, K.S., 'Refugee emergencies in Africa: 1980-1981', in Institute of International Public Law and International Relations of Thessaloniki, op. cit. supra n. 112, at 395, Drüke, L., Preventive Action for Refugee Producing Situations, Frankfurt a.M. etc., P. Lang, 1990, at 229, Hannum, H., The Right to Leave and Return in International Law and Practice, Dordrecht etc., Martinus Nijhoff, 1987, at 109. See also Holborn, L.W., Refugees: A Problem of Our Time, vol.II, Metuchen, N.J., The Scarecrow Press, 1975, at 825-833.

¹¹⁵See Holborn, L.W., op.cit. supra n. 107, at 184-5. See also Weis, P., 'The Convention of the Organisation of African Unity governing the Specific Aspects of Refugee Problems in Africa', 3 Human Rights Journal (1970) 449, at 449-451.

¹¹⁶Adopted on 10 September 1969, 1001 UNTS 45. On the drafting history of the 1969 OAU Convention see Holborn, L.W., op. cit. supra n. 107, at 183 et seq., Weis, P., 'The Convention of the Organisation of African Unity governing the Specific Aspects of Refugee Problems in Africa', 3 Human Rights Journal (1970) 449, Melander, G., 'Further development of international refugee law', in Institute of International Public Law and International Relations of Thessaloniki, op. cit. supra n. 112, 469, at 483 et seq. See also Smyser, W.R., Refugees Extended Exile, New York etc., Praeger Publishers, 1987, at 14-15. See also D'Sa, R.M., 'The African refugee problem: Relevant international conventions and recent activities of the Organization of African Unity', 31 NILR (1984) 378, Nanda, V., 'The African refugee dilemma: A challenge for international law and policy', 32 Africa Today (1985), Nos. 1, 2, p.61, Apollis, G., 'Mécanismes inter-africains de protection et d'assistance aux réfugiés', in Institut Français de Droit Humanitaire et des Droits de l'Homme (ed.), op. cit. supra n. 113, at 67.

Even though the 1969 OAU Refugee Convention recognises the fundamental character and universality of the 1951 UN Refugee Convention¹¹⁷, the refugee definition laid down in Article I of the former Convention has gone far beyond the classic 1951 definition. It complements the latter, adding that 'The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'¹¹⁸.

The main objective of the OAU states was to 'africanise' the international refugee definition¹¹⁹, to link it with the, mainly African, causes of contemporary refugeehood, that is,

¹¹⁷See Preamble of 1969 OAU Refugee Convention, paragraphs 9, 10. See also Article 30.2 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, according to which 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.' See also Rwelamira, M.R.K., loc. cit. supra n. 113 at 171 where it is argued that the OAU Convention 'as originally conceived was intended to cover all aspects of the African refugee problem, but finally it was a convention complimentary to the 1951 Convention that was adopted'.

¹¹⁸Article I 2. of the OAU Convention.

¹¹⁹See Gunning, I.R., 'Expanding the international definition of refugee: A multicultural view', 13 Fordham International Law Journal (1989-90), 35, at 47. See also Goundiam, O., 'La protection juridique des réfugiés en Afrique', Revue Sénégalaise de Droit 1970, no.8, Septembre 1970, 5, at 20 et seq., Onyango, J.O., Plugging the Gaps Refugees, OAU Policy, and the Practices of Member States in Africa, US Committee for Refugees, Issue Brief, October 1986, at 6-7.

armed conflicts and serious natural disasters ('natural causes' of refugee flows). According to the OAU refugee concept, refugee is any individual who is 'compelled' to sever the bond with her/his state of origin for any of the above-mentioned reasons. No mention is made in Article I 2. of the 1969 Convention of a 'well-founded fear' of persecution on the part of the refugee. As a consequence, unlike the 1951 definition that combines subjective, psychological, factors ('fear') with objective ones ('well-founded'), the OAU complementary definition is a purely objective definition.

The first OAU category of reasons for which the refugee may be compelled to leave their country consists of three basic war-related phenomena: external aggression¹²⁰, occupation¹²¹, or foreign domination¹²². These are phenomena that affect, in the usual course of events, large groups of people and are not related to individual persecution of the refugee on grounds regarding her/his race, religion, nationality, political opinion or membership in a particular social group, as

¹²⁰On the concept of aggression in international humanitarian law see De Lupis, I.D., The Law of War, Cambridge etc., Cambridge University Press, 1987, at 57 et seq.

¹²¹On the concept of occupation in international humanitarian law see Roberts, A., 'What is a military occupation?', 55 BYIL (1984) 249 infra.

¹²²See De Lupis, I.D., op. cit. supra n. 120, at 43 et seq. See also Chemillier-Gendreau, M., 'Droit des peuples à disposer d'eux-mêmes et réfugiés', in Mélanges Offerts à Charles Chaumont, Paris, Pedone, 1984, 161 infra.

prescribed by the 1951/1967 refugee definition¹²³. The second category of reasons regarding refugee exodus consists of 'events seriously disturbing public order'. This phrase is a further enlargement of the refugee definition. Events that may seriously disturb public order go beyond war-related social, lato sensu, phenomena, and embrace potential natural calamities¹²⁴. Finally, all these refugee-generating events

¹²³It was the intention of the OAU states from the very beginning of the drafting of their Refugee Convention to provide for refugee status to whole groups of people considered as refugees by them: 'Already in the so-called Kampala Draft of 1964, the enlarged African definition has found an expression. After having more or less repeated the definition of the 1951 Refugee Convention it was added:

'Member States in deciding whether the term "refugee" for the purpose of this Proposal applies prima facie to a group shall take into account in particular whether persons forming a part of the group:

(i) have been uprooted by political, racial, social, religious or other similar turmoil or upheaval,
(ii) risk injury to their life, physical integrity or liberty in the event of their return to their country of origin, and
(iii) do not in law or in fact enjoy the protection of their country of origin or have compelling reasons for not doing so.'', see Melander, G., 'Further development of international refugee law', in Institute of International Public Law and International Relations of Thessaloniki (ed.), op. cit. supra n. 112, 469, at 484.

¹²⁴See Miranda, C.O., 'Toward a broader definition of refugee: Twentieth century development trends', 20 California Western International Law Journal (1990) 315, at 323, Rwelamira, M.R.K., loc. cit. supra n. 113, at 171, Independent Commission on International Humanitarian Issues, Famine A Man-Made Disaster?, London, Sydney, Pan Books, 1985, at 117-124. See also UN Study on the human rights issues related to internally displaced persons, UN Doc. E/CN.4/1993/35, 21 January 1993, at 9. Public order has been, lato sensu, defined as a term that 'includes the existence and the functioning of the state organization, which not only allows it to maintain peace and order in the country but ensures the common welfare by satisfying collective needs and protecting human rights', see Kiss, A.C., 'Permissible limitations on rights', in Henkin, L. (ed.), The International Bill of Rights The Covenant on Civil and Political Rights, New York, Columbia University Press, 1981, 290, at 301. See also Sieghart, P., The International Law of Human Rights, Oxford, Clarendon Press, 1983, at 95, Daes, E.I., The Individual's Duties to the

may take place in the whole of the country of origin, or even in a part of it. This African prism of viewing the actual contemporary refugeeism has been indirectly approved by UNHCR itself whose 1979 Handbook on Procedures and Criteria for Determining Refugee Status stipulates that '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, the 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.'¹²⁵

It is to be noted that, in contrast to paragraph 1, the second paragraph of the African Convention containing the definitional expansion does not prescribe that the refugee be outside of her/his country of nationality, but only be compelled to leave her/his place of habitual residence¹²⁶.

Community and the Limitations of Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights, New York, UN, UN Doc. E/CN.4/Sub.2/432/Rev.2, 1983, at 121-2.

¹²⁵Geneva, UNHCR, 1979, para. 91, pp. 21-22. See also infra Chapter IV.

¹²⁶On the notion of 'habitual residence' see Council of Europe, Committee of Ministers, Standardisation of the Legal Concepts of "Domicile" and of "Residence", Resolution (72) 1, 18 January 1972, Strasbourg, Council of Europe, 1972, Rule No. 9, at 7: 'In determining whether a residence [dwelling in a country for a certain period of time, according to Rule No.8] is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a

Consequently, internally displaced persons may also qualify for refugee status under the 1969 Convention, something incompatible with the classic 1951/1967 refugee status framework.

The OAU refugee definition, because of its pragmatic, objective character, of revolutionary dimensions at its age, has gained considerable de iure and/or de facto acceptance on the African continent. Some African countries, such as Senegal and The Sudan, have actually incorporated and applied this definition in their jurisdictions¹²⁷, despite the need for creation of new group-based systems of screening procedures, in view of the inevitably large numbers of refugees that such

personal or professional nature which point to durable ties between a person and his residence.'; see also para. 56 of Explanatory Memorandum on 'habitual residence', ibid. at 27. N. Van Hear has claimed that the OAU Convention 'was not designed to cover large numbers of other people compelled to move, notably those displaced within their own countries - a vast number by the 1980s- and those migrants who were expelled en masse back to their own countries', in his op. cit. supra n. 113, at 23.

¹²⁷See Nobel, P., loc. cit. supra n. 113, at 267 et seq.; see also Plender, R., 'The present state of research carried out by the English-speaking Section of the Centre for Studies and Research', in Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law (ed.), The Right of Asylum, Dordrecht etc., Martinus Nijhoff Publishers, 1990, 63, at 68. See also Weis, P., loc. cit. supra n. 115, Arboleda, E., 'Refugee definitions in Africa and Latin America: The lessons of pragmatism', 3 IJRL (1991) 185, at 194-7, Diallo, I.B.Y., Les Réfugiés en Afrique: De la Conception à l'Application d'un Instrument Juridique de Protection, Wien, W. Braumüller, 1974, at 71, Staude, Ch., 'Besonderheiten des internationalen Flüchtlingsrechts im Bereich der Organisation für Afrikanische Einheit', in Geistlinger, M. et al. (Hrsg.), Flucht-Asyl-Migration, Regensburg, Transfer-Verlag, 1991, 77, at 84 et seq.

an application involves¹²⁸.

4.4. REFUGEEHOOD IN THE FRAMEWORK OF THE 1977 DRAFT CONVENTION ON TERRITORIAL ASYLUM

Following the 1967 Declaration on Territorial Asylum, adopted by the UN General Assembly¹²⁹, efforts were made both by intergovernmental and non-governmental organisations with a view to the conclusion of a binding international treaty on the same subject. The 1967 UN Declaration contained 'principles', in other words recommendations to the states of the international society with regard to their 'sovereign right' to grant asylum 'to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including

¹²⁸See 1979 UN/OAU Arusha Conference on the Situation of Refugees in Africa, Recommendation 2, in Eriksson, L.G., Melander, G., Nobel, P. (eds.), An Analysing Account of the Conference on the African Refugee Problem, Arusha, May 1979, Uppsala, The Scandinavian Institute of African Studies, 1981, at 48:

'[The Conference]....,

1. Recognises the definitions of the term "refugee" contained in Article I paragraphs 1 and 2 of the 1969 Refugee Convention as the basis for determining refugee status in Africa;...

4. Considers, however, that the application of such procedures might be impracticable in the case of large-scale movements of asylum-seekers in Africa, a matter which calls for the setting up of special arrangements for identifying refugees;...'; see also Melander, G., 'The concept of the term "refugee"', in Bramwell, A.C. (ed.), Refugees in the Age of Total War, London, Unwin Hyman, 1988, 7, at 11.

¹²⁹14 December 1967, Resolution 2312 (XXII), text in UNHCR (ed.), Collection of International Instruments Concerning Refugees, Geneva, UNHCR, 1990, 57. See also analysis of the 1967 Declaration in Weis, P., 'The United Nations Declaration on Territorial Asylum', VII Canadian Yearbook of International Law (1969) 92.

persons struggling against colonialism'¹³⁰. Draft texts of an international convention on territorial asylum were prepared and elaborated upon in 1971 and 1972, in an UN-sponsored Colloquium and an experts meeting respectively¹³¹. With the support of the UN General Assembly an International Conference of 92 states was convened in Geneva in order to agree upon a Convention on Territorial Asylum¹³². Even though the 1977

¹³⁰See Article 1.1 of the 1967 UN GA Declaration, and Weis, P., ibid. at 135-6. On territorial asylum see Grahl-Madsen, A., Territorial Asylum, Stockholm, Almqvist & Wiksell International, 1980, at 11 infra, Grahl-Madsen, A., 'Asylum, Territorial', 8 Encyclopedia of Public International Law (1985), 42, Grahl-Madsen, A., The Status of Refugees in International Law, vol.II, Leiden, A.W. Sijthoff, 1972, at 3 et seq., Bolesta-Koziebrodzki, L., Le Droit d'Asile, Leyden, A.W. Sijthoff, 1962, at 84 et seq., Kirchheimer, O., Political Justice, Princeton, N.J., Princeton University Press, 1961, at 351 et seq., Sinha, S.P., Asylum and International Law, The Hague, Martinus Nijhoff Publishers, 1971, Gusy, Ch., Asylrecht und Asylverfahren in der Bundesrepublik Deutschland, Königstein, Athenäum, 1980, at 30 et seq. See also Morgenstern, F., 'The right of asylum', 26 BYIL (1949) 327, Goodwin-Gill, G.S., International Law and the Movement of Persons Between States, Oxford, Clarendon Press, 1978, 145, Kaladharan Nayar, M.G., 'The right of asylum in international law: Its status and prospects', 17 Saint Louis University Law Journal (1972-73) 17, Gilbert, G.S., 'Right of asylum: A change of direction', 32 ICLQ (1983) 633. See also 80 ASIL Proceedings (1986) 95, 'International Law and the influx of Aliens: Sanctuary and the right to exclude', Doehring, K., 'Asylrecht und Staatsschutz', 26 ZaöRV (1966) 33, at 34-6, Hyndman, P., 'Asylum and non-refoulement-Are these obligations owed to refugees under international law?', 57 Philippine Law Journal (1982) 43 infra, Hyndman, P., 'Refugees under international law with a reference to the concept of asylum', 60 Australian Law Journal (1986) 148 infra, Weis, P., 'The present state of international law on territorial asylum', 31 Annuaire Suisse de Droit International (1975) 71 infra.

¹³¹For a detailed analysis of the 1977 Conference on the Draft Convention on Territorial Asylum see Leduc, F., 'L'asile territorial et Conférence des Nations Unies de Genève Janvier 1977', 23 AFDI (1977) 221.

¹³²See UNGA Resolutions 3272 (XXIX), 10 December 1974, and 3456 (XXX), 9 December 1975, in UNHCR (ed.), UN Resolutions and Decisions relating to the Office of the UNHCR, Geneva, 1989, at I-50-I-53. R. Plender argues that one of the

Conference was not successful, mainly due to its deficient political preparation¹³³, an important step forward was made with regard to the inclusion clause on asylees/refugees who would benefit from asylum according to the draft Convention's provisions. The fact that the basic objective of the Geneva Conference was the expansion of the internationally accepted aetiological framework of refugeehood provided for by the 1951/1967 Refugee Convention was made abundantly clear by Article 2 of the 1977 Draft Convention on Territorial Asylum¹³⁴. According to the basic inclusion clause of Article 2.1 of the Draft Convention, each state would be entitled to 'grant the benefits of this Convention to a person seeking asylum, if he, being faced with a definite possibility of: (a) Persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and apartheid, foreign occupation, alien domination and all forms of racism; or (b) Prosecution or punishment for reasons directly related to the persecution as set forth in (a); is unable or unwilling to return to [his country of origin]'.

objectives of the 1977 Conference was to 'rectify some of the shortcomings of the 1951 Convention and the 1967 Protocol', Plender, R., 'Admission of refugees: Draft Convention on Territorial Asylum', 15 San Diego Law Review (1977) 45, at 48 and 56.

¹³³See Jaeger, G., loc. cit. supra n. 56, at 100, Weis, P., 'The draft United Nations Convention on Territorial Asylum', 50 BYIL (1979) 151 at 169, Grahl-Madsen, A., Territorial Asylum, Stockholm, Almqvist & Wiksell International, 1980, at 61 et seq.

¹³⁴See UN Doc. A/CONF.78/12, 21 April 1977.

There are some noteworthy developments of the definition of refugee status, expressed in the above inclusion clause. First and foremost, the character of the above refugee definition is purely objective, excluding any element relating to the psychological status of the individual asylum seeker, expressed by the 'well-founded fear' of the 1951 Refugee Convention. The possibility, however, that refugee status might be determined by a state solely on the basis of objective evidence allowing no place for the individual refugee's psychological status might have detrimental effects upon the protection from which the refugee may eventually benefit¹³⁵. Even though the beginning of Article 2.1. ('Each Contracting State may grant the benefits of this Convention to a person seeking asylum, if he, being faced with a definite possibility of:') was adopted by a narrow majority¹³⁶, it constitutes a clear-cut expression of the states' intention to retain the upper hand in refugee status determination procedures, having the ability, or prerogative, to grant an asylum seeker protection on the basis of evidence that leaves aside essential personal characteristics of the latter¹³⁷. The second novel element of Article 2.1 is, nonetheless, the addition of three, at least nominally, more persecution grounds: colour, and national or ethnic origin. This amendment

¹³⁵See Weis, P., loc. cit. supra n. 133 at 162.

¹³⁶38 votes to 34, 15 abstentions, idem. It was the countries of the east bloc with some Asian, Arab and African countries that voted for the amendment, while the western and some Latin American states voted against, see Leduc, F., loc. cit. supra n.131, at 246.

¹³⁷See Leduc, F., loc. cit. supra n. 131, at 246.

was coupled with the addition of the phrase '[struggle against] foreign occupation, alien domination and all forms of racism'. Colonialism and apartheid had already been included as grounds of persecution in Article 1 of the 1967 UN Declaration on Territorial Asylum. Both these amendments were proposed mainly by Arab and African countries¹³⁸ whose voice was not strong enough on the international plane before 1960 to influence international conferences like those that had led to the 1951/1967 Refugee Convention. Kinship was a basis of persecution proposed by Australia and accepted as a new element of refugee persecution. Finally, the express acceptance by the 1977 Conference of the exception to the principle that prosecution is not equivalent to persecution was another novelty, as was also the case with the clear state admission of the fact that refugees, in a number of cases, are in fact persons persecuted on the basis of domestic legislation that violates internationally established human rights standards¹³⁹. On the other hand, it is worth noting that it was not proposed to the Conference the inclusion of the terms of the 1969 OAU Convention referring to 'external aggression' and 'events seriously disturbing public order'¹⁴⁰.

¹³⁸See Weis, P., loc. cit. supra n. 133, at 162, Leduc, F., loc. cit. supra n. 131, at 248.

¹³⁹See para. 59 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, UNHCR, 1979, at 16. See also Plender, R., loc. cit. supra n. 132, at 58.

¹⁴⁰See Zoller, E., 'Bilan de recherches de la Section de Langue Française du Centre d'Étude et de Recherche de l'Académie', in Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law (ed.), The Right of Asylum, Dordrecht etc., Martinus Nijhoff Publishers, 1990, 15 at 25.

Despite the breakdown of the 1977 Conference, the Draft Convention on Territorial Asylum represents today an advanced international instrument that has gone, in some points, beyond the classic 1951 framework of refugee status, and which has the potential to constitute a future internationally accepted prototype reflecting contemporary refugee situations.

4.5. VIEW OF REFUGEEHOOD UNDER THE 1966 PRINCIPLES OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE (AALCC)

In 1966 AALCC¹⁴¹, at their Eight Session in Bangkok, adopted the Principles Concerning Treatment of Refugees¹⁴². Using as basis the 1951 Refugee Convention, Article I of the Principles defines the term refugee as 'a person who, owing to persecution or well-founded fear of persecution for reasons of

¹⁴¹See Statutes of AALCC in Danusaputro, M., Asian-African Identity in World Affairs - Its Impact and Prospects for the Future, Bandung and Jakarta, AALCC, 1981, 200. On AALCC see also Yasseen, M.K., 'Le Comité Juridique Consultatif Africano-asiatique', 10 AFDI (1964) 653, Jahn, E., 'The work of the Asian-African Legal Consultative Committee on the legal status of refugees', 27 ZaöRV (1967) 122.

¹⁴²August 1966, text in UNHCR (ed.), Collection of International Instruments Concerning Refugees, Geneva, UNHCR, 1990, 201. On refugees in Asia, See Khan, D.J., 'The magnitude and complexity of contemporary refugee problem in Asian-African region: Humanitarian and legal response', in AALCC (ed.), AALCC-UNHCR Workshop on International Refugee and Humanitarian Law, New Delhi, 24-26 October 1991, New Delhi, AALCC 1991, 70, UNHCR Report, ibid. at 90. See also Alvarez, J.E., 'Refugees-UN meeting on refugees and displaced persons in South-East Asia, July 20-21, 1979', Note in 21 HarvILJ (1980) 290. See also Ramcharan, B.G., Humanitarian Good Offices in International Law, The Hague etc., Martinus Nijhoff Publishers, 1983, at 110-119, Shearer, I.A., 'International law and refugees in South-East Asia', in Institute of International Public Law and International Relations of Thessaloniki (ed.), op. cit. supra n. 112, at 425, Castles, S., Miller, M.J., The Age of Migration, London, Macmillan, 1993, at 163-5.

race, colour, religion, political belief or membership of a particular social group: (a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or, (b) being outside such State or Country, is unable or unwilling to return to it or to avail himself of its protection.'

The foregoing definition of refugeehood has no binding character, in view of the solely advisory role of AALCC. Each state member of the Committee is free to decide in which manner it wishes to apply the Principles¹⁴³. However, despite the lack of force of the 1966 Principles, their importance is not to be underestimated. Most of the state members of AALCC have not been parties to the basic 1951/1967 Refugee Convention. The fact that official delegations of these countries have agreed upon some fundamental principles on refugee protection, deriving, actually, from the above international Convention, constitutes a positive step towards recognition of internationally accepted standards, and inter-state harmonisation of rules relating to refugee protection.

One of the persecution grounds added to the refugee definition of AALCC has been 'colour' (substituting nationality) a word that was inserted later in the 1977 Draft Convention on Territorial Asylum. Even though the refugee definition of the Bangkok Principles is almost a replica of the 1951 refugee

¹⁴³See Jahn, E., loc. cit. supra n.141, at 127.

definition, and no reference is actually made to refugee-generating situations like armed conflict, foreign occupation or racism, some delegations expressed their will to extend refugee status to persons forced to flee from their country of origin in case of alien military aggression¹⁴⁴. On the other hand, two other members of AALCC, (former) Ceylon, and Japan, have interpreted 'persecution' in a wide and liberal fashion, so as to include any 'conduct [that] shocks the conscience of civilized nations'¹⁴⁵. Despite the serious difficulties that such a wide view of persecution may produce in practice, it is, nonetheless, of great interest the fact that some states have shown themselves willing to provide asylum seekers with an extended refugee definition and, thus, with greater protection than that provided for by the established legal refugee concept.

4.6. REFUGEEHOOD THROUGH THE PRISM OF THE 1984 CARTAGENA DECLARATION

In view of the crisis originating in serious human displacement in Central America, due to the long-lasting armed conflicts of that region, and the hundreds of thousands of forced migrants¹⁴⁶, an, inter alios, UNHCR-sponsored

¹⁴⁴See Note (ii) of Article I of the 1966 Bangkok Principles.

¹⁴⁵See Note (iii) of Article I of the 1966 Bangkok Principles.

¹⁴⁶See Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons, International Conference on Central American Refugees (CIREFCA), 31 May 1980, UN Doc. CIREFCA/89/14, 31 May 1989, text in 1 IJRL (1989) 582. See also EXCOM Conclusion No. 37

Colloquium on Central American refugees was convened in 1984 in Cartagena, Colombia¹⁴⁷. The subject matter of the Colloquium was the question of protection of refugees in Central America, Mexico, and Panama. The conference was concluded with the adoption by ten Latin American states of the Cartagena Declaration on Refugees¹⁴⁸. In the Cartagena Declaration was expressed the necessity, in the context of the Central American refugee situation, to enlarge the concept of refugeehood, 'in light of the characteristics of the existing situation in the region, the precedent of the OAU Convention (Article 1, paragraph 2) and the doctrines set forth in the reports of the Inter-American Commission on Human Rights.'¹⁴⁹ In consequence, the Central American states went on to state

(XXXVI) (1985) on Central American Refugees and the Cartagena Declaration, in UNHCR (ed.), Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Geneva, UNHCR, 1989, at 81. See also Gros Espiell, H. et al., 'Principles and criteria for the protection of and assistance to Central American refugees, returnees and displaced persons in Latin America', 2 IJRL (1990) 83, Arboleda, E., 'Refugee definition in Africa and Latin America: The lessons of pragmatism', 3 IJRL (1991) 185 at 200 et seq., Cuéllar, R. et al., 'Refugee and related developments in Latin America: Challenges ahead', 3 IJRL (1991) 482 infra.

¹⁴⁷See Miranda, C.O., 'Toward a broader definition of refugee: 20th century development trends', 20 California Western International Law Journal (1990) 315, at 323-4.

¹⁴⁸Adopted on 22 November 1984. See text in Organization of American States, Annual Report of the Inter-American Commission on Human Rights 1984-1985, Washington, D.C., OAS, 1985, OAS/Ser.L/V/II.66 doc. 10 rev. 1, at 179 et seq.

¹⁴⁹Ibid. at 180. See also 1994 Tunis OAU Declaration on the 1969 Refugee Convention, Assembly of Heads of State and Government, 13-15 June 1994, reproduced in 13 Refugee Survey Quarterly (1994) 167, at 168: 'We also take pride in the fact that the [1969 OAU] Convention has provided inspiration for legal developments elsewhere, such the Cartagena Declaration on Refugees in Latin America.'

that the definition or concept of refugee recommended for use in the region might, in addition to containing elements from the 1951 Convention and the 1967 Protocol, also consider as refugees those persons that have fled from their countries because their life, safety or liberty have been threatened by widespread violence, foreign aggression, domestic conflict, massive violation of human rights or other situations that have seriously disturbed public order.¹⁵⁰ Following its approval by the OAS General Assembly in 1985, the above refugee definition provides today a non-binding basis of the prevailing concept of refugeehood in Central America, reflecting, concurrently, the actual situation of refugee movements in that area¹⁵¹.

The Cartagena definition bears some common characteristics with the one contained in the 1969 OAU Refugee Convention. Firstly, they both regard their proposed definition as complementary to the classic 1951/1967 one, recognising, thus, the universality of the UN Refugee Convention and its Protocol. Secondly, both documents accept that foreign (external) aggression or events (situations) that seriously disturb public order may provide sound bases for refugee

¹⁵⁰ Idem.

¹⁵¹ See OAS General Assembly Resolution AG/RES.774 (XV-0/85) on Legal Status of Asylees, Refugees, and Displaced Persons in the American Hemisphere (December 9, 1985), in OAS, Annual Report of the Inter-American Commission on Human Rights 1985-1986, Washington, D.C., 1986, OEA/Ser.L/V/II.68 Doc.8 rev.1, September 26, 1986, at 14-15. See also Durieux, J.-F., 'Capturing the Central American refugee phenomenon: Refugee law-making in Mexico and Belize', 4 IJRL (1992) 301 infra.

status claims.

The refugee status-related element that clearly distinguishes the 1984 Cartagena definition from the 1969 OAU one is the former's proviso that in order for an individual to qualify for refugee status (s)he must have faced a threat against her/his life, safety or liberty. By contrast, the wording of the OAU supplementary definition -with a mere reference to compelling circumstances of exodus ('is compelled to leave')- has not included any such qualification, providing, thus, potentially a much wider protection to refugees under its cover. Also, the phrase 'massive violation of human rights' is one encountered for the first time in the Cartagena Declaration. The similar term 'gross violations of human rights' has been frequently used to describe human rights violations in Latin American states, some of which, like Argentina and Uruguay, have been scrutinised by the competent UN organs of the Resolution 1503 Procedure¹⁵². Even though

¹⁵²See Robertson, A.H., Merrills, J.G., Human Rights in the World, Third Edition, Manchester, New York, Manchester University Press, 1989, at 74-78, Tardu, M.E., 'United Nations response to gross violations of human rights: The 1503 Procedure', 20 Santa Clara Law Review (1980) 559, esp. at 582 et seq.. See also Quiroga Medina, C., The Battle of Human Rights Gross, Systematic Violations and the Inter-American System, Dordrecht, London, Martinus Nijhoff Publishers, 1988, at 16: 'Gross, systematic violations of human rights are those violations, instrumental to the achievement of governmental policies, perpetrated in such a quantity and in such a manner as to create a situation in which the rights to life, to personal integrity or to personal liberty of the population as a whole or of one or more sectors of the population of a country are continuously infringed or threatened...The definition allows those examining a situation of violations of human rights to give specificity to a number of elements. The question of how many victims are needed to constitute such a pattern, or how many rights or which rights must be affected

there has not been any internationally established definition of the term 'gross/massive violations of human rights', it has been employed and recognised as a contemporary form of cause of refugee exodus in international fora like the United Nations¹⁵³.

and in what manner, cannot be answered in terms of a general rule. The appraisal has to be made case by case, since the situation exists only when the aggregate of all the elements mentioned is present. The importance of each element will vary from instance to instance.'

¹⁵³See definition provided by C. Quiroga Medina, supra n. 152. Other similar terms have been: 'consistent pattern of gross violations [of human rights]', and 'serious and widespread violations of basic human rights', see UN GA, Note by the Secretary-General on International Co-operation to Avert New Flows of Refugees, UN Doc. A/41/324, 13 May 1986, at 11, para.35; UN ECOSOC, Analytical Report of the Secretary-General on Internally Displaced Persons, UN Doc.E/CN.4/1992/23, 14 February 1992 at 10 (para.37); UN ECOSOC, Study on Internally Displaced Persons by Mr. F.M. Deng, UN Doc. E/CN.4/1993/35, 21 January 1993, at 9 (para.25); UN ECOSOC Report on Refugees, Displaced Persons and Returnees, by Mr. J. Cuénod, UN Doc. E/1991/109/Add.1, 27 June 1991; Aga Khan, S., Study on Human Rights and Massive Exoduses, UN Doc. E/CN.4/1503, 31 December 1981, at 12-13. See also UN General Assembly, Resolution 35/124, 11 December 1980, in UN, Resolutions and Decisions adopted by the General Assembly during its 35th Session, UN, New York, 1981, 93, UNGA Resolution 43/154 on human rights and mass exoduses, 8 December 1988, UN Doc. HCR/INF.49/Add.2, December 1990, I-151, UNGA Resolution 44/164 on human rights and mass exoduses, 15 December 1989, ibid. at I-177, Note by the Secretary-General on the effects of gross violations of human rights on international peace and security, UN Doc.E/CN.4/Sub.2/1982/18, reprinted in Ramcharan, B.G., Humanitarian Good Offices in International Law, The Hague etc., Martinus Nijhoff Publishers, 1983, at 209. See also 78 ASIL Proceedings (1984) 339 'Human rights and the movement of persons', esp. at 342-6, Frelick, B., 'Refugees: Contemporary witnesses to genocide', in Fein, H. (ed.), Genocide Watch, New Haven, London, Yale University Press, 1992, 45, Van Hear, N., 'Mass expulsion of minorities: An overview', 6 Journal of Refugee Studies (1993) 274, Nanda, V.P., 'International law and the refugee challenge: Mass expulsion and internally displaced people', 28 Willamette Law Review (1992) 791, Gilbert, G., 'Tackling the causes of refugee flows', in Spencer, S. (ed.), Strangers & Citizens A Positive Approach to Migrants and Refugees, London, Rivers Oram Press, 1994, 18, at 24-26.

THE POST-1950 EVOLUTION OF THE INTERNATIONAL LEGAL CONCEPTUALISATION OF REFUGEEHOOD - CONCLUSION AND OVERVIEW

The post-1950 period of development of international refugee law constitutes a hallmark and, at the same time, one more serious transitional era of evolution of the legal refugee definition. It is through the 1950 UNHCR Statute, the 1951 Refugee Convention and the 1967 Refugee Protocol that a universal legal morphology of refugee status was created and established in international, legally binding instruments. No doubt, these treaties have been functional and have provided significant practical aid to states of permanent or temporary refuge, enabling them to grant asylum and to cope with the plight of individual 'human rights refugees' that prevailed on the scene of international political events after the Second World War¹⁵⁴. The 1951/1967 Refugee Convention has constituted

¹⁵⁴See Hathaway, J.C., loc. cit. supra n. 17, at 143 et seq., Johansson, R., 'The refugee experience in Europe after World War II: Some theoretical and empirical considerations', in Rystad, G. (ed.), The Uprooted Forced Migration as an International Problem in the Post-War Era, Lund, Lund University Press, 1990, 227, Jackson, I.C., 'The 1951 Convention relating to the Status of Refugees: A universal basis for protection', 3 IJRL (1991) 403, at 404-407, Kjaerum, M., 'Article 14', in Eide, A. et al. (eds.), The Universal Declaration of Human Rights: A Commentary, Oslo, Scandinavian University Press, 1992, 217, at 219, Martin, D.A., 'Reforming asylum adjudication: On navigating the coast of Bohemia', 138 University of Pennsylvania Law Review (1990) 1247, at 1253-7. See also Kaul, Ch., 'Bemerkungen zum Flüchtlingsbegriff der Genfer Flüchtlingskonvention', in Geistlinger, M. et al. (Hrsg.), Flucht-Asyl-Migration, Regensburg, Transfer-Verlag, 1991, 23, at 27-30, Kimminich, O., 'Probleme der Anpassung der Genfer Flüchtlingskonvention an gewandelte Verhältnisse', in Delbrück, J. et al. (Hrsg.), Recht im Dienst des Friedens Festschrift für E. Menzel, Berlin, Duncker & Humblot, 1975, 307, at 313. On 'human rights refugees' and 'humanitarian refugees' see Melander, G., 'The two refugee definitions', in International Institute of Humanitarian Law, Yearbook 1986-87, 141, at 143 et seq.. See also Ayling, D.C., Blay, S.K.N., 'Australia and international refugee law: An appraisal', 9

an excellent example of the post-World War II attention of states to the protection of the, especially civil and political, human rights of the individual from state overpowering and concomitant abuse of power inside the former's country of origin, as well as on the territory of foreign states. Indeed, the above Refugee Convention has been one of the law-making treaties-products of the UN system whose prime concern has been the protection of the individual from 'exemplary experiences of injustice'¹⁵⁵, that is, from the effects of state mechanisms whose excesses' detrimental effects over the unprotected individual had been more than evident during the first half of the 20th century¹⁵⁶. The

University of Tasmania Law Review (1989) 245, at 250-3, Coles, G.J.L., 'Les buts et les principes du droit des réfugiés', in Institut Français de Droit Humanitaire et des Droits de l'Homme (ed.) op. cit. supra n. 113, 17, at 26, Desbarats, J., 'Institutional and policy interactions among countries and refugee flows', in Kritz, M.M. et al. (eds.), International Migration Systems A Global Approach, Oxford, Clarendon Press, 1992, 279, at 295-8, Grahl-Madsen, A., 'Further development of international refugee law', 35 NTIR (1965) 159, at 160-162, Goodwin-Gill, G.S., 'Refugee or asylum: International law and the search for solutions to the refugee problem', in Adelman, H., Lanphier, C.M. (eds.), Refugee or Asylum? A Choice for Canada, Toronto, York Lanes Press, 1990, 27, at 28, Hathaway, J.C., 'Reconceiving refugee law as human rights protection', 4 Journal of Refugee Studies (1991) 113, at 114-5.

¹⁵⁵See Brugger, W., 'Menschenrechte von Flüchtlingen in universalistischer und kommunitaristischer Sicht', 80 Archiv für Rechts- und Sozialphilosophie (1994) 318, at 318-20.

¹⁵⁶See Krenz, F.E., 'The refugee as a subject of international law', 15 ICLQ (1966) 90 at 92, Sieghart, P., The International Law of Human Rights, Oxford, Clarendon Press, 1983, at 14 et seq., Brownlie, I., Principles of Public International Law, 4th edition, Oxford, Clarendon Press, 1990, at 564 et seq., Detter, I., The Concept of International Law, 2nd edition, Stockholm, Norstedts Juridik, 1993, at 47-9, Lauterpacht, H., International Law and Human Rights, London, Stevens & Sons Ltd., 1950, at 31 et seq., Daes, E.-I.A., Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at

focus on individual -in contradistinction to group- protection in the framework of post-1945 international law has been evident also in cases where states have endeavoured to provide protection to minorities, like those of an ethnic, religious or linguistic character. Even there, emphasis has been placed on the 'persons belonging to such minorities', and not on the minorities as groups¹⁵⁷. Undoubtedly, violations of (individual) civil and political rights have been intertwined with the causes of refugee exodus¹⁵⁸. As shown above, these

National, Regional and International Levels, New York, UN, 1992, at 53 et seq.

¹⁵⁷See Article 27 of the International Covenant on Civil and Political Rights, adopted by UN General Assembly on 16 December 1966, 1496th Plenary Meeting. See also Dechênes, J., Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1985/31, 14 May 1985, at 9, Capotorti, F., Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, New York, UN, 1979, at 35-36, Thornberry, P., International Law and the Rights of Minorities, Oxford, Clarendon Press, 1991, at 173-4, Tomuschat, Ch., 'Protection of minorities under Article 27 of the the International Covenant on Civil and Political Rights', in Bernhardt, R. et al. (Hrsg.), Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte, Festschrift für H. Mosler, Berlin etc., Springer-Verlag, 1983, 949 at 954, Shaw, M.N., 'The definition of minorities in international law', in Dinstein, Y., Tabor, M. (eds.), The Protection of Minorities and Human Rights, Dordrecht etc., Martinus Nijhoff Publishers, 1992, 1, at 22-23, Ramaga, P.V., 'The group concept in minority protection', 15 HRQ (1993) 575, at 582 et seq. See also UN General Assembly Resolution and Declaration on the Rights of Persons Belonging to National, or Ethnic, Religious and Linguistic Minorities, 18 December 1992, UN Doc. A/RES/47/135, 3 February 1993.

¹⁵⁸See Statement on Refugees and Human Rights by former UNHCR T. Stoltenberg to the 46th Session of the UN Commission on Human Rights, 22 February 1990, text in 2 IJRL (1990) 274. See also Garvey, J.I., loc. cit. supra n. 99, at 486-9, Coles, G.J.L., 'The human rights approach to the solution of the refugee problem: A theoretical and practical enquiry', in Nash, A.E. (ed.), Human Rights and the Protection of Refugees under International Law, Halifax, Canadian Human Rights Foundation, The Institute for Research on Public Policy, 1988, 195. See also 70 ASIL Proceedings (1976) 58, 'Refugees: A new

were the human rights that the states of the West expressly wished to protect in the 1950s through the 1951 Refugee Convention. The notion of 'well-founded fear of persecution' on the grounds of race, religion, nationality, political opinion or membership in a particular social group has provided a sound basis for serving that objective. No doubt, the protection of the civil and political rights of refugees

dimension in international human rights', Amnesty International USA, Reasonable Fear Human Rights and US Refugee Policy, New York, AIUSA, March 1990, at 4-5, Beyer, G.A., 'Monitoring root causes of refugee flows and early warning: The need for substance', IJRL Special Issue, September 1990, 71, at 73, Coles, G., 'Approaching the refugee problem today', in Loescher, G., Monahan, L. (eds.), Refugees and International Relations, Oxford, Clarendon Press, 1990, 373, at 391, Coles, G.J.L., 'Refugees and human rights', in UN Bulletin of Human Rights 91/1, New York, UN, 1992, 63, Feliciano, F.P., 'International humanitarian law and coerced movements of peoples across state boundaries', 9 AYIL (1985) 113, at 144 et seq., Ghoshal, A., Crowley, T.M., 'Refugees and immigrants: A human rights dilemma', 5 HRQ (1983) 327, at 328-330. See also Gunning, I.R., 'Expanding the international definition of refugee: A multicultural view', 13 Fordham International Law Journal (1989-90) 35, at 71-2, Gibney, M.P., 'Foreign policy: Ideological and human rights factors', 4 Journal of Policy History (1992) 36, at 37, Gibney, M. et al. 'USA refugee policy: A human rights analysis update', 5 Journal of Refugee Studies (1992) 33, Goodwin-Gill, G.S., 'International law and human rights: Trends concerning international migrants and refugees', 23 IMR (1989) 526, at 526-8, Hayes, S.E., Human Rights and Refugees in the Western Hemisphere: A Case for Regional International Protection, MA Thesis, University of Oregon, 1982, at 117 et seq., Moussalli, M., 'Refugees: A continuing challenge for humanity For a realistic approach in asylum policy', International Institute of Humanitarian Law, Yearbook 1989-90, 187, Miranda, C.O., 'Toward a broader definition of refugee: 20th century development trends', 20 California Western International Law Journal (1990) 315, at 315-7, Martin, D.A., 'The refugee concept: On definitions, politics, and the careful use of a scarce resource', in Adelman, H. (ed.), Refugee Policy Canada and the United States, Toronto, York Lanes Press, 1991, 30, at 30-34, Nobel, P., 'Blurred vision in the rich world and violations of human rights-a critical assessment of the human rights and refugee linkage', UN Bulletin of Human Rights, 91/1, New York, UN, 1992, 74, Ogata, S., 'The right to remain', Refugees, no. 92, April 1993, at 11.

are still today a valid basis for granting territorial asylum, in view of the unabated violations of that set of rights by governments throughout the world. Consequently, the basic UN treaties of international refugee law are still of great importance and value for refugee victims of violations of first generation, in principle, human rights¹⁵⁹.

However, the 1951/1967 Refugee Convention started to become rusty and outdated from the early 1960s when the metamorphosis of the international refugee movements commenced. The current 'jet age' of refugee flows¹⁶⁰, and the situations of large scale refugee influxes¹⁶¹ have presented the states with novel forms of refugeehood unforeseen a few decades ago. Humanitarian law refugees', that is, forced migrants who flee their

¹⁵⁹See Melander, G., loc. cit. supra n. 154, at 143. See also Howland, T., 'A comparative analysis of the changing definition of a refugee', 5 New York Law School Journal of Human Rights (1987) 33, at 39-42.

¹⁶⁰See Den Hond, M., 'Jet-age refugees': In search of balance and cooperation', in Martin, D.A. (ed.), The New Asylum Seekers: Refugee Law in the 1980s, Dordrecht etc., Martinus Nijhoff Publishers, 1988, 49. See also Nanda, V.P., 'Refugee law and policy', in Nanda, V.P. (ed.), Refugee Law and Policy, New York etc., Greenwood Press, 1989, 3, Smyser, W.R., Refugees Extended Exile, New York etc., Praeger, 1987, at 92 et seq., Coles, G.J.L., 'Changing perspectives of refugee law and policy', in Gowlland, V., Samson, K., (eds.), Problems and Prospects of Refugee Law, Geneva, The Graduate Institute of International Studies, 1992, 31, at 31-37, Martin, D.A. loc. cit. supra n. 158.

¹⁶¹See EXCOM Conclusion No. 22 (XXXII) (1981) on Protection of Asylum Seekers in Situations of Large-Scale Influx, UNHCR Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Geneva, UNHCR, 1989, at 48.

countries of origin escaping from armed conflicts¹⁶², constitute the majority of the Third World victims of contemporary forced migration. While these people may be granted, in a number of cases, de facto refugee status in countries of asylum, or be provided with material assistance

¹⁶²See Loescher, G., Refugee Movements and International Security, Adelphi Papers 268, London, Brassey's, 1992, at 28 et seq., Meissner, D., 'Managing migrations', Foreign Policy, no. 86, 1992, at 66 infra, Melander, G., loc. cit. supra n. 154, at 145 et seq., Oeter, S., 'Flüchtlinge aus Bürgerkriegssituationen - ein ungelöstes Problem des Asylrechts', 47 ZaöRV (1987) 559 infra, Plattner, D., 'The protection of displaced persons in non-international armed conflicts', 32 International Review of the Red Cross (1992) 567, Comité International de la Croix-Rouge, Executive Committee Working Group on Solutions and Protection, 'Persons displaced within their own countries as a result of armed conflict or disturbances', Geneva, March 1991, Parker, K., 'The rights of refugees under international humanitarian law', in Nanda, V.P. (ed.), Refugee Law and Policy, New York etc., Greenwood Press, 1989, 33 infra, Perrakis, S., 'Refugee protection during international armed conflicts', in his (ed.), The International Humanitarian Law Applicable in Armed Conflicts (in Greek), Athens, Komotini, Sakkoulas, 1989, at 121 infra, Perluss, D., Hartman, J.F., 'Temporary refuge: emergence of a customary norm', 26 VaJIL (1986) 551 infra, Levinson, D., 'Ethnic conflict and refugees', Refugees no. 93, August 1993, 4-9, Suhrke, A., 'A crisis diminished: Refugees in the developing world', 48 International Journal (1993), 215, at 226 et seq., Von Sternberg, M.R., 'Political asylum and the law of internal armed conflict: Refugee status, human rights and humanitarian law concerns', 5 IJRL (1993) 153, Van Hear, N., 'Forced migration and the Gulf conflict, 1990-1991', 3 The Oxford International Review (1991) 17. See also Fragomen, A.T., 'The refugee: A problem of definition', 3 Case Western Reserve Journal of International Law (1970) 45, at 64-5, Gilbert, G., loc. cit. supra n. 153, at 19-23, 27-31, Gallagher, D., 'The evolution of the international refugee system', 23 IMR (1989) 579, at 584 et seq., Heyman, M.G., 'Redefining refugee: A proposal for relief for the victims of civil strife', 24 San Diego Law Review (1987) 449, Lewis, C.E., 'Dealing with the problem of internally displaced persons', 6 Georgetown Immigration Law Journal (1992) 693, at 699-102, Kälin, W., 'Refugees and civil war: Only a matter of interpretation?', 3 IJRL (1991) 435 infra; see also Gordenker, L., Refugees in International Politics, London, Sydney, Croom Helm, 1987, at 62 et seq., Hakovirta, H., Third World Conflicts and Refugeeism, Helsinki, Finnish Society of Sciences and Letters, 1986, at 15-18, 63 et seq.

by the UNHCR, they are not, nonetheless, expressly covered by any internationally accepted (intercontinental) treaty. Individual persecution and subsequent alienage through exodus from the country of origin are still the main, principal criteria of refugee status established in international refugee law, precepts with which collided the 1969 OAU Refugee Convention¹⁶³. This has been a regional refugee protection instrument that broke an entirely new ground and was tentatively followed by the 1977 UN Draft Convention on Territorial Asylum. The OAU Convention managed to establish at a regional level the thesis that the genesis of refugeehood is not always dependant on the wilful individual persecution carried out by state, or quasi-state, forces, but that, moreover, other factors directly related to the limbo status of states in disarray, de facto unable to protect their citizens, may and do come into play in refugee-producing situations. These are events that deprive individuals of, inter alia, social rights, as basic as those rights expressly protected in 'developed' states, and which also have the potential to produce massive refugee flows. This major shift from the individual persecution paradigm has had as a consequence the recognition at a regional level of the group character that contemporary refugee persecution may take on. This shift is reminiscent of the post-World War I international legal efforts of refugee protection on an ad hoc ethnic origin-group basis. Nevertheless, it constitutes a completely

¹⁶³See Shacknove, A.E., 'Who is a refugee?', 95 Ethics (1985) 274.

different type of recognition of refugeehood, since it bears no limitations of an ad hoc ethnic origin character, and recognises a new set of refugee flight causes. The breakthrough of the African Refugee Convention has gained the recognition of Asian and American states, as well as of UN organs¹⁶⁴, providing therefore evidence of the fact that refugeehood in contemporary international law may be successfully adapted to changing socio-political contexts, at least (or exclusively) at a regional level. However, this has not proved enough for a legally binding internationalisation of the extended aetiological framework of the refugee concept, which would inexorably have as a consequence the creation of a much wider range of state duties towards forced migrants. This was clearly shown by the deadlock in which the 1977 UN Conference on Territorial Asylum resulted, the current state inertia vis-à-vis any liberalisation of the international legal conceptualisation of refugeehood, and especially the restrictive immigration and asylum measures taken by 'developed' countries of 'the North' like those of the European Union¹⁶⁵. As a consequence, the prospects of any

¹⁶⁴See EXCOM Conclusion No. 22 (XXXII) (1981) on Protection of Asylum Seekers in Situations of Large-Scale Influx, in UNHCR op. cit. supra n. 161, at 48.

¹⁶⁵See Belgium-France-FRG-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at their Common Borders, and Convention Applying the Agreement, 30 ILM (1991) 68, Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, 30 ILM (1991) 425. On these conventions see Meijers, H. et al. (eds.), Schengen internationalisation of central chapters of the law on aliens, refugees, privacy, security and the police, 2nd edition, Leiden, Stichting NJCM-Boekerij, 1992, Weckel, P., 'La Convention Additionnelle à l'Accord de Schengen', 95 RGDIP (1991) 405,

further inter-state co-operation and subsequent advance

UNHCR, 'Dublin and Schengen Conventions: UNHCR's Position', Memorandum, UNHCR, 16 August 1991, UNHCR Branch Office for Belgium, Luxembourg and the European Institutions, 'Ratification Process of Schengen UNHCR's position, concerns and recommendations', Brussels, 15 February 1992. See also, inter alia, Collinson, S., Beyond Borders: West European Migration Policy Towards the 21st Century, London, Royal Institute of International Affairs, 1993, at 35 et seq., Fernhout, R., Meijers, H., 'Asylum', in Terlouw, A. et al. (eds.), A New Immigration Law for Europe?, Utrecht, Dutch Centre for Immigrants, 1993, at 8, Hailbronner, K., 'Perspectives of a harmonization of the law of asylum after the Maastricht Summit', 29 Common Market Law Review (1992) 917, Marx, R., 'Anforderungen an ein europäisches Asylrecht', 25 Kritische Justiz (1992) 405. See also Martin, D.A., 'Asylum seekers in the western democracies: A comparative overview', in Kälin, W. (ed.), Droit des Réfugiés, Fribourg, Editions Universitaires Fribourg, 1991, 11, Hathaway, J.C., 'The emerging politics of non-entrée', Refugees no. 91, December 1992, 40, d'Oliveira, H.U.J., 'Fortress Europe and (extra-communitarian) refugees: Cooperation in sealing off the external borders', in Schermers, H.G. et al. (eds.), Free Movement of Persons in Europe, T.M.C. Asser Instituut, Dordrecht etc., Martinus Nijhoff Publishers, 1993, 166 infra, Korte-van Hemel, V., 'Die Notwendigkeit der Angleichung asylrechtlicher Bestimmungen in der Europäischen Gemeinschaft', in Knoche, M. (Hrsg.), Binnenmarkt '92 Innere Sicherheit und Asylrecht im Europa ohne Grenzen, Koblenz, Görres-Verlag, 1990, 83, Giannoulis, Ch., Die Idee des "Europa der Bürger" und ihre Bedeutung für den Grundrechtsschutz, Europa-Institut, Universität des Saarlandes, 1992, at 39-47, Rudge, P., 'The asylum dilemma-crisis in the modern world: A European perspective', 4 Journal of Policy History (1992) 93, Dacyl, J.W., A Shift in the Existing Paradigm? The Fall of Communism, the Harmonization of the European Refugee Policy and the Dynamics of the Early Post-Cold War Refugee Problem: Selected Dimensions, University of Stockholm, Political Science Dept., 1991. See also Gurtov, M., 'Refugees in the post-cold war era', 28 Willamette Law Review (1992) 849, Henderson, D., 'International migration: Appraising current policies', 70 International Affairs (1994) 93, Höfling, B., 'Überlegungen zu aktuellen Fluchtbewegungen und deren Beurteilung', 44 Politische Studien (1993) 29, Langer, S., 'Asylrecht - ein strukturelles Verfassungsproblem der Staatengemeinschaft?', 46 Die Öffentliche Verwaltung (1993) 273, Pfaff, V., 'Flucht und Einwanderung Die Nation im Umgang mit Fremden', 25 Kritische Justiz (1992) 129, at 143-6. See also Refugees, March 1991, 'European Community: New directions in refugee policy', 13 et seq., Fullerton, M., 'Restricting the flow of asylum-seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights', 29 VaJIL (1988) at 33 infra.

towards an internationally binding recognition of the 1969 OAU proposal, and, accordingly, of the currently real forms of refugeeism, seem indeed bleak in the 1990s¹⁶⁶.

However, this does not mean that individuals in real need of effective protection from persecution may necessarily remain outside of the protective zone of the internationally established and functioning 1951/1967 legal refugee concept. The refugee definition, and especially the notion of persecution, of the 1951/1967 Refugee Convention has been drafted, as demonstrated in the following chapters, in a manner that does not actually preempt a legal interpretation (application) that would cover individuals originating in countries where, e.g. large-scale human rights violations, or internal armed conflicts, unforeseen in the late 1940s, take place. Even though an individualised persecution on the five established political, lato sensu, grounds is a prerequisite of the above Convention, this may not be viewed as a factor that impedes the provision of protection, through the Convention's prism of refugeehood, to persons whose life and/or liberty is really at stake in their countries of origin. In the final analysis, a liberal application of the 1951/1967 Refugee Convention has been, as noted earlier, the express wish of this instrument's drafting states themselves.

¹⁶⁶See European Consultation on Refugees and Exiles, Nécessité d'Une Définition Complémentaire du Concept de Réfugié, Avril 1993, Aleinikoff, T.A., 'The Refugee Convention at forty: Reflections on the IJRL Colloquium', 3 IJRL (1991) 617, at 624, Dirks, G.E., 'International migration in the nineties: causes and consequences', 48 International Journal (1993) 191, at 206 et seq.

Consequently, what is the crux of the matter in legal practice is not a formal expansion of the Convention refugee concept, but this concept's actual interpretation by the competent national asylum-adjudicating organs in a manner that would enable the above, inherently flexible as will be demonstrated, concept to provide protection to threatened individuals who come from factual frameworks which could not be foretold in 1950, but who are worthy of protection nowadays, due to the gravity of their situation. Our thesis is that the serious challenge and task of refugee protection lies in such cases in an imaginative, but bona fide and, above all, legally principled, interpretation of the established legal concept of refugeehood by national courts and tribunals. These are the organs whose interpretational praxis, under the aforementioned conditions, may constitute the sole instrument that would enable a revitalising and up-to-date substantive application of the above concept. This is the question that will be dealt with theoretically and practically, with a focus on European jurisprudence, in the following chapters.

CHAPTER II

REFUGEEHOOD AS A DEFINITION IN INTERNATIONAL LAW AND THE ROLE OF ITS INTERPRETATION IN DOMESTIC FORA

SECTION 1. REFUGEEHOOD VIEWED FROM THE ANGLE OF AN INTERNATIONAL LEGAL DEFINITION

Defining is an intellectual enterprise that is needed to draw lines between subjects of a particular intellectual investigation¹. Thus, it constitutes a working facilitator for the most, if not all, the fields of human knowledge. John Rawls has described the definitional enterprise as one that consists of 'assigning to each kind of thing a set of properties by which instances of that kind are to be assessed, namely, the properties which it is rational to want in things of that kind'². Defining is therefore a process through which men attempt to 'rationalise the real'³, or the unreal, and put it in a convenient framework of language usage⁴ in favour of their own work/life context. From this viewpoint, definitions

¹See Hart, H.L.A., The Concept of Law, Oxford, Clarendon Press, 1961, at 13.

²See Rawls, J., A Theory of Justice, Oxford, Clarendon Press, 1972 at 406.

³See Castoriadis, C., 'Intellectuals and History', Salmagundi, No. 80, Fall 1988, 161, at 163. See also Salmon, J.J.A., 'Le procédé de la fiction en droit international public', in Perelman, Ch., Fofiers, P. (eds.), Les Présomptions et les Fictions en Droit, Bruxelles, Bruylant, 1974, 114, at 114-6.

⁴See von Savigny, E., Grundkurs im wissenschaftlichen Definieren, München, Deutscher Taschenbuch Verlag, 1970, at 25, and 30; see also von Savigny, E., Zum Begriff der Sprache, Stuttgart, Philipp Reclam jun., 1983, at 17 et seq.; see also Wittgenstein, L., Philosophical Investigations, Oxford, Basil Blackwell, 1953 at 20, paragraph 43: 'For a large class of cases...the meaning of a word is its use in the language.'

may be regarded as artificial, given that their basic aim is the establishment of intellectual boundaries of things or phenomena through the manuals of mind and words. Consequently, a definition in general may never be regarded as an expression, or depiction, of the one and only 'truth' of the things or social phenomena under consideration⁵. The fact that different definitions are actually used for the conventional use of a concept, a thing, or a word, constitutes irrefutable evidence of the artificiality and fictional character of any definitional attempt⁶.

There are three major categories of definitions established in analytical philosophy and jurisprudence: first, the real definition which corresponds to the need to define 'things', secondly the nominal definition referring to the defining process of 'signs', that is, words, and finally the conceptual, Kantian, type of definition that aims at the presentation of the 'complete, original concept of a thing

⁵See Williams, G.L., 'Language and the Law', 61 Law Quarterly Review (1945) 71, at 388; see also Williams, G.L., 'International law and the controversy concerning the word "Law"', 22 BYIL (1945) 146, Gallie, W.B., 'Essentially contested concepts', Proceedings of the Aristotelian Society, 1955-56, 167, at 168.

⁶See Ogden, C.K., Richards, I.A., The Meaning of Meaning, London, Routledge and Kegan Paul Ltd., 1949 (Tenth edition), at 111: '...all definitions are essentially ad hoc. They are relevant to some purpose or situation, and consequently are applicable only over a restricted field or 'universe of discourse'.'; see also Locke, J., An Essay Concerning Human Understanding, Oxford, Clarendon Press, 1975, at 408, paragraph 8, Ross, A., 'Tû-Tû', 70 Harvard Law Review (1957) 812, at 813.

within the limits of its concept'⁷. Another name of the conceptual type of a definition has been, in German, 'semantische Definition', viz. 'semantic definition'⁸ which has consequently been divided into two sub-categories. The first one is the analytical-semantic definition, the function of which is to analyse and establish the order that is already employed for a concept in the use of the language. The second sub-category has been described as a synthetic-semantic definition, which actually adds a new meaning to a concept in the framework of the language, thus creating a new use of language ('ein neue Sprachgebrauch')⁹.

Law provides a particularly sui generis scope of definitional exercises in view, firstly, of the normative function of the legal framework within a national or international societal boundary¹⁰ and, secondly, or consequently, of the stipulative nature of any legal definitional expression. The basic

⁷See Robinson, R., Definition, Oxford, Clarendon Press, 1950, at 7-9.

⁸See Wank, R., Die Juristische Begriffsbildung, München, C.H. Beck'sche Verlagsbuchhandlung, 1985, at 62-63. See also Marugg, M., Völkerrechtliche Definitionen des Ausdruckes "Flüchtling", Basel, Frankfurt a.M., Helbing & Lichtenhahn, 1990, at 7.

⁹Idem.

¹⁰See Hart, H.L.A., 'Definition and theory in Jurisprudence', in his Essays in Jurisprudence and Philosophy, Oxford, Clarendon Press, 1983, at 21. See also Ellul, J., 'Sur l'artificialité du droit et le droit d'exception', 3 Archives de Philosophie du Droit (1963) 21, at 21-23, Carbonnier, J., 'Les notions à contenu variable dans le Droit Français de la Famille', in Perelman, Ch., Vander Elst, R. (eds.), Les Notions à Contenu Variable en Droit, Bruxelles, Bruylant, 1984, at 99.

functions of the general language have been described as either descriptive or prescriptive¹¹. Legal language may be regarded as serving a prescriptive function in the majority of cases, engendering and controlling the application of commands which in a domestic legal framework have the potential to basically regulate national legal relations, while on the international plane the interests and subjects under control transcend national boundaries. Legal, stipulative, definitions represent the apotheosis of the fictional function of a definitional enterprise. What, in fact, happens in the legal area is not only the legal determination of the meaning, e.g. of a word or of a concept, but the coercive determination of the one and only manner in which a word, or set of words, or concepts, ought to be used under certain factual circumstances¹². Law thus becomes the main source through which language is equated, in effect, with a mechanism of

¹¹See Ross, A., 'Tû-Tû', 70 Harvard Law Review (1957) 812, at 813, Kelly, D., 'Legal concepts, logical functions and statements of fact', 3 University of Tasmania Law Review (1968-70) 43.

¹²See Robinson, R., Definition, Oxford, Clarendon Press, 1950, at 59, 62-63, Hart, H.L.A., op. cit. supra n. 1, at 6, Cotterrell, R., The Sociology of Law An Introduction, London, Butterworths, 1984, at 259 et seq. See also Cahin, G., 'Apport du concept de mythification aux méthodes d'analyse du droit international', in Mélanges Offerts à Charles Chaumont, Paris, Pedone, 1984, 89, at 93. See also de Sousa Santos, B., 'Droit: une carte de la lecture déformée Pour une conception post-moderne du droit', Droit et Société, Nos. 8-10 (1988) 363 at 365, Van Hoecke, M., 'Définitions légales et interprétation de la loi', Droit et Société, Nos. 8-10 (1988) 93 at 94, 98. See also Foriers, P., 'Présomptions et fictions', in Perleman, Ch., Foriers, P. (eds.), Les Présomptions et les Fictions en Droit, Bruxelles, Bruylant, 1974, 7, Bayart, A., 'Peut-on éliminer les fictions du discours juridique?', ibid. at 27.

social control¹³. As a consequence, in many cases legal definitions actually constitute synthetic-semantic definitions, since their aim and function are usually to impose and establish a certain new view/prism of a particular concept in the legal domain.

Even though legal definitions, usually, not only assert but also lay down and command, this is not at all to say that definitions in the framework of national or international law distance themselves from the real world, or that the sphere of the application of legal definitions is a utopian area of legal fiction. All legal definitions possess an instrumentalist nature, in the sense that they are 'designed to further certain purposes'¹⁴. As argued by M.D. Bayles, the purpose of the instrumentalist approach to legal definitions, in the domestic legal sphere, should be a 'justifiable legal system' with 'various constraints and rules for construing terms in different contexts'¹⁵. In other words, any exercise of a legal definitional attempt should have as its basis, or justification, the preservation of the 'rule of law', in the sense of the principled preservation of the interests of the

¹³See Williams, G.L., 'Language and the law', 61 Law Quarterly Review (1945) 71.

¹⁴See Bayles, M.D., 'Definitions in law', in Fetzer, J.H. et al. (eds.), Definitions and Definability: Philosophical Perspectives, Dordrecht etc., Kluwer, 1991, 253 at 256.

¹⁵Ibid. at 263.

general human society or, in some cases, of a human community¹⁶. Nevertheless, it may not be a matter of dispute that through this kind of stipulative definitional exercise there is always the possibility of evolution and a consequent development of the basic concept that formed the subject of the definition¹⁷. Legal definitions in particular constitute one of the categories of definitions most receptive of such evolutionary processes. Given the fact that law, both domestic and international, is by nature of a dynamic character, being continuously subject to societal changes and needs¹⁸ to which it should be always in a position to respond effectively, the actual manner in which law views these developments and, accordingly, reacts is of great importance. Legal definitions, that is to say, legal prisms of viewing, observing and

¹⁶On the 'rule of law' see Cotterrell, R., op. cit. supra n. 12 at 168-171. On the 'rule of law' based on the 'rights' conception and not the rule-book one see Dworkin, R., Political Judges and the Rule of Law, Proceedings of the British Academy, London, Volume LXIV (1978), Oxford, Oxford University Press, 1980, at 262, Morin, J.-Y., 'The rule of law and the Rechtsstaat concept: A comparison', in McWhinney, E. et al. (eds.), Federalism-in-the-Making, Dordrecht etc., Kluwer, 1992, 60 infra. See also Dekkers, R., 'Le fait et le droit-Problèmes qu'ils posent', in Centre National de Recherches de Logique (Travaux de), Le Fait et le Droit, Bruxelles, Bruylant, 1961, 7, at 13. See also Marburger, P., 'Technische Begriffe und Rechtsbegriffe', in Rüthers, B., Stern, K. (Hrsg.), Freiheit und Verantwortung im Verfassungsstaat Festgabe zum 10jährigen Jubiläum der Gesellschaft für Rechtspolitik, München, C.H. Beck'sche Verlagsbuchhandlung, 1984, 275, at 278 infra.

¹⁷See Robinson, R., op. cit. supra n. 12 at 66-68.

¹⁸See Cotterrell, R., loc. cit. supra n. 12, at 53-54. See also Ellul, J., 'Sur l'artificialité du droit et le droit d'exception', 3 Archives de Philosophie du Droit (1963) 21, at 22, 23, Carbonnier, J., loc. cit. supra n. 10 at 99. See also MacCormick, N., 'On reasonableness', in Perelman, Ch., Vander Elst, R. (eds.), Les Notions à Contenu Variable en Droit, Bruxelles, Bruylant, 1984, 131, at 144 et seq.

responding to continuously evolving societal circumstances and requirements are consequently to be subjected to concomitant alterations and improvements.

One of the best methods used in legal science for this kind of development of the legal framework in an evolving societal context has been the creation and establishment of legal notions, including definitions, which deliberately contain, mainly with the aim of obtaining the necessary wide consensus, a high degree of vagueness, porousness ('Porosität'): notions of a variable content ('notions à contenu variable'), that have indeed pervaded the legal conceptual cosmos since its very inception¹⁹. It is exactly this vagueness that has provided the basis for the evolution of legal notions through the 'discretionary power' and 'sovereign judgment'²⁰ of judicial or quasi-judicial organs in the course of interpretation, that is to say, application of legal concepts²¹. It is in the course of interpretational efforts

¹⁹See Wank, R., op. cit. supra n. 8 at 44-45, Wabnitz, R.J., Politische Fragen, Rechtsfragen und Sachfragen, Frankfurt a.M. etc., Peter Lang, 1980, at 42-51. See also Legros, R., 'Les notions à contenu variable en droit pénal', in Perelman, Ch., Vander Elst, R. (eds.), ibid., 21, at 36. See also Murphy, W.F., Elements of Judicial Strategy, Chicago, London, The University of Chicago Press, 1964, at 14.

²⁰See Rials, S., 'Les standards, notions critiques du droit', in Perelman, Ch., Vander Elst, R. (eds.), ibid., 39, at 40.

²¹Ibid. at 45 et seq.. See also Ghestin, J., 'L'ordre public, notion à contenu variable, en droit privé français', in Perelman, Ch., Vander Elst, R. (eds.), ibid. at 76 et seq., Perrin, J.-F., 'Comment le juge suisse détermine-t-il les notions juridiques à contenu variable?', ibid. at 201.

that the force and 'historical and sociological potential'²² of legal notions or definitions with a high degree of vagueness, or porousness, are actually judged, no matter whether they belong to domestic or international law.

Legal concepts have, accordingly, an inherently Janus-faced character. They may not only serve the general aim of law, i.e. the preservation, or even conservation, of the functioning of a society with the least possible perturbations, but they may, moreover, play a significant 'revolutionary' role²³, in the sense of adapting existing legal contexts to new societal data and developments. The above prima facie contradiction of legal conceptualisation is to be regarded as a real inherent advantageous force, given that it is a unique element that may provide the actual springboard for evolution and adjustment of the letter of law to novel societal facts and needs²⁴. However, this inherent potential of legal conceptualisation has not been always used by the principal forces in legal conceptual exercises, be they states in international law, or the executive power of a state

²²See Chaumont, Ch., 'L'ambivalence des concepts essentiels du droit international', in Makarczyk, J. (ed.), Essays in International Law in honour of Judge Manfred Lachs, The Hague etc., Martinus Nijhoff Publishers, 1984, 55, at 56: '...un concept ne tire pas de force de son caractère obligatoire..., ce qui dans certains cas n'a pas de sens; il la tire de ses implications, de son potentiel historique et sociologique.'

²³Ibid. at 57.

²⁴See Salmon, J.J.A., 'Les notions à contenu variable en droit international public', in Perelman, Ch., Vander Elst, R. (eds.), Les Notions à Contenu Variable en Droit, Bruxelles, Bruylant, 1984, 251, at 253-4.

in a national legal framework. One of the most important reasons for that reluctance or even refusal to adjust legal concepts of a domestic or of an international status to the factual developments to which they have the potential to respond has been the factor 'ideology', according to which certain states act at a national or at an international level²⁵. If by 'ideology' one actually means the national state interests that dictate action or reaction by a state or a group of states to socio-political developments, it becomes clear that any potential adaptability of legal concepts or fictions are, in fact, subject to the sovereign discretion of states. It is actually only states that have the prerogative, in a national context, or on the international plane par excellence, to recognise or to refuse to recognise de iure, through domestic legislation or international agreements/treaties accordingly, socio-political alterations and new factual data. In such cases, states usually not only prefer, for the sake of their own convenience, to act hypocritically, but moreover they actually opt for living in their own secluded, surrealistic, world of interests, 'recognising [in effect] the unreal'²⁶, or semi-recognising the real.

²⁵See Salmon, J.J.A., 'Le procédé de la fiction en droit international public', in Perelman, Ch., Fofiers, P. (eds.), Les Présomptions et les Fictions en Droit, Bruxelles, Bruylant, 1974, 114, at 128 et seq.; see also Chaumont, Ch., 'Méthode d'analyse du droit international', 11 RBDI (1975) 32, at 33, and 36-7.

²⁶Idem; see also Salmon, J.J.A., 'Le fait dans l'application du droit international', 175 (II) Recueil des Cours (1982), 257, at 285-294. See also Cahin, G., 'Apport du concept de mythification aux méthodes d'analyse du droit international', in Mélanges Offerts à Charles Chaumont, Paris, Pedone, 1984, 89, at 104-7. See also Carty, A., The Decay of

As seen in the previous Chapter, inter-state efforts for the establishment and dissemination of a legal refugee definition have played a crucial role in the international refugee protection process throughout this century. Categorising forced migrants on a selective international legal basis, according to the emergency or strength of their needs has been necessary not only because of the 'otherness'²⁷ of such people in need of protection following their flight from persecution or violence: drawing up conceptual (definitional) lines and, consequently, barriers has been necessary because recognition by states of refugeehood is tantamount to state recognition of a specific person's exceptional state of emergency, and of the latter's concomitant need to be provided with a special legal status, involving rights and duties on a national, sovereign, in principle, territory²⁸.

International Law?, Manchester, Manchester University Press, 1986, at 20-1, and 129-130; Georgiev, D., 'Politics or rule of law: Deconstruction and legitimacy in international law', 4 European Journal of International Law (1993) 1, at 3: 'Defined broadly as distant from state practice or total independence from politics, the concept of the rule of law would be possible under a 'naturalist' but not under a 'social' conception of the rule of law. If law is man-made and artificial then, of course, it is permeated by politics, which is involved at least in its making. To define the rule of law under the 'social conception' of law as 'distance' and 'independence' from politics would actually involve a contradiction in terms.', see also ibid. at 11-14.

²⁷See Warner, D., 'We are all refugees', 4 IJRL (1992) 365 at 367.

²⁸See Zolberg, A.R., Suhrke, A., Aguayo, S., Escape from Violence, New York, Oxford, Oxford University Press, 1989, at 3-4, Martin, D.A., 'The refugee concept: On definitions, politics, and the careful use of a scarce resource', in Adelman, H. (ed.), Refugee Policy Canada and the United States, Toronto, York Lanes Press, 1991, 30 at 31, 34-37. See also Skran, C.M., The International Refugee Regime and the Refugee Problem in Interwar Europe, D.Phil. Thesis, Magdalen

Defining refugeehood in legal terms, internationally or nationally, viewed from the historical perspective of the twentieth century, has actually been a process of a synthetic-stipulative definition in which states have participated either internationally in groups, or individually at a national legislative level. Refugeehood in international law, through the various treaties and agreements of the twentieth century, is a legal definition which, as seen in the first chapter, has provided in the course of this century new prescriptive intellectual prisms to the international society through which states should view, examine and deal with the question of refugee protection, and especially the concept of refugeehood, internationally and/or domestically.

One of the fundamental characteristics of the established international legal refugee definition has been, as for all legal definitions of a general nature (synthetic-semantic definitions), a certain vagueness of its terminology, especially since the UNRRA and IRO express introduction of the basic notion of persecution in their legal refugee conceptualisation²⁹. It is generally accepted in refugee law literature that the refugee definitional porousness,

College Oxford, 1989, at 17. See also Shimada, Y., 'The concept of the political refugee in international law', 19 JAIL (1975) 24, Miranda, C.O., 'Toward a broader definition of refugee: 20th century development trends', 20 California Western International Law Journal (1990) 315, Kaul, Ch., 'Bemerkungen zum Flüchtlingsbegriff der Genfer Flüchtlingskonvention', in Geistlinger, M. et al. (Hrsg.), Flucht-Asyl-Migration, Regensburg, Transfer-Verlag, 1991, 23, at 27-30.

²⁹See supra Chapter I, Section 3.

especially of the notion of persecution, was kept on purpose by the drafting state members of the 1951/1967 Refugee Convention, thus establishing a refugee definition which is 'prudently dubious'³⁰. Porousness has, nonetheless, encircled other constitutive elements of the above Convention refugee concept as well, like 'membership of a particular social group'. This is a fact that has established the international refugee definition as a really nebulous one³¹, but with many potential advantages of elasticity and adjustment to circumstances unforeseeable at the age of its drafting. The second fundamental characteristic of the legal refugee definition's creation in the course of this century has thus been the latter's natural openness to new geopolitical developments, as well as its malleability by state members of the international society, continuously from the end of the Great War until 1967, when the Refugee Protocol was signed in New York. From that year on, however, as noted in Chapter I, states of the industrialised or former Western world have refused to live up, de iure, to the new demands presented by

³⁰See Bettati, M., L'Asile Politique en Question, Paris, Presses Universitaires de France, 1985, at 79 et seq., where the author actually categorises the legal refugee definition as one of the 'définitions prudemment incertaines'. See also Grahl-Madsen, A., The Status of Refugees in International Law, vol. I, Leyden, A.W. Sijthoff, 1966, at 188 et seq., Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 38 et seq., Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 102-5. See also Beijer, G., 'Modern patterns of international migratory movements', in Jackson, J.A. (ed.), Migration, Cambridge, Cambridge University Press, 1969, 11, at 17.

³¹See Veiter, Th., 'Begriffe und Definitionen zum Flüchtlingsrecht', 21 Association for the Study of the World Refugee Problem Bulletin (1983) 118, at 118-9. See also infra Chapter XI.

the de facto metamorphosis of refugeeism.

Despite the positive and dynamic developments from 1969 onwards on the African continent and in the Americas³², the actual lack of a contemporary inter-continental treaty recognising the current forms and causes of refugee exodus has been a reflection of the predominant state-centric ideology in the international society, whose members' pragmatic interests have made it to refuse to recognise, in effect, the reality of the modern world, and to accept de iure the novel post-1960 form of forced migration. This novel character of refugeeism has been represented by the 'refugee-victim' of 'societal or international violence'³³ that has constituted the primary cause of exodus on the contemporary geopolitical scene. In contrast to the 'refugee-activist' (persecuted on ideological grounds) and the 'refugee-target' (persecuted on the ground of her/his belonging to a particular social circle/group)³⁴ the refugee-victim type of forced migration has not gained any internationally state-binding legal recognition, even though it constitutes the major contemporary form of refugeehood. The states' refusal to accept more responsibilities out of the

³²See supra Chapter I at Section 4.3 infra.

³³See Zolberg, A., Suhrke, A., Aguayo, S., Escape from Violence, New York, Oxford, Oxford University Press, 1989, at 29-33. The sociological definition of contemporary refugees provided by the above scholars, based on both ethical and realistic considerations, has been the following: 'persons whose presence abroad is attributable to a well-founded fear of violence, as might be established by impartial experts with adequate information', ibid. at 33. See also Shacknove, A.E., 'Who is a refugee?', 95 Ethics (1985) 274 at 275 et seq.

³⁴Zolberg, A., Suhrke, A., Aguayo, S., idem.

contemporary reality of refugeeism, as we saw in the previous chapter, and the concomitant requirements of refugee protection has thus resulted in the predominance of legal formalism on the international plane, existing and functioning to a great extent in many cases, in domestic judicial fora, in a factual vacuum³⁵.

However, this does not mean that the internationally established refugee definition of the 1951/1967 Refugee Convention, used directly or indirectly by all three European states targeted by the present thesis, is unable to function, in the framework of the modern morphology of refugeeism, beneficially to individual 'refugee-victims' in need of vital protection, in accordance with the Convention's spirit and the express liberal application prescription of its drafters³⁶.

³⁵See Arboleda, E., Hoy, I., 'The Convention refugee definition in the West: Disharmony of interpretation and application', 5 IJRL (1993) 66, at 83-85. See also Chimni, B.S., 'The meaning of words and the role of UNHCR in voluntary repatriation', 5 IJRL (1993) 442, at 443, Goodwin-Gill, G.S., 'Who is a refugee?', in Netherlands Institute of Human Rights (SIM) (ed.), Report of the International Conference Refugees in the World: The European Community's Response, The Hague 7-8 December 1989, SIM Special no.10, Utrecht, 53, at 59-60, Feller, E., 'Who is a refugee?', ibid., 63 at 64-65. See also Muntarhorn, V., 'Determinations of the status of refugees: Definition in context', in UNHCR, UNESCO, UNU, Symposium on the Promotion, Dissemination and Teaching of Fundamental Human Rights of Refugees (Tokyo, 7-11 December, 1981) Collected Proceedings, Geneva, UNHCR, 1982, 83 infra, Jaeger, G., 'The definition of "refugee": Restrictive versus expanding trends' in US Committee for Refugees, 1983 World Refugee Survey, 5 at 9. See also Hailbronner, K., 'Der Flüchtlingsbegriff der Genfer Flüchtlingskonvention und die Rechtsstellung von De-facto-Flüchtlingen', 13 ZAR (1993) 3, at 3-5.

³⁶See recommendation E. of the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 UNTS 137, at 148: 'THE CONFERENCE

The strong point of the Convention refugeehood has been, in fact, its definitional porousness. The core of the above definition, the notion of 'persecution', constitutes indeed, as already noted and as demonstrated later in the present thesis³⁷, a paradigmatic example of conceptual vagueness. However, the difficulty of the Convention refugeehood's conceptual delimitation provides, at the same time, the appropriate ground for an application, through the interpretation process in domestic judicial fora, that has enabled the Convention definition to function after more than forty years since its conception. In many cases this definitional particularity has also enabled judicial fora to effectively cope with the plight of individual refugees whose factual background was unforeseen by the Convention drafters but which deserves, nonetheless, legal coverage by reason of its gravity. However, any such judicial interpretational effort should be carried out in a principled manner. Given the treaty origin of the 1951/1967 refugee definition, it is submitted that the most appropriate legal mould for any such ruled interpretation is currently provided by the interpretational legally binding rules laid down by the 1969 Vienna Convention on the Law of Treaties. The role and potentials of this Convention, almost completely underrated,

EXPRESSES the hope that the [1951 Refugee] Convention...will have value as an example exceeding its contractual nature and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.'

³⁷See infra Chapter V.

or even ignored, in the modern domestic judicial praxis of asylum adjudication, are examined in the next Section.

SECTION 2. INTERPRETATION OF THE LEGAL NOTION OF REFUGEEHOOD BY COURTS, WITH SPECIAL REFERENCE TO THE CONTEXT OF THE LAW OF TREATIES

2.1. TREATIES AND THE 1951/1967 REFUGEE CONVENTION: ROLES AND PERFORMANCES.

Treaties have played a crucial role in the development of international law and international relations, thus constituting one of the major current sources of international law. Article 38 para. 1(a) of the Statute of the International Court of Justice (ICJ) has recognised expressis verbis the special status of the 'international conventions, whether general or particular' on the international legal plane³⁸. A general definition of a 'treaty' has been provided by the 1969 Vienna Convention on Treaties. In the words of Article 2 para.

³⁸11 ILM (1972) 899; see also Preamble to the Vienna Convention on the Law of Treaties, 8 ILM (1969) 679, 1155 UNTS 331, Villiger, M.E., Customary International Law and Treaties, Dordrecht etc., Martinus Nijhoff Publishers, 1985, at 149 et seq., Schwarzenberger, G., The Frontiers of International Law, London, Stevens & Sons Ltd., 1962, at 36. On the law of treaties see McNair, A., The Law of Treaties, Oxford, Clarendon Press, 1961, Brierly, J.L., The Law of Nations, Oxford, Clarendon Press, 1963, Sixth Edition, at 317 et seq., Brownlie, I., Principles of Public International Law, Oxford, Clarendon Press, 1990, Fourth Edition, at 603 et seq., Ott, D.H., Public International Law in the Modern World, London, Pitman, 1987, at 190 et seq., Harris, D.J., Cases and Materials on International Law, London, Sweet & Maxwell, 1991, Fourth Edition, at 729 et seq., Cassesse, A., International Law in a Divided World, Oxford, Clarendon Press, 1986, at 185 et seq., Chen, L.-C., An Introduction to Contemporary International Law, New Haven, London, Yale University Press, 1989, at 264 et seq., Detter, I., The Concept of International Law, Stockholm, Norstedts Juridik, 1993, Second Edition, at 82 et seq.

1(a) of this Convention, treaty is 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. There are four general categories of international agreements³⁹: 'Constitutive or organic international agreements', relating to the constitutions of international organisations; 'law-making, or legislative treaties' that lay down world-wide norms binding upon states; 'contractual agreements' between two or more states, regulating a limited area of their relations, thus creating 'shared expectations or commitments'; and finally 'dispositive agreements' that refer to 'exchange[s] in relatively consummated transactions...such as treaties of lease or cession and boundary treaties'⁴⁰.

Of special relevance to the present work is the second category of treaties, that of the law-making, or legislative treaties. The characteristic element of such treaties is the coincidence of the will of various states upon a central question of general concern. They represent the evolutionary status of modern international law, since they constitute the product of inter-state co-operation whose aims are agreed upon and adopted by a, usually large, number of the state members

³⁹The term 'international agreement' is used here interchangeably with the term 'treaty'.

⁴⁰See Chen, L.-C., ibid. at 265-6.

of the international society⁴¹. To this category of treaties belongs the 1951/1967 Refugee Convention. It is an international agreement which, firstly, does not seek to regulate inter-state but state-individual relations. Its aim has been to place under control the legal status of a particularly disadvantaged category of individuals/aliens who fall into the 1951 refugee definition⁴². However, the second and most striking characteristic of the Refugee Convention is that it does not constitute an agreement whose main purpose is to benefit the states parties but, on the contrary, to impose on them a general obligation of effective protection⁴³ (particularly through the non-refoulement prescription) vis-à-vis refugees in need of such protection, once they are outside of their home territory and jurisdiction. The Refugee Convention thus constitutes, in the final analysis, a human rights treaty given that the principal rights and entitlements enshrined in its corpus aim at the protection of individuals'

⁴¹McNair, A., 'The functions and differing legal character of treaties', 11 BYIL (1930) 100, at 105: '...the modern multilateral law-making treaty...is merely the Vereinbarung [Agreement, as opposed to Vertrag (Contract) where the aims of each of the parties are different] raised to a higher power. The many contracting parties concur in the purpose of creating identical rules binding upon all of them.'; on the Vereinbarung/Vertrag categorisation of treaties see Lauterpacht, H., Private Law Sources and Analogies in International Law, London, Longmans, Green and Co. Ltd., 1927, at 158-9.

⁴²See Lillich, R.B., The Human Rights of Aliens in Contemporary International Law, Manchester, Manchester University Press, 1984, at 62 et seq.. See also Walzer, M., Spheres of Justice, Oxford, Blackwell, 1983, at 48-51.

⁴³See Goodwin-Gill, G.S., 'Implementation of treaties: Obligations of conduct and result under the 1951 Convention Relating to the Status of Refugees', unpublished report, Geneva, UNHCR, 1982.

and not states' interests⁴⁴. It represents, indeed, one of the most striking examples of post-1945 inter-state treaty co-operation, aiming at the effective protection of, inter alia, the life and liberty of a particular category of individuals, a protection that, as in most human rights protection frameworks, materialises through binding international legislation in the form of a convention⁴⁵. As shown in Chapter I, the 1951/1967 Refugee Convention has been a product not only of strictly political state considerations of the cold war period, but also of human rights sensitivity and awareness on the part of the international society, represented mainly by Western states in the aftermath of World War II⁴⁶. As the

⁴⁴On the nature of human rights treaties see European Commission of Human Rights, Report in Golder Case, Series B, Vol. 16 (1973-1975), at 40, para. 57. See also Dimitrijevic, V., 'The monitoring of human rights and the prevention of human rights through reporting procedures', in Bloed, A. et al. (eds.), Monitoring Human Rights in Europe, Dordrecht etc., Martinus Nijhoff Publishers, 1993, 1, Bernhardt, R., 'Thoughts on the interpretation of human-rights treaties', in Matscher, F., Petzold, H. (eds.), Protecting Human Rights: The European Dimension Studies in Honour of G.J. Wiarda, Köln etc., Carl Heymanns Verlag KG, 1988, 65, at 66, Schermers, H.G., 'Rights-giving treaties: Higher law?', in Mélanges Offerts à Pierre-Henri Teitgen, Paris, Pedone, 1984, at 503 infra. See also Kälin, W., Grundriss des Asylverfahrens, Basel, Frankfurt a.M., Helbing & Lichtenhahn, 1990, at 5-9.

⁴⁵See Sieghart, P., The International Law of Human Rights, Oxford, Clarendon Press, 1983, 14-17, Sohn, L.B., 'The new international law: Protection of the rights of individuals rather than States', 32 American University Law Review (1982) 1, at 11 et seq. See also Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, 140 et seq., Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, 6-10, Köfner, G., Nicolaus, P., Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Mainz, München, Grünewald/Kaiser, 1986, Band 1, 137 et seq.

⁴⁶See Grahl-Madsen, A., 'Identifying the world's refugees', Annals of the American Academy of Political and Social Science, (467), May 1983, 11, at 13; see also Friedmann, W., 'The changing dimensions of international law',

Convention's Preamble indicates, one of the legal foundations of the treaty is the UN Charter and the entrenched principle therein of enjoyment by all human beings of 'fundamental rights and freedoms without discrimination'. From this general premise of international human rights protection emanates the special concern for the plight and for the effective protection of refugees, a premise that is 'social and humanitarian' in nature⁴⁷. This human right aim of the Refugee Convention is stressed by the meticulous stipulation of the party states' duties towards refugees, once they are accepted on national territory, such as those regarding civil rights (e.g. Article 4 on freedom of religion), and socio-economic rights of refugees in countries of asylum (e.g. Article 13 on the right to property, Articles 17-19 on refugees' employment rights). These rights, though, culminate in the hard-core provision of Article 33 which proscribes the refugee's expulsion or forcible return in any manner whatsoever by a state to territory where the former's life or freedom would be

62 Columbia Law Review (1962) 1147, at 1148.

⁴⁷See Preamble of the 1951 Refugee Convention; see also Schwelb, E., 'The law of treaties and human rights', in Reisman, W.M., Weston, B.H. (eds.), Toward World Order and Human Dignity, New York, The Free Press, 1976, 262, at 265: 'Now it is a well-established rule of interpretation that every word and part of a treaty is presumed to have a meaning and to produce some legal effect. It is the normal function of a preamble to provide an expression of the objects of a treaty.' See also Jackson, I., 'The 1951 Convention Relating to the Status of Refugees: A universal basis for protection', 3 IJRL (1991) 403, Goodwin-Gill, G.S., 'The language of protection', 1 IJRL (1989) 6, at 14, Blay, S.K.N., Tsamenyi, B.M., 'Reservations and declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', 2 IJRL (1990) 527, at 528.

endangered⁴⁸.

The legal concept of refugeehood is thus entrenched and, at the same time, delimited ratione personae, in a Convention that encapsulates, inter alia, state obligations erga omnes, 'towards the international community as a whole', given the fact that at least some of these obligations correspond to 'basic rights of the human person'⁴⁹. In Reservations to the Convention on Genocide, Advisory Opinion⁵⁰, ICJ linked the

⁴⁸On the principle of non-refoulement in international and refugee law see, inter alia, Stenberg, G., Non-Expulsion and Non-Refoulement, Uppsala, Iustus Förlag, 1989, esp. at 245 et seq., Hailbronner, K., 'Nonrefoulement and "humanitarian" refugees: Customary law or wishful legal thinking?', in Martin, D.A. (ed.), The New Asylum Seekers: Refugee Law in the 1980s, Dordrecht etc., Martinus Nijhoff Publishers, 1988, 123, Goodwin-Gill, G.S., 'Nonrefoulement and the new asylum seekers', ibid. at 103, Gornig, G.-H., Das Refoulement-Verbot im Völkerrecht, Wien, W. Braumüller, 1987, Kälin, W., Das Prinzip des Non-Refoulement, Bern, Frankfurt a.M., Peter Lang, 1982. See also infra n. 64.

⁴⁹See Barcelona Traction, Light and Power Co. Ltd., Judgment, ICJ Reports 1970, p. 3, at 32, paras. 33, 34. On this dictum as well as on the fading split-categorisation in international law between 'basic', or 'fundamental' human rights, and, simply, 'human rights', see Meron, T., Human Rights Law-Making in the United Nations, Oxford, Clarendon Press, 1986, at 173-202, esp. at 189, Weil, P., 'Towards relative normativity in international law?', 77 AJIL (1983) 413, at 432, Rodley, N.S., 'Human rights and humanitarian intervention: The case law of the World Court', 38 ICLQ (1989) 321. See also Suy, E., 'Droit des traités et droits de l'homme', in Bernhardt, R. et al. (Hrsg.), Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte Festschrift für H. Mosler, Berlin etc., Springer-Verlag, 1983, 935 at 935-9. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16, at 57, para. 131, United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p. 3, at 42, para. 91.

⁵⁰ICJ Reports 1951, p. 15; Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UNTS 277.

Genocide Convention with three basic characteristics: firstly, its 'humanitarian and civilizing purpose'⁵¹; secondly, the lack, on the part of the states, of any interest of their own in concluding that international agreement⁵²; lastly, that the object and purpose of the Convention as well as its moral and humanitarian principles had as a consequence the opening of the treaty to the participation of 'as many States as possible'⁵³. Judge Alvarez in his Dissenting Opinion in the same case⁵⁴ categorised the Convention on Genocide as a 'multilateral convention of a special character', part of those conventions that seek to 'regulate matters of a social or humanitarian interest with a view to improving the position of individuals'⁵⁵. The above judge stressed that such conventions reflect 'the new orientation of the legal conscience of the nations'. The fact that the majority of the states have been parties to such a convention should, as a consequence, have a binding effect even upon states that have not 'expressly accepted them'⁵⁶. The far-sighted, long-term significance of these humanitarian, lato sensu, treaties was made more than clear by the same jurist when he asserted that they 'must be interpreted without regard to the past, and only

⁵¹ICJ Reports 1951 at 23.

⁵²Idem.

⁵³Ibid. at 24.

⁵⁴Ibid. at 49 et seq.

⁵⁵Ibid. at 51.

⁵⁶Ibid. at 52.

with regard to the future'⁵⁷. The above remarks are transferable and adaptable to the 1951/1967 Refugee Convention, on the ground that, even though not of the same calibre, it bears many similarities to the aforementioned Convention. First, both belong to the same genus of treaties, those that purport to protect fundamental individual and/or social rights. Secondly, both treaties have a strong 'humanitarian and civilizing purpose' regarding the effective protection and welfare of individuals persecuted on their homeland territory where they usually constitute minorities of an, inter alia, ethnic, racial, or religious character. Article II of the 1948 Genocide Convention, when defining genocide, refers to intentional destruction 'in whole, or in part, [of] a national, ethnical, racial or religious group'. The five established grounds for persecution in the UN Refugee Convention are race, religion, nationality, political opinion, or membership of a particular social group. Finally, both treaties have been signed by the overwhelming majority of the state members of the international society, a fact with the inherent potential to provide an international treaty with elements of a customary international law character; this potential has the ability to transform the contracting states' opinio obligationis conventionalis to an opinio iuris generalis⁵⁸.

⁵⁷Ibid. at 53.

⁵⁸See Cheng, B., 'On the nature and sources of international law', in his (ed.), International Law: Teaching and Practice, London, Stevens & Sons, 1982, 203, at 229. In North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3, ICJ stated that (p. 42, para. 73): '...it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention

International agreements in the context of contemporary international law have thus contributed, to a large extent, to the formation and development of customary international law⁵⁹. The International Court of Justice in Continental Shelf (Libya/Malta) made it abundantly clear that multilateral conventions are in a position to 'have an important role to play in recording and defining rules deriving from customs, or indeed in developing them'⁶⁰. This is particularly the case with many 'humanitarian treaties' regarding the law of armed conflicts⁶¹. The UN Refugee Convention is a humanitarian, lato sensu, treaty, since one of its objects is arguably the protection and elevation of the concept of human dignity to a normative status⁶². Even though it may hardly be claimed that the provisions of the above Convention, in general, constitute norms of customary international law, that is, 'evidence of a general practice accepted as law'⁶³, there is one central

might suffice of itself, [for the creation of a customary international legal norm] provided it included that of States whose interests were specially affected.'. See also Sohn, L.B., 'Generally accepted' international rules', 61 Washington Law Review (1986) 1073, at 1077-8, Baxter, R.R., 'Multilateral treaties as evidence of customary international law', 41 BYIL (1965-66), 275 at 285, Villiger, M.E., op. cit. supra n. 38, at 159. See also Meron, Th., Human Rights and Humanitarian Norms as Customary Law, Oxford, Clarendon Press, 1989, at 79 et seq.

⁵⁹See Schwarzenberger, G., The Inductive Approach to International Law, London, Stevens & Sons, 1965, at 34.

⁶⁰Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985, p.13, at 29-30, para. 27.

⁶¹See Baxter, R.R., loc. cit. supra n. 58, at 280 et seq.

⁶²See Schachter, O., 'Human dignity as a normative concept', 77 AJIL (1983) 848 infra.

⁶³See ICJ Statute, Article 38 para. 1(b).

provision that is regarded by a large part of the contemporary refugee law doctrine as a customary international legal norm: Article 33 para. 1 on non-refoulement⁶⁴. It is this provision, as well as the internationally recognised and applied legal concept of refugeehood of the first Article that have endowed the 1951/1967 UN Refugee Convention with an extraordinary character and place among contemporary treaties. The Convention's origins, aim, content, appeal to and application by the vast majority of states confer upon its provisions a

⁶⁴See Goodwin-Gill, G.S., The Principle of Non-Refoulement: Its Standing and Scope in International Law, (unpublished) Study prepared for the UNHCR Division of International Protection, July 1993, at 26 et seq., Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 97-100, his, loc. cit. supra n. 48, Stenberg, G., op. cit. supra n. 48 at 266-80, Kälin, W., Grundriss des Asylverfahrens, Basel, Frankfurt a.M., Helbing & Lichtenhahn, 1990, at 211, Feliciano, F.P., 'The principle of non-refoulement: A note on international legal protection of refugees and displaced persons', 57 Philippine Law Journal (1982) 598, Feliciano, F.P., 'International humanitarian law and coerced movements of peoples across state boundaries', 9 AYIL (1985) 113, at 120, Perluss, D., Hartman, J.F., 'Temporary refuge: Emergence of a customary norm', 26 VaJIL (1986) 551, at 599-600, Sexton, R.C., 'Political refugees, nonrefoulement and state practice: A comparative study', 18 Vanderbilt Journal of Transnational Law (1985) 731, at 797-804, Coles, G.J.L., 'Temporary refuge and the large scale influx of refugees', 8 AYIL (1984) 189, at 195, UNHCR, 'The Haitian Interdiction Case 1993 Brief amicus curiae', 6 IJRL (1994) 85, at 95-6; see also UNHCR EXCOM Conclusion No. 25 (XXXIII) (1982) in UNHCR, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Geneva, UNHCR, 1989, at 57. Contra: Hailbronner, K., loc. cit. supra n. 48, Gornig, G.-H., op. cit. supra n. 48, at 45 et seq.; see also US Supreme Court Opinion in Sale v. Haitian Centres Council, June 21, 1993, in 32 ILM (1993) 1039, at 1057, German Federal Administrative Court, judgment of 22 March 1994, 9 C 443.93, 47 Die Öffentliche Verwaltung (1994) at 740. For an intermediate stance, see Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 24-27, and Hyndman, P., 'Asylum and non-refoulement-Are these obligations owed to refugees under international law?', 57 Philippine Law Journal (1982) 43, at 59 et seq.

sui generis universal legal status with long-range ramifications as far as their actual application and/or interpretation in international and domestic fora is concerned.

2.2. THE ROLE OF INTERPRETATION IN LAW

No legal text exists in a state of inertia. The purpose of every law, be it in the form of an act or a treaty, is to regulate certain relations among individuals, or states, or among individuals and states. The application, consequently, of a legal normative provision becomes inevitable, bringing along with it the necessity of interpretation by competent administrative or judicial organs⁶⁵.

Interpretation, or construction⁶⁶, viz. the attempt to make a text or a concept clear, to elucidate them in a contemporary factual context, and its role in the development of law have always been of great importance to legal theory and practice. The importance and difficulty of the interpretational process lie first and foremost in the nature of the words as linguistic tools of communication. The non-existence of a clear-cut, one and only, 'meaning of a word', given that words/concepts exist always in a given, e.g. scientific or legal, context, has been the first step of man's mind towards the recognition and acknowledgment of the fact that a word may

⁶⁵See Salmon, J.J.A., 'Le fait dans l'application du droit international', 175 (II) Recueil des Cours (1982) 257, at 343.

⁶⁶See Walker, D.M., The Oxford Companion to Law, Oxford, Clarendon Press, 1980, at 644.

acquire various meanings, depending on who provides the meaning, and for which purpose⁶⁷. Secondly, words provided in a legal context, in general, are subject to application/interpretation under circumstances provided by a specific case before a specific interpreting organ. As stressed by C.P. Curtis, words in such cases are 'simply delegations to others of authority to give them meaning by applying them to particular things or occasions'⁶⁸.

Consequently, what a legal interpretation is able to engender may never be the meaning of a word, or a group of words, but

⁶⁷See Locke, J., An Essay Concerning Human Understanding, Oxford, Clarendon Press, 1975, at 408, para. 8: 'Words by long and familiar use...come to excite in Men certain Ideas, so constantly and readily, that they are apt to suppose a natural connexion between them. But that they signify only Men's peculiar Ideas, and that by a perfectly arbitrary Imposition, is evident, in that they often fail to excite in others (even that use the same language) the same Ideas, we take them to be the Sign of: And every Man has so inviolable a Liberty, to make Words stand for what Ideas he pleases...'; see also Taylor, Ch., Philosophy and the Human Sciences, Cambridge etc., Cambridge University Press, 1985, at 22: 'Things only have meaning in a field, that is, in relation to the meanings of other things. This means that there is no such thing as a single, unrelated meaningful element...'. See also Williams, G.L., 'Language and the law', 61 Law Quarterly Review (1945) 71, at 384 et seq., Curtis, C.P., 'A better theory of legal interpretation', 3 Vanderbilt Law Review (1950) 407, at 409-410, Frankfurter, F., 'Some reflections on the reading of statutes', 47 Columbia Law Review (1947) 527, at 529, Hilf, M., Die Auslegung Mehrsprachigen Verträge, Berlin etc., Springer-Verlag, 1973, at 21, Weis, J.L., 'Jurisprudence by Webster's: The role of the dictionary in legal thought', 39 Mercer Law Review (1988) 961, at 973. See also Koskenniemi, M., From Apology to Utopia, The Structure of International Legal Argument, Helsinki, Lakimiesliiton Kustannus, 1989, at 471-6.

⁶⁸See Curtis, C.P., ibid. at 425.

only their boundary⁶⁹. It is exactly this boundary that limits interpreters of a legal instrument, thus prescribing the 'vital space' within which they may act and produce legal effects and new legal frameworks⁷⁰. However, this space of action may, concurrently, play a liberal, progressive role allowing for the existence of a creative relationship ('demiurgische Beziehung')⁷¹ between legal text and interpreter. It is exactly that inherent potential multiplicity of readings of the legal language⁷² that may allow the individual interpreter to undertake a dynamic role in the course of the legal interpretation process, and to respond promptly and constructively to new needs or demands in

⁶⁹Ibid. at 426; see also Dworkin, R., Law's Empire, London, Fontana Press, 1986, at 50-51, Kelsen, H., Pure Theory of Law, Translation: M. Knight, Berkeley etc., University of California Press, 1970, at 351.

⁷⁰See Twining, W., Miers, D., How to Do Things with Rules, London, Weidenfeld and Nicolson, 1991, at 173-4, Kalinowski, G., 'Philosophie et logique de l'interprétation en droit', 17 Archives de Philosophie du Droit (1972) 39, at 41, Sur, S., L'Interprétation en Droit International Public, Paris, LGDJ, 1974, at 85.

⁷¹See Frosini, V., 'Die Auslegung der Menschenrechte', 79 Archiv für Rechts- und Sozialphilosophie (1993) 299, at 303. see also Bentham, J., (The Collected Works of), (edited by H.L.A. Hart), Of Laws in General, University of London, The Athlone Press, 1970, at 163. Perelman, Ch., 'L'interprétation juridique', 17 Archives de Philosophie du Droit (1972) 29, at 31.

⁷²See White, J.B., When Words Lose their Meaning, Chicago, London, The University of Chicago Press, 1984, at 273. See also Holmes, O.W., 'The theory of legal interpretation', 12 Harvard Law Review (1898-99), 417, Silving, H., 'A plea for a law of interpretation', 98 University of Pennsylvania Law Review (1949-50) 499, at 501. See also Mouton, J.-D., Etude de la Méthode d'Interprétation dite de l'Effet Utile en Droit International Public, Thèse, Doctorat d'Etat, Université de Nancy II, 1986-1987, at 62-63, Siorat, L., Le Problème des Lacunes en Droit International, Paris, LGDJ, 1958, at 64.

factual problematic contexts.

2.3. METHODS OF INTERPRETATION IN THE CONTEXT OF TREATY TEXTS AND THE 1951/1967 REFUGEE CONVENTION

This section tackles the question of the applicable norms of interpretation in the context of a treaty, in the perspective of the potential role played by a domestic court in such an operation. The question of interpretation of treaty provisions has been one of the thorniest and most tantalising questions in the theory of international law since the age of Grotius⁷³ and De Vattel⁷⁴. R. Phillimore has characteristically pointed out the importance of treaty interpretation when asserting that interpretation is 'the life of the dead letter', which, accordingly, should be 'governed by settled rules and fixed principles, originally deduced from right reason and rational equity, and subsequently formed into laws'⁷⁵.

The laying down of clear-cut principles or canons of treaty interpretation occupied international law doctrine for many years, especially until the late 1960s when the 1969 Vienna

⁷³See Grotius, H., De Jure Belli Ac Pacis Libri Tres, Translation: F.W. Kelsey et al., Oxford, Clarendon Press, 1925, Book II, Chapter XVI, On Interpretation, at 409 et seq.

⁷⁴See De Vattel, E., Le Droit des Gens, in Scott, J.B. (ed.), The Classics of International Law, Washington, The Carnegie Institution of Washington, 1916, Liv. II, Chap. XVII, at 460 et seq.

⁷⁵See Phillimore, R., Commentaries upon International Law, Vol. II, Third Edition, London, Butterworths, 1882, at 95. See also Degan, V.D., L'Interprétation des Accords en Droit International, La Haye, Martinus Nijhoff, 1963, at 163. See also Bos, M., 'Theory and practice of treaty interpretation', 27 NILR (1980) 135, at 170.

Convention on the Law of Treaties was adopted. The importance of establishing such rules lies in the very essence of interpretation of an international agreement, described by G. Schwarzenberger as 'the process of establishing the legal character and effects of a consensus achieved by the parties'⁷⁶. The importance and complexity of bringing forward the consensual content of an international agreement has also been emphasised by McDougal, Laswell and Miller, when referring to the interpretation process, regarding it as a 'responsible effort to ascertain the degree and content of the genuine shared expectations of the parties to an international agreement'⁷⁷. The question of interpretation has played a particularly predominant role as far as international legal texts are concerned for two more reasons: firstly, the lack of precision in international legislation, a drawback of legislation in general which takes, nonetheless, much more serious dimensions on the international plane in the context of multi-state co-operation⁷⁸; secondly, a large number of

⁷⁶See Schwarzenberger, G., 'Myths and realities of treaty interpretation', 22 Current Legal Problems (1969) 205, at 212.

⁷⁷See McDougal, M.S., Lasswell, H.D., Miller, J.C., The Interpretation of Agreements and World Public Order, New Haven, London, Yale University Press, 1967, at 29.

⁷⁸See Vagts, D.F., 'Treaty interpretation and the new American ways of law reading', 4 European Journal of International Law (1993) 472, at 473, Bos, M., 'Theory and practice of treaty interpretation', 27 NILR (1980) 3, at 27; see also de Visscher, Ch., Problèmes d'Interprétation Judiciaire en Droit International Public, Paris, Pedone, 1963, at 28; see also Simon, D., L'Interprétation Judiciaire des Traités d'Organisations Internationales, Paris, Pedone, 1981, at 7. See also Fitzmaurice, G., 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points', 33 BYIL (1957) 203, at 216.

international agreements constitute par excellence products of diplomatic and highly political negotiations⁷⁹, with potential socio-political consequences of a very large-scale character. As noticed by H. Lauterpacht, treaties 'are often a political substitute for rather than a legal expression of the agreement of the parties'⁸⁰, a comment that holds good as far as the conclusion of the UN Refugee Convention is concerned, having been a typical 'universeller Vertragskompromiß'⁸¹.

The inescapable necessity of interpreting a treaty's provisions, that is, of analysing and providing them with clarity, in the course of application of the treaty⁸² offers

⁷⁹See Stone, J., 'Fictitious elements in treaty interpretation A Study in the international judicial process', 1 Sydney Law Review (1953-55) 344, at 347: 'It is notorious that, even there, [in bilateral or paucilateral treaties] the treaty terms may often be intended, not to express the consensus reached, but rather to conceal the failure to reach it. In multilateral instruments, especially political ones, that agreed content expressed by the terms may be far less important than the non-agreed content concealed by them.'; see also Yambrusic, E.S., Treaty Interpretation Theory and Reality, Lanham etc., University Press of America, 1987, at 5; see also Chaumont, Ch., 'Méthode d'analyse du droit international', 11 RBDI (1975) 32, at 34.

⁸⁰See Lauterpacht, H., 'Restrictive interpretation and the principle of effectiveness in the interpretation of treaties', 26 BYIL (1949) 48, at 82. See also Pescatore, P., 'L'application des traités internationaux dans la Communauté Européenne et dans ses Etats Membres', in Mélanges Offerts à Pierre-Henri Teitgen, Paris, Pedone, 1984, 355.

⁸¹See Marx, R., 'Die Definition politischer Verfolgung in der Bundesrepublik Deutschland', in Thränhardt, D., Wolken, S. (Hrsg.), Flucht und Asyl, Freiburg im Breisgau, Lambertus, 1988, 148, at 149.

⁸²See Haraszti, G., Some Fundamental Problems of the Law of Treaties, Budapest, Akadémiai Kiadó, 1973, at 16; see also Bos, M., 'Theory and practice of treaty interpretation', 27 NILR (1980) 3, at 14.

interpreting organs, be they domestic or international, the potential for especially dynamic creative action, and the opportunity to reflect, to a certain extent, their own values and principles in the results of an interpretative intellectual process⁸³. Until the conclusion of the 1969 Vienna Convention on Treaties there was a plethora of doctrinal argumentation on the norms of treaty interpretation, emanating basically from three, rather interpenetrating, schools of thought, which have been effectively combined by and included in the Vienna Convention and are, consequently, still in operation in legal theory and practice. The first, 'objective' school has given preponderance to the text of the international agreement. The text, in a narrow grammatical sense, according to this school of thought, should be the starting point as well as the most influential element in the interpretation process. The second, 'subjective' approach has gravitated mostly towards the intentions of the parties to the

⁸³See Falk, R.A., 'On treaty interpretation and the New Haven Approach: Achievements and prospects', 8 VaJIL (1968) 323, at 325, and 351, Falk, R.A., 'Charybdis responds: A note on treaty interpretation', 63 AJIL (1969) 510, at 511. See also de Visscher, Ch., op. cit. supra n. 78 at 11, and 14-15, 28, McDougal, M.S. et al., op. cit. supra n. 77, at 41, Lauterpacht, H., loc. cit. supra n. 80, at 83. See also Harvard Law School Draft Convention on the Law of Treaties, in 29 AJIL (1935) 653, at 946: '...interpretation involves giving a meaning to a text -not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgment to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve.' See also Lauterpacht, H., 'Some observations on preparatory work in the interpretation of treaties', 48 Harvard Law Review (1934-35) 549 at 574, Belaid, S., Essai sur le Pouvoir Createur et Normatif du Juge, Paris, LGDJ, 1974, at 261 et seq.

treaty, regarding these intentions as the 'compass' of any intended interpretation. Finally, the 'teleological school' has attached particular weight not to the text, or to the parties' intentions, but to the 'object and purpose' of the treaty, thus viewing the latter as a quasi-autonomous instrument reflecting aims, programmes, or ideologies of a larger community than that represented by the initial signatories, or by the eventual parties to the agreement⁸⁴.

While the textual approach to a treaty interpretation could be described as a theory of literal interpretation, attached to the 'immutable meaning of the word', and representing the 'requirement of convenience and certainty'⁸⁵, the subjective school represents a 'liberal' approach, trying to fulfill the requirements of 'equity and justice'⁸⁶. Of particular interest to the present work, however, is the teleological approach, which has been most aptly used in cases of multilateral 'normative' conventions, and has been particularly related to treaties of a humanitarian character⁸⁷. The teleological

⁸⁴See Sinclair, I., The Vienna Convention on the Law of Treaties, Manchester, Manchester University Press, 1984, at 115; Fitzmaurice, G., 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points', 33 BYIL (1957) 203, at 204 et seq.

⁸⁵See Lauterpacht, H., 'Some observations on preparatory work in the interpretation of treaties', 48 Harvard Law Review (1934-35) 549, at 551.

⁸⁶Idem.

⁸⁷See Fitzmaurice, G., loc. cit. supra n. 84, at 207, Leonhard, A.T., 'The teleological approach to treaty interpretation', in Deener, D.R. (ed.), De lege pactorum Essays in honor of R.R. Wilson, Durham, N.C., Duke University Press, 1970, at 160 infra.

approach may also be characterised as liberal, in the sense that it may contribute to a positive interpretative reconstruction of the legal text, that reconstruction, nonetheless, going `no farther than from what it appears was the legislator's will to what, it is supposed, would have been his will had the case in question been present to his view: from his actual to his hypothetical will'⁸⁸.

A theory related to the teleological one, exposed and concurrently rejected, on principle, by G. Fitzmaurice is the theory of the `emergent purpose'. According to this theory, the text of a treaty should be applied/interpreted in such a manner that corresponds to and serves not a static object or purpose of the treaty in question, but its object or purpose that develops and emerges in particular cases `as experience is gained in the operation and working of the convention'⁸⁹. This school of thought is grounded upon the dissenting opinions of two jurist members of the ICJ who expressed them in 1950 in the ICJ Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the UN⁹⁰.

⁸⁸See Bentham, J. (The Collected Works of), ed.: Hart, H.L.A., Of Laws in General, University of London, The Athlone Press, 1970, at 163.

⁸⁹See Fitzmaurice, G., loc. cit. supra n. 84 at 208: `At any given moment, the convention is to be interpreted [according to this theory] not so much, or not merely, with reference to what its object was when entered into, but with reference to what that object has since become and now appears to be.'; see also Perelman, Ch., `L'interprétation juridique', 17 Archives de Philosophie du Droit (1972) 29, at 31.

⁹⁰Competence of Assembly regarding admission to the United Nations, Advisory Opinion, ICJ Reports 1950, at 4.

Judge Alvarez propounded and backed, in his Opinion, a novel view of the post-1945 international legal order. He grounded his thoughts in the 'new international law', flowing from the regime of state interdependence, that 'has not only a legal, but also a political, social, economic and even a psychological aspect'⁹¹. Alvarez asserted the much more dynamic character of international life, in comparison to national life, and went on to claim that 'because of the progressive tendencies of international life, it is necessary to-day to interpret treaties, as well as laws, in a different manner than was customary when international life showed few changes. His conclusion was that this different manner of interpretation 'must be made in such a way as to ensure that institutions and rules of law shall continue to be in harmony with the new conditions in the life of the peoples'⁹². The same stance was adopted and expressed by Judge Azevedo in the same case, who pointed out that 'Even more than in the application of municipal law, the meaning and the scope of international texts must continually be perfected, even if the terms remain unchanged'⁹³.

⁹¹Ibid. at 13; see also his Individual Opinion in Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, ICJ Reports 1948, p. 57, 67, at 69: 'The traditional distinction between what is legal and what is political, and between law and politics, has to-day been profoundly modified', and at 70: 'Far...from being in opposition to each other, law and policy are to-day closely linked together.'

⁹²Supra n. 90 at 16, and at 19.

⁹³Ibid. at 23.

G. Fitzmaurice has rejected, on principle, the 'emergent purpose' approach of viewing the text of a treaty as a live instrument, an approach that indeed enables the interpreter to move flexibly in a context of facts and circumstances that have been dramatically altered since the treaty's conception and entry into force. He discarded that method, on principle, having associated it with an assumption of a 'quasi-legislative function by any tribunal that embarks on it', even though he admitted that '[a] limited and largely unconscious legislative element enters perforce into the work of most tribunals, domestic or other'⁹⁴.

However, it is our thesis that the theory of the emergent purpose has the potential to play a significant role in the interpretation of texts such as that of the definition/conceptualisation of refugeehood of the 1951/1967 UN Refugee Convention. The special humanitarian and, consequently, dynamic nature of the Refugee Convention was emphasised by the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons in whose Final Act (1951) recommendation E

⁹⁴See Fitzmaurice, G., 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points', 33 BYIL (1957) 203, at 208, and 208, n.3; see also Fitzmaurice, G., 'The law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points', 28 BYIL (1951) 1, at 13-14. See also Casenove, E., Le Concept de Démocratie dans la Jurispudence de la Cour Européenne des Droits de l'Homme, Mémoire pour le D.E.A. de Science Administrative, Université de Picardie, Faculté de Droit et des Sciences Politiques et Sociales, 1988, at 20: '...pour la mise en oeuvre de son pouvoir d'interprétation, qui fait appel à une méthode essentiellement téléologique et évolutive, la Cour participe à la création du droit.'

was adopted, in which the Conference expressed "the hope that the Convention...will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides"⁹⁵. The legal concept of refugeehood constitutes a part of a Convention agreed upon by states and applied for over forty years by a large number of domestic courts and tribunals the world over. It is a treaty that conceived refugeehood in the light of some particular geopolitical circumstances of the European continent in the aftermath of World War II. As already noted, the global refugee morphology has dramatically altered since then, not only in purely geographical terms of refugee origin, but moreover, and especially, in terms of the causes of refugee exodus. The substantial question challenge is consequently the following: Is the Refugee Convention, which undoubtedly belongs to the genus of human rights treaties, not to be applied and not to grant protection, e.g. to individuals fleeing internal/internationalised armed conflicts, on the

⁹⁵189 UNTS 137, at 148. See also Separate Opinion of Judge Fitzmaurice in Golder Case, European Court of Human Rights, Judgment of 21 February 1975, Series A, vol. 18, at 51 n. 22 and accompanying text. Judge Fitzmaurice emphasised here that the 'cry of the judicial legislator...has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact' unless 'it can be shown that the treaty or convention itself concedes some legislative role to the tribunal called upon to apply it, or that the parties to it intended to delegate in some degree the function (otherwise exclusively to them pertaining) of changing or enhancing its effects, - or again that they must be held to have agreed a priori to an extensive interpretation of its terms, possibly exceeding the original intention.'

ground that these refugees rest dehors the ambit of the treaty's 'object and purpose', let alone the 'parties' intentions', elements that have been established in international jurisprudence as being de rigueur in the interpretation of a human rights treaty?⁹⁶ One might be able to construe the object and purpose of the 1951/1967 Refugee Convention as being merely the protection of individuals persecuted for their political, in general, differentiation ('Anderssein') and/or resistance to and, consequently, alienage vis-à-vis their state's power/protection. That is a perspective perfectly corresponding to the setting of the cold war period to which the Refugee Convention was attached in the course of its international conception and conclusion. As a consequence, people who nowadays flee countries being, in the majority of cases, subjected to the destructive force of armed conflicts, because of persecution, e.g. by a factional political group, should not be able to benefit from the Convention's protection, being left out, in principle, of its concept of refugeehood. The Refugee Convention, if applied in

⁹⁶ In the Commission's opinion the object of the international application of the [European] Convention [on Human Rights] is to interpret its provisions objectively, and not to interpret the Convention by reference to what may have been the understanding of one Party at the time of its ratification.', European Commission of Human Rights, Report in Golder Case, Series B, Vol. 16 (1973-1975), at 34, para. 44. On the close relation of the object and purpose of a treaty with the parties' intentions, and the perforce 'reasonably liberal construction' of a human rights convention see Separate Opinion of Judge Sir G. Fitzmaurice in European Court of Human Rights, National Union of Belgian Police Case, Judgment of 27 October 1975, Series A., vol. 19, 30, at 33 and 34. See also Inter-American Court of Human Rights, Advisory Opinion of May 9, 1986, No. OC-6/86- The word "laws" in Article 30 of the American Convention on Human Rights, in 7 Human Rights Law Journal (1986) 231, at 236 para. 34.

such an anti-development manner, would be inoperational today. Nonetheless, as demonstrated in the following chapters, the practice of the domestic courts that have applied the Convention's definitional provision has indicated that this is one of the treaties that should have been and indeed have been applied in many instances in line not only with the object and purpose of the Convention, as well as with the party states' intentions as recorded in the preparatory works, but also, in effect, with the theory of the emergent purpose. Domestic jurisprudential practice has thus provided, on a number of occasions, the treaty interpretation with the rejuvenating, dynamic form and character that the international community has shown itself unable to provide up to this date, through a formal, conventional, and legally binding, channel.

2.4. THE 1951/1967 REFUGEE CONVENTION IN THE CONTEXT OF THE 1969 VIENNA RULE AND SUPPLEMENTARY MEANS OF TREATY INTERPRETATION

The 1969 Vienna Convention on the Law of Treaties today provides some generally accepted 'rule and means' of interpretation of treaty texts, which are applicable to cases arising not only before international but also national courts and tribunals⁹⁷. The Convention constitutes an attempt at codification of international law regarding inter-state treaties (Article 1 of the Convention), and some of its

⁹⁷See Reuter, P., Introduction to the Law of Treaties, London, New York, Pinter, 1989, at 74. See also Vagts, D.F., 'Treaty interpretation and the new American ways of law reading', 4 European Journal of International Law (1993) 472, at 481.

provisions are declaratory of general international law or, simply, of rules applied by international or domestic judicial organs⁹⁸. In view of the great importance that Articles 31 and 32 of the Vienna Convention, which refer to treaty interpretation, have acquired, being actually declaratory of customary international law⁹⁹, and of the significant role that they may play in domestic litigation, it is appropriate to provide a general analysis of some of the provisions of these Articles which may be fruitfully operational in a national case law framework, like that regarding domestic interpretation of the 1951/1967 Convention refugee concept.

Article 31 is entitled 'General rule of interpretation', and this rule corresponds to the first paragraph of the Article, according to which 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' It is quite clear from the wording of the above paragraph that the general interpretation rule

⁹⁸See Harris, D.J., Cases and Materials on International Law, Fourth edition, London, Sweet & Maxwell, 1991, at 729-730, Brownlie, I., Principles of Public International Law, Fourth edition, Oxford, Clarendon Press, 1990, at 603-5. See also Merrills, J.G., 'Two approaches to treaty interpretation', AYIL, 1968-69, 55, at 74 et seq. See also Reuter, P., ibid. at 15, 73-74.

⁹⁹See Villiger, M.E., Customary International Law and Treaties, Dordrecht etc., Martinus Nijhoff, 1985, at 342; Thirlway, H., 'The law and procedure of the International Court of Justice 1960-1989', 62 BYIL (1991) 1, at 3. Accord, European Commission of Human Rights, Report of the Commission in Golder Case, Series B, Vol. 16 (1973-1975), at 33, para. 44, and European Court of Human Rights, Golder Case, Series A, Vol. 18 (1975), at 14, para. 29.

constitutes an amalgamation of the three basic schools of thought previously referred to: the textual, the subjective, and the teleological. Even though no hierarchical citation was intended, either by the International Law Commission (ILC) or by the negotiating states during the preparatory works¹⁰⁰, the first-cited premise of interpretation of a term (word) of the convention is indeed a textual one, corresponding to the 'ordinary meaning' of the interpreted term¹⁰¹.

But what is the 'ordinary meaning' of a term in a treaty? No detailed answer to this question appears to have been provided in the travaux by any of the negotiating states, the ILC, or even any of the Special Rapporteurs of the ILC. The comment of the Israeli delegate that any predominance of an 'ordinary meaning' theory might prove to be vulnerable to 'changes in linguistic usage subsequent to the establishment of the treaty text'¹⁰² may provide a preliminary answer, in the sense that

¹⁰⁰See Wetzel, R.G., Rauschnig, D. (eds.), The Vienna Convention on the Law of Treaties, Travaux Préparatoires, Frankfurt a.M., A. Metzner Verlag, 1978, (hereinafter cited as Travaux), at 243, para. 4, at 251 para. 8, 252 paras. 8, 9; see also Yearbook of the International Law Commission, 1966, Vol. II at 95. ILC underlined, however, that it was logic that governed the wording of the part of the Convention regarding interpretation, and that, accordingly, '...the starting point of interpretation is the meaning of the text...', Travaux at 252 para. 9; '...the text must be presumed to be the authentic expression of the intentions of the parties;...in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intention of the parties.', ibid. at 252 para. 11.

¹⁰¹Idem.

¹⁰²See Travaux at 244 para. 7. See also Schwarzenberger, G., 'Myths and realities of treaty interpretation', 22 Current Legal Problems (1969) 205 at 219: 'The word "meaning" itself, has at least sixteen different meanings. Thus, if parties are

the 'ordinary meaning' of a term is related to its linguistic usage, and that, consequently, not only legal norms but also lexical ones may be used to elaborate the meaning¹⁰³. G. Fitzmaurice has provided another helpful remark on the matter, asserting that according to the principle of the 'natural and ordinary meaning' '...particular words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur...' ¹⁰⁴. Drawing upon ICJ case law, such as that of the Second Admissions case¹⁰⁵, and of the

in dispute of any term of a treaty, each of them is likely to consider the meaning it attaches to a particular word as the ordinary meaning in the context and in the light of the object and purpose of the treaty...', although he draws one's attention to the fact that 'undue emphasis on the "polysemous" character of words and, therefore, of legal rules proves too much. It might support the semantic impossibility of any type of social communication in articulate language.', ibid. at 221.

¹⁰³The term 'ordinary meaning' is arguably identical with the term 'plain meaning' which has been defined by P. Brest as 'the meaning that [a text] would have for a "normal speaker of English" under the circumstances in which it is used. Two kinds of circumstances seem relevant: the linguistic and the social contexts. The linguistic context refers to vocabulary and syntax. The social context refers to a shared understanding of the purposes the provision might plausibly serve.', Brest, P., 'The misconceived quest for the original understanding', 60 Boston University Law Review (1980) 204 at 206; see also Holmes, O.W., 'The theory of legal interpretation', 12 Harvard Law Review (1898-99) 417; see also Williams, G.L., 'Language and the law', 61 Law Quarterly Review (1945) 71, at 392.

¹⁰⁴See Fitzmaurice, G., loc. cit. supra n. 94 (33 BYIL (1957) 203) at 211, emphasis added. See Second Admissions case, cit. supra n. 90 at 8: '...the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.'

¹⁰⁵Competence of Assembly regarding admission to the United Nations, Advisory Opinion, ICJ Reports, 1950, p. 4.

Morocco case¹⁰⁶, G. Fitzmaurice has pointed out that 'natural and ordinary meaning' does not denote 'literal meaning', since such a view that would pay no attention to contextual elements 'would lead to absurd or unreasonable results'¹⁰⁷.

The International Law Commission took the view in 1964 that 'the "ordinary meaning" of terms cannot properly be determined without reference to their context and to the objects and purposes of the treaty and to any relevant rules of international law'¹⁰⁸. As to the previously raised problem of 'inter-temporal linguistics', the Commission, as well as the Special Rapporteur, accepted the 'principle of contemporaneity' (interpretation ex tunc) propounded by G.

¹⁰⁶Case Concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, ICJ Reports 1952, p. 176, at 195.

¹⁰⁷Fitzmaurice, G., loc. cit. supra n. 94 (33 BYIL (1957) 203) at 214; see also Sinclair, I., The Vienna Convention on the Law of Treaties, Manchester, Manchester University Press, 1984, at 121. See also Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952, ICJ Reports 1952, p. 93 at 104, Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978, p.3, at 23. The 'plain meaning rule' is, in effect, tantamount to the sens clair theory which denies the need to interpret unambiguous language, see Murphy, A.W., 'Old maxims never die: The "plain-meaning rule", and statutory interpretation in the "modern" federal courts', 75 Columbia Law Review (1975) 1299 infra.

¹⁰⁸See Travaux at 244 para. 5. Accord, European Commission of Human Rights, Report in Golder Case, Series B, Vol. 16 (1973-1975), at 36 et seq. See also Separate Opinion of Judge Fitzmaurice, in National Union of Belgian Police Case, European Court of Human Rights, Judgment of 27 October 1975, Series A, Vol. 19, at 33: '...the real raison d'être of the hallowed rule of textual interpretation of a treaty lies precisely in the fact that the intentions of the parties are supposed to be expressed or embodied in - or derivable from - the text which they finally draw up, and may not therefore legitimately be sought elsewhere save in special circumstances...'

Fitzmaurice, according to which 'the language of a treaty must be interpreted in the light of the rules of general international law in force at the time of its conclusion, and also in the light of the contemporaneous meaning of terms'¹⁰⁹, even though the application of that principle should always be qualified by 'common sense' and the general maxim of good faith¹¹⁰. This is in harmony with the nature of all principles of international legal interpretation. As stressed by the ILC, these principles are 'for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expression that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement

¹⁰⁹See Brownlie, I., op. cit. supra n. 98, at 629; see also Fitzmaurice, G., loc. cit. supra n. 94 (33 BYIL (1957) 203), at 225-7, Bos, M., 'Theory and practice of treaty interpretation', 27 NILR (1980) 135 (second part) at 152. See also Thirlway, H., 'The law and procedure of the International Court of Justice 1960-1989', 62 BYIL (1991) 1, at 57, where, on the basis of ICJ case law, it is pointed out: 'Provided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, the treaty must be interpreted so as to give effect to that intention.'

¹¹⁰See Special Rapporteur in Travaux, at 244 para. 7. Accord, European Commission of Human Rights, Report in Golder Case, Series B, Vol. 16 (1973-1975), at 36-7, para. 49: 'More often than not, what is read into legal texts as their "natural" or "ordinary" meaning goes beyond the purely linguistic appreciation which is based on the text itself and nothing else. When faced with legal texts, even the simplest ones, both laymen and lawyers consciously or unconsciously are applying the pragmatism popularly called "common sense". This means a sense of purpose and consistency with the factual and legal background...'

of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up etc.'¹¹¹

The Vienna Convention links, in Article 31 para.1, any attempt of treaty interpretation based on the 'ordinary meaning' of the treaty terms with the context of the terms subject to interpretation. Paragraph 2 of the same Article elaborates on the meaning of 'context' and prescribes that the first element that should be regarded as the context of a term is the text of the treaty itself, which is to include not only the preamble but also the annexes. Secondly, as a context should be construed 'any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty'. Finally, a third context of a term is 'any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. Accordingly, the context proviso is arguably related to the subjective theory of interpretation which attaches particular weight to the parties' views and intentions in a treaty framework.

¹¹¹See Travaux, at 250 para. 4, emphasis added; '...it is true that the character of a treaty may affect the question whether the application of a particular principle, maxim or method of interpretation is suitable in a particular case...', ibid. at 251 para. 6. However, the Commission did not lay down any such distinction in the treaty drafts 'for the purpose of formulating the general rules of interpretation', idem; see also Morocco case (supra n. 106) at 195.

The third part of the general rule of treaty interpretation that is of special importance to the question of interpretation of a convention such as that relating to the status of refugees is the 'object and purpose' of the treaty itself. It is the teleological element of the interpretation rule which, even though listed at the end of the first paragraph of Article 31.1 of the Vienna Convention, has a role that is not to be regarded as minor in the process of interpretation. From the travaux préparatoires of the Vienna Convention it becomes obvious that the terms 'object and purpose' were not subjected to any special scrutiny or analysis by the states or the Rapporteurs¹¹². Even though it has been suggested by some authors that the 'object and purpose' of a treaty is synonymous with the 'intentions of the parties', this is not to be accepted as correct¹¹³. The flaw of this suggestion lies in the fact that although, no doubt, there is always a specific object in the minds representing the states that initiate the conclusion of a treaty, this may not necessarily lead one to the conclusion that all the final parties to that treaty have the same objects and purposes at

¹¹²See Travaux, at 237-256.

¹¹³See Sinclair, I., op. cit. supra n. 107, at 130. In National Union of Belgian Police of the European Court of Human Rights Judge Fitzmaurice took a more qualified stance stating in his Opinion that 'The objects and purposes of a treaty are not something that exist in abstracto: they follow from and are closely bound up with the intentions of the parties, as expressed in the text of the treaty, or as properly to be inferred from it, these intentions being the sole sources of those objects and purposes.', see supra n. 96.

the moment of signature, ratification, or accession¹¹⁴. Moreover, the fact that usually only some of the final party states participate in the preparatory work of an international agreement makes it abundantly clear that the 'telos' (in ancient Greek meaning the end, the ultimate purpose) of a treaty does not usually coincide with that of its final parties as a whole, or that it may solely coincide with the object(s) of only a group of them. In consequence, it may safely be concluded that a convention may indeed have a 'character of its own', shaped to a large extent by the states initiating its conclusion (the 'framers'), to which character, however, other states may subscribe when they decide to become parties. However, in many cases, the majority (or minority) of the parties may never attach themselves to that character, given the immense variety of reasons for which each individual state takes the decision to participate in the application of a specific treaty¹¹⁵.

¹¹⁴See Sinclair, I., ibid. at 130-1: 'In the case of general multilateral conventions, a search for the common intentions of the parties can be likened to a search for the pot of gold at the end of a rainbow.' See also Fitzmaurice, G., 'The law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points', 28 BYIL (1951) 1, at 3-4, Stone, J., 'Fictitious elements in treaty interpretation A study in the international judicial process', 1 Sydney Law Review (1953-55) 344, at 347. See also Bernhardt, R., Die Auslegung völkerrechtlicher Verträge, Köln, Berlin, Carl Heymanns Verlag KG, 1963, at 34-39.

¹¹⁵See Fitzmaurice, G., 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points', 33 BYIL (1957) 203 at 205-6. See also Lauterpacht, H., 'Restrictive interpretation and the principle of effectiveness in the interpretation of treaties', 26 BYIL (1949) 48, at 76.

The importance attached to a treaty's object and purpose, viz. its teleological nature, has been regarded by many a writer as perilous, in view of the alluring danger of law-making by the judicial or administrative interpreter¹¹⁶. However, the teleological approach provides the interpretation of a 'humanitarian' or 'human rights' treaty with particular advantages, on the ground of the former's affiliation, or even identification, with the principle of maximum effectiveness ('ut res magis valeat quam pereat') which gives priority to the treaty's 'fullest value and effect'¹¹⁷. This is a particularly valuable and efficient legal principle in cases of human rights or humanitarian conventions where the 'interests of the individual', like individual liberty or life, at stake are usually extremely high and, accordingly, a highly sensitive safety valve should always be in operation as far as possible. Moreover, the fact that in such treaties the final number of party states is usually large provides the teleological approach to interpretation with a particular

¹¹⁶See Brownlie, I., op. cit. supra n. 98, at 631-2, Sinclair, I., op. cit. supra n. 107, at 131.

¹¹⁷See Fitzmaurice, G., loc. cit. supra n. 114, at 8; see also South West Africa, Second Phase, Judgment, ICJ Reports 1966, p. 6 at 48, para. 91. See also Fitzmaurice, G., 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points', 33 BYIL (1957) 203, at 207-8; see also Leonhard, A.T., 'The teleological approach to treaty interpretation', in Deener, D.R. (ed.), De lege pactorum Essays in honor of R.R. Wilson, Durham, N.C., Duke University Press, 1970, 160, at 166-8; on the 'prominent and ever-growing part [of the principle of effectiveness] in the administration of international law' see also Lauterpacht, H., 'Restrictive interpretation and the principle of effectiveness in the interpretation of treaties', 26 BYIL (1948) 48, at 67 et seq., Thirlway, H., 'The law and procedure of the International Court of Justice 1960-1989', 62 BYIL (1991) 1, at 44. See also supra Section 2.3 infra.

force. This is a result of the inevitable lack of homogeneity of the intentions of the numerous party states, which leaves the agreed text as an evidential element of a final negotiation compromise, with little practical value for any attempt at effective interpretation/application on the basis of a subjective or literal (textual), approach. Conventions entrenching individual rights in general or, like the Refugee Convention, rights of a specific category of utterly vulnerable individuals, tend to acquire a life and character of their own. As a consequence, any application of the provisions of such treaties should take place in an objective, and above all effective, manner¹¹⁸, within the general ideological context of human rights protection, and not by

¹¹⁸See Report of the European Commission of Human Rights in the Golder Case, Series B, Vol. 16 (1973-1975), at 34, where the Commission accepted that 'the provisions of the [European] Convention [on Human Rights] should not be interpreted restrictively so as to prevent its aims and objects being achieved.' Accord, European Court of Human Rights, Airey Case, judgment of 9 October 1979, Series A Vol. 32, at 14-15, and Marckx Case, judgment of 13 June 1979, Series A Vol. 31, at 15, para. 31; see also Ost, F., 'The original canons of interpretation of the European Court of Human Rights', in Delmas-Marty, M. (ed.), The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions, Dordrecht etc., Martinus Nijhoff Publishers, 1992, at 283 infra, Van Dijk, P., Van Hoof, G.J.H., Theory and Practice of the European Convention on Human Rights, Second Edition, Deventer, Kluwer, 1990, at 13, and 43-4. See also UNHCR, Branch Office for Germany, 'Stellungnahme des Hohen Flüchtlingskommissars der Vereinten Nationen (UNHCR) zur Frage der Urheberschaft von Verfolgung im Sinne des Art. 1 A (2) GFK bzw. Art. 33 (1) GFK', Bonn, d. 19. Mai 1992, in ZDWF (Hrsg.), Schriftenreihe der Rechtsberaterkonferenz- "§ 51 Abs.1 AuslG und der Verfolgungsbegriff der Genfer Flüchtlingskonvention", Bonn, ZDWF, September 1992, 9, at 11-12. See also Marx, R., Eine menschenrechtliche Begründung des Asylrechts, Baden-Baden, Nomos, 1984, at 198-200, Kälin, W., 'Refugees and civil wars: Only a matter of interpretation?', 3 IJRL (1991) 435 infra, esp. at 448-51.

reference to the understanding that some final or initial parties to these treaties may have formed and propounded during the actual life of the instruments¹¹⁹.

Article 32 of the 1969 Vienna Convention on the Law of Treaties provides, finally, two supplementary means of interpretation: the preparatory works of the treaty and the circumstances of the treaty's conclusion. Recourse to these

¹¹⁹See Report of the European Commission of Human Rights, Golder Case, Publications of the European Court of Human Rights, Series B, vol. 16 (1973-1975), at 33-34, para. 44. See also Decision of the UN Human Rights Committee (7 April 1982) in G.C. Van Duzen v. Canada (Communication No. R.12/50), in Report of the Human Rights Committee, UN GA Official Records: 37th Session, Suppl. No. 40 (A/37/40), New York, United Nations, 1982, 150, at 155, para. 10.2: 'The Committee...notes that its interpretation and application of the International Covenant on Civil and Political Rights has to be based on the principle that the terms and concepts of the Covenant are independent of any particular national system of law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning.'; see also McGoldrick, D., The Human Rights Committee, Oxford, Clarendon Press, 1994, at 158-160. See also Jacobs, F.G., The European Convention on Human Rights, Oxford, Clarendon Press, 1975, at 15-20, Drzemczewski, A.Z., European Human Rights Convention in Domestic Law, Oxford, Clarendon Press, 1983, at 27-34, Clapham, A., Human Rights in the Private Sphere, Oxford, Clarendon Press, 1993, at 98, Nedjati, Z.M., Human Rights under the European Convention, Amsterdam etc., North-Holland, 1978, at 27-9; Alleweldt, R., 'Protection against expulsion under Article 3 of the European Convention on Human Rights', 4 European Journal of International Law (1993) 360, at 366. See also Casenove, E., Le Concept de Démocratie dans la Jurisprudence de la Cour Européenne des Droits de l'Homme, Mémoire pour le D.E.A. de Science Administrative, Université de Picardie, Faculté de Droit et des Sciences Politiques et Sociales, 1988, at 20. See also Inter-American Court of Human Rights, Advisory Opinion of May 9, 1986, No. OC-6/86- The word "laws" in Article 30 of the American Convention on Human Rights, in 7 Human Rights Law Journal (1986) 231, at 234 para. 21: 'The meaning of the word "laws" in the context of a system for the protection of human rights cannot be disassociated from the nature and origin of that system.', and at 235 para. 27.

means may be had only in three cases according to the same provision: 'in order to confirm the meaning resulting from the application of Article 31'; secondly, in case the interpretation attempted on the basis of the Article 31 rule 'leaves the meaning ambiguous or obscure'; and thirdly, the determination of the meaning of the text of a treaty may materialise on the basis of the supplementary means if the application of the general interpretation rule of Article 31 'leads to a result which is manifestly absurd or unreasonable.'

Both the travaux préparatoires and the circumstances pertaining to the conclusion of a treaty may and do play in practice¹²⁰ a significant role in the interpretation of the provisions of the treaty. This applies particularly to conventions like those concerning human rights protection, because their dynamic character and the ever-evolving subject matter lead naturally to the interpreter's need to place greater emphasis on, and pay particular attention not so much to the textual school of thought, but rather to the subjective and/or the teleological approach of interpretation. As demonstrated in subsequent chapters, courts and tribunals, let alone refugee law doctrine, have often, in a quasi-habitual manner, had recourse to the preparatory work of the Refugee Convention or the parliamentary debates concerning its

¹²⁰See e.g. Eastern Airlines, Inc v. Floyd, US Supreme Court, April 17, 1991, 499 US 530, 113 L Ed 2d 569, at 581-4, Air France v. Saks, US Supreme Court, March 4, 1985, 470 US 392, 84 L Ed 2d 289, at 297-9.

incorporation into domestic law, or the right to asylum (vide: the case of the FRG asylum case law), when adjudicating on refugee status claims¹²¹.

The circumstances of the conclusion of a treaty are related to two basic elements of the framework within which the conclusion of a treaty is initiated and materialises: firstly, the 'historical background'¹²², that is to say, the historical/political reasons that provide the foundation for the conclusion of a treaty; and secondly, the 'individual attitudes of the parties' which reflect, in the words of I. Sinclair, 'their economic, political and social conditions, their adherence to certain groupings or their status [in the context of the state cooperation aiming at the regulation of the particular subject matter(s) of a treaty]'¹²³. All these factors are not only inextricably linked with, but moreover reflected in the preparatory work of a convention¹²⁴, where

¹²¹On the use of preparatory work by domestic courts in general see Sinclair, I., The Vienna Convention on the Law of Treaties, Manchester, Manchester University Press, 1984, at 144-7.

¹²²Ibid. at 141.

¹²³Idem.

¹²⁴It is noteworthy that in pre-1969 international law doctrine recourse to preparatory work was tantamount to recourse to 'extrinsic evidence', see Lauterpacht, H., 'Some observations on preparatory work in the interpretation of treaties', 48 Harvard Law Review (1934-35) 549, at 551. The characterisation of 'extrinsic evidence' has been also attributed by I. Sinclair to the 'circumstances of the treaty conclusion', see his op. cit. supra n. 121 at 141; see also Fitzmaurice, G., 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points', 33 BYIL (1957) 203, at 215-6.

state policies, aims and interests are expressed and come to light in a more or less clear, if necessarily diplomatic manner.

The International Law Commission has avoided providing a definition of 'preparatory work', on the ground that 'to do so might only lead to the possible exclusion of relevant evidence'¹²⁵. However, in the case of a convention, preparatory work may well include conference proceedings, treaty drafts¹²⁶, and reports of expert committees¹²⁷. Despite the undeniably useful role that the travaux may play in the interpretation process concerning the text of a treaty, doctrine has expressed concern about the use of travaux préparatoires in interpretation¹²⁸. This concern should be accepted as justifiable to a certain extent, given that in most cases the ambiguity of the text that the travaux are called upon to solve is usually derived from the various and often conflicting views, interests and aims of the states initiating the conclusion of the treaty, which are reflected in the text of the preparatory work itself. However, whether or not any clear conclusion may be reached from the travaux, the latter may effectively play an elucidatory role in the

¹²⁵See Travaux, at 255 para. 20.

¹²⁶See Brownlie, I., Principles of Public International Law, Fourth Edition, Oxford, Clarendon Press, 1990, at 630.

¹²⁷See Walker, D.M., The Oxford Companion to Law, Oxford, Clarendon Press, 1980, at 1231.

¹²⁸See Brownlie, I., op. cit. supra n. 126, Sinclair, I., op. cit. supra n. 121, at 144.

course of an interpretation, depending on the subject matter of the interpretation process and on prudent and effective use of the preparatory work by the interpreting organ.

2.5. THE ROLE OF DOMESTIC COURTS IN THE INTERPRETATION PROCESS

A question of great significance for the application and the concomitant interpretation of a legal text, be it inside a treaty or in domestic legislation, is the role of a domestic court or tribunal, and the method/rule it applies in the course of interpretation. As already mentioned, the above interpretation provisions of the 1969 Vienna Convention are binding on domestic judicial fora, apart from the international courts and tribunals, when called upon to apply a treaty text¹²⁹. Paragraph 3 of Article 31 of the Vienna Convention prescribes that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' belongs, *inter alia*, to the context of the interpreted terms of a treaty. This subsequent practice may include the domestic judicial interpretation of a treaty which has the potential to show and

¹²⁹See Reuter, P., Introduction to the Law of Treaties, London, New York, Pinter, 1989, at 73 *et seq.*, Merrills, J.G., 'Two approaches to treaty interpretation', 4 AYIL (1968-69) 55, at 74 *et seq.*, Sinclair, I., 'The principles of treaty interpretation and their application by the English courts', 12 ICLQ (1963) 508; Yambrusic, E.S., Treaty Interpretation Theory and Reality, Lanham etc., University Press of America, 1987, at 18 *et seq.*. See also Frowein, J.A., 'Federal Republic of Germany', in Jacobs, F.G., Roberts, S. (eds.), The Effects of Treaties in Domestic Law, London, Sweet & Maxwell, 1987, 63, at 73. See also Constantinesco, L.-J., Traité de Droit Comparé, Tome II, Paris, LGDJ, 1974, at 343-348. See also Sale v. Haitian Centers Council, US Supreme Court, June 21, 1993, 32 ILM (1993) 1039, at 1060.

establish the degree of agreement of the treaty parties, in a case law framework, with regard to the interpretation of (a part of) the treaty.

The fact that different organs in various countries are called upon or obligated to put into effect identical international legal rules does not lead to identical conclusions and effects. This may apply particularly in cases where domestic fora are called upon to interpret national or international legal concepts endowed with a high degree of porousness, like that of refugeehood. As emphasised by J.G. Merrills, two fundamental problems have been encountered in the context of the work of a domestic judicial forum: first, the interpreter's time and effort, and secondly the interpreter's bias¹³⁰.

In contrast to most international litigation, the backlog of cases that face domestic courts and tribunals in everyday litigation has a negative effect on the eventual manner of interpretation. Time and, concurrently, incomplete knowledge of international legal provisions that affect conventional interpretation make domestic fora particularly vulnerable to a critical consideration of their interpretational function.

However, a far more important question has been that of the conscious or unconscious bias on the part of the domestic interpreter, be that a court or an administrative organ. The

¹³⁰See Merrills, J.G., idem.

political limitations imposed upon a domestic, especially judicial, forum by the national constitutional framework within which a domestic court or tribunal is obliged to function always take their toll on the supposedly impartial and unbiased application of legal texts/rules by a (quasi-) judicial interpreter¹³¹. But while institutional, constitutional limitations may impose structural long-term hindrances par excellence on the state's apparatus of the judicial branch, it is the short- or medium-term socio-political considerations that provide the seedbed for the application and interpretation of international/national legal texts, especially in cases of legal frameworks concerning immigration and granting of asylum on the sovereign territory of a state¹³². Interpretation of a legal text as such,

¹³¹See Griffith, J.A.G., The Politics of the Judiciary, Fourth Edition, London, Fontana Press, 1991, at 270 et seq., Murphy, W.F., Elements of Judicial Strategy, Chicago, London, The University of Chicago Press, 1964, at 199 et seq., Laski, H.J., Studies in Law and Politics, New Haven, Yale University Press, 1932, at 276 et seq. See also Henkel, H., 'Bemerkungen zum Verhältnis von Recht und Politik', in Stratenwerth, G. et al. (Hrsg.), Festschrift für H. Welzer zum 70. Geburtstag, Berlin, New York, Walter de Gruyter, 1974, 31, at 38, Bos, M., 'Theory and practice of treaty interpretation', 27 NILR (1980) 3, at 34, Freund, J., 'Droit et politique Essai de définition du Droit', 16 Archives de Philosophie du Droit (1971) 15, at 22. See also Husson, L., 'Les trois dimensions de la motivation judiciaire', in Perelman, Ch., Foriers, P. (eds.), La Motivation des Décisions de Justice, Bruxelles, Bruylant, 1978, 69, at 82 et seq.

¹³²See, inter alia, Legomsky, S.H., Immigration and the Judiciary Law and Politics in Britain and America, Oxford, Clarendon Press, 1987, at 223 et seq., Legomsky, S.H., 'Political asylum and the theory of judicial review', 73 Minnesota Law Review (1989) 1205, Schmid, W., 'Migrationen und Rechtsordnung', in Kälin, W., Moser, R. (Hrsg.), Migrationen aus der Dritten Welt, Bern, Stuttgart, Verlag P. Haupt, 1989, at 193. See also Blum, C.P., 'Political assumptions in asylum decision-making: The example of refugees from armed conflict', in Adelman, H. (ed.), Refugee Policy Canada and the United

concerning refugee status and subsequent provision of protection through territorial asylum on a state's territory have inherent political significance and ramifications on an intra-national level concerning a refugee's state of origin and the country of refuge or asylum. As a consequence, any such interpretation is especially vulnerable to political intervention and manipulation by the executive, as well as to the fact that judges have to act, consciously or not, inside a domestic social framework whose character has been a priori moulded by socio-political interests and conflicts¹³³. The political, manipulative atmosphere generated in such cases contributes very largely to the genesis and existence of a mentality towards pro-executive bias in domestic judicial organs, a mentality that is usually unconscious and mostly

States, Toronto, York Lanes Press, 1991, 282, at 283, Note, 'Political legitimacy in the law of political asylum', 99 Harvard Law Review (1985) 450, Joly, D. et al., Refugees Asylum in Europe?, London, Minority Rights Group, 1992, at 33. See also Palley, C., 'Decision making in the area of public order by English courts', in Finnegan, R. et al. (eds.), Public Order, Walton Hall Bletchley Bucks, The Open University Press, 1972, 45. See also Köfner, G., 'Politik und Asylrecht', in Köfner, G., Nicolaus, P. (Hrsg.), Probleme des Asylrechts in der Bundesrepublik Deutschland, München, Mainz, Kaiser/Grünwald, 1983, at 52 infra, Herrmann, H., 'Probleme des Asylrechts in der richterlichen Praxis', 1 ZAR (1981) 111 infra, Marx, R., 'Politische Justiz im Asylrecht', 4 InfAuslR (1982) 238 infra.

¹³³See Stein, E., 'Juristische Auslegungslehren und wissenschaftliche Methodik', in Delbrück, J. et al. (Hrsg.), Recht im Dienst des Friedens Festschrift für E. Menzel, Berlin, Duncker & Humblot, 1975, 3, at 10 et seq., Penski, U., 'Recht als Mittel von Politik. Möglichkeit oder Mißverständnis?', in Voigt, R. (Hrsg.), Recht als Instrument der Politik, Opladen, Westdeutscher Verlag, 1986, 35, at 43-45. See also Dworkin, R., 'Hard cases', 88 Harvard Law Review (1975) 1057, at 1064-5, Perelman, Ch., 'La distinction du fait et du droit - Le point de vue du logicien', in Centre National de Recherches de Logique (Travaux de), Le Fait et le Droit, Bruxelles, Bruylant, 1961, 269, at 278.

responsible for the creation and procreation of an interpretation policy subjected to political commands of the executive, e.g. through enacted legislation, even if the interpretation process is linked with a text of an, in effect, human rights treaty like that of the UN Refugee Convention. Domestic judicial fora should, however, always try to avoid this political bias pitfall which constitutes, in effect, the complete antithesis to the concept of the rule of law¹³⁴. It is submitted that these kinds of pitfalls in the course of interpretation of international legal texts may well be avoided if domestic courts follow established rules of interpretation like the ones of the 1969 Vienna Convention¹³⁵, in conformity with the interpretational requirements of the subject matter. When the international definition of refugeehood is applied and interpreted as established in the 1951/1967 Refugee Convention, any domestic judicial

¹³⁴See Lauterpacht, H., 'Restrictive interpretation and the principle of effectiveness in the interpretation of treaties', 26 BYIL (1949) 48, at 82, Bos, M., 'Theory and practice of treaty interpretation', 27 NILR (1980) 3, at 32-33. See also UN Social Defence Research Institute, International Association of Judges, The Rôle of the Judge in Contemporary Society, Rome, Fratelli Palombi Editori, 1984, at 14.

¹³⁵See Conforti, B., 'The activities of national judges and the international relations of their State', in 65 (I) Institute of International Law Yearbook 1993, 327, at 354-7, and homonymous Resolution of the Institute of International Law, September 7, 1993, ibid., Part II, 319, at 323, Article 5.3: 'National courts should have full independence in the interpretation of a treaty, making every effort to interpret it as it would be interpreted by an international tribunal and avoiding interpretations influenced by national interests.'. See also Benvenisti, E., 'Judicial misgivings regarding the application of international law: An analysis of attitudes of national courts', 4 European Journal of International Law (1993) 159, at 166-8.

interpretational process should be guided, in our view, by the teleological approach of interpretation and/or the related theory of the emergent purpose, methods that have the potential to provide the judicial organ with the best tool in order to be able to cope, in a ruled and creative manner¹³⁶, with the dynamic, evolutionary and humanitarian nature and demands of an international text, like that containing the conceptualisation of contemporary refugeeism.

¹³⁶See Cappelletti, M., 'Des juges législateurs?', in his, Le Pouvoir des Juges, Paris, Economica, 1990, 23, at 29 et seq., Belaid, S., Essai sur le Pouvoir Createur et Normatif du Juge, Paris, LGDJ, 1974, at 304 et seq. See also Mahoney, P., 'Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin', 11 Human Rights Law Journal (1990) 57 infra, Lillich, R.B., 'The role of domestic courts in enforcing international human rights law', 74 ASIL Proceedings (1980) 20 et seq. See also Doehring, K., 'Functions and limits of judge-made law in German constitutional law and European Community Law', in McWhinney, E. et al. (eds.), Federalism-in-the-Making, Dordrecht etc., Kluwer, 1992, 48 infra. See also Dworkin, R., 'Judicial discretion', 60 Journal of Philosophy (1963) 624, Raz, J., 'Legal principles and the limits of law', in Cohen, M. (ed.), Ronald Dworkin and Contemporary Jurisprudence, London, Duckworth, 1983, 73, at 76-77, Greenawalt, K., 'Policy, rights, and judicial decisions', ibid. 88, at 112. See also Dworkin, R., Political Judges and the Rule of Law, Proceedings of the British Academy, London, Volume LXIV (1978), Oxford, Oxford University Press, 1980, 259, at 261 et seq. See also Cappelletti, M., 'The law-making power of the judge and its limits', 8 Monash University Law Review (1981) 15, at 54, McHugh, M., 'The law-making function of the judicial process', 62 Australian Law Journal (1988) 15, at 116 et seq., MacGuigan, M.R., 'Sources of judicial decision making and judicial activism', in Martin, S.L., Mahoney, K.E. (eds.), Equality and Judicial Neutrality, Toronto etc., Carswell, 1987, 30; see also Zippelius, R., 'Rechtsgewinnung durch experimentierendes Denken', in Perelman, Ch., Vander Elst, R. (eds.), Les Notions à Contenu Variable en Droit, Bruxelles, Bruylant, 1984, 351 infra, Sofaer, A.D., 'Judicial control of informal discretionary adjudication and enforcement', 72 Columbia Law Review (1972) 1291 infra.

SECTION 3. THE DOMESTIC LEGAL CONTEXT OF INTERPRETATION OF THE
CONCEPT OF REFUGEEHOOD IN THE UK, FRANCE AND THE FRG, WITH
SPECIAL REFERENCE TO THE GERMAN LEGAL FRAMEWORK

Refugee status adjudication in the UK has been based on the 1951/1967 UN Refugee Convention which was, in effect, incorporated into British law by virtue of the Asylum and Immigration Appeals Act 1993. The above Convention has been the sole legal background regarding refugee status claims in the United Kingdom¹³⁷. The 1993 Asylum Act actually laid down in its Section 2, expressis verbis, the 'primacy of [the UN Refugee] Convention', according to which 'Nothing in the immigration rules (within the meaning of the 1971 [Immigration] Act) shall lay down any practice which would be contrary to the Convention.'¹³⁸

The French domestic background concerning refugee status adjudication is similar to the British one. French refugee status law is also founded upon the UN Refugee Convention whose legal concept of refugeehood has been exclusively, so far, employed by the competent asylum adjudicating tribunals

¹³⁷See, inter alia, Macdonald, I., Blake, N.J., Macdonald's Immigration Law and Practice, London, Butterworths, Third Edition, 1991, at 287 et seq., Gardner, J.P., 'Cooperation in the field of aliens law in the United Kingdom and Ireland', in Schermers, H.G. et al. (eds.), Free Movement of Persons in Europe, T.M.C. Asser Instituut, The Hague, Dordrecht etc., Martinus Nijhoff Publishers, 1993, 199, at 200-2.

¹³⁸See also Statement of Changes in Immigration Rules (HC 395), 23 May 1994, Part 11: ASYLUM, Paras. 327-352, at 69-72.

and courts¹³⁹. The 1946/1958 constitutional right to asylum in favour of persons 'persecuted because of [their] activities in the cause of freedom'¹⁴⁰ has never, so far, played any role in the course of asylum adjudication in France, remaining thus in practice 'a dead letter'¹⁴¹. The reason for this inactivation of the above constitutional provision has been the fact that French domestic law has based, as already mentioned, refugee status adjudication solely upon the UN Refugee Convention. However, in its pre-1993 jurisprudence the French Constitutional Council established that the constitutional principle on asylum 'is brought into operation by legislation and the international conventions'¹⁴². The issue of whether the above constitutional provision may

¹³⁹See Art. 2 of the Loi no 52-803 du 25 juillet 1952 portant création d'un Office français de protection des réfugiés et apatrides, and Décret no 53-377 du 2 mai 1953 relatif à la Commission des recours, reproduced in Documentation-Réfuégiés, Supplément au No 243, 24 mai/6 juin 1994, 1 infra, following Loi no 93-1027 du 24 août 1993 relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France, 12196 Journal Officiel de la République Française (hereinafter JO), 29 août 1993, in Documentation-Réfuégiés, No 223, 17/30 août 1993, 32, and Loi no 93-1417 du 30 décembre 1993 portant diverses dispositions relatives à la maîtrise de l'immigration et modifiant le code civil, JO, 1er janvier 1994, 11, in Documentation-Réfuégiés, No 233, 4/17 janvier 1994, at 15. See also Chapitre VII of the Ordonnance no 45-2658 du 2 novembre 1945 relative aux conditions d'entrée et de séjour des étrangers, as modified by the above-mentioned 1993 legislative instruments, in Documentation-Réfuégiés, No 233, 4/17 janvier 1994, at 19.

¹⁴⁰See supra Introduction to the thesis, n. 1.

¹⁴¹See Alland, D., 'Jurisprudence française en matière de droit international public', 98 RGDIP (1994) 205, at 213. See also supra Introduction to the thesis, n. 1.

¹⁴²See relevant jurisprudential analysis in Genevois, B., 'Un statut constitutionnel pour les étrangers', 9 Revue française de Droit administratif (1993) 871, at 883 et seq.

provide a sound basis for a refugee status claim did not constitute a serious preoccupation in France until the Decision of the French Constitutional Council of 13 August 1993 regarding the 1993 French Immigration Law¹⁴³. This decision emphasised for the first time the fundamental nature of the right of asylum ('droit fondamental') enjoyable individually by persecuted 'freedom fighters'¹⁴⁴, and the supremacy of the above provision over provisions of relevant treaties to which France is a contracting state¹⁴⁵.

Following this decision of the Conseil Constitutionnel the issue of the potential role of the French asylum constitutional provision in asylum adjudication was raised for the first time before the Commission des Recours des Réfugiés in Traoré Djibril Mary¹⁴⁶. The refugee applicant in this case attempted to ground his refugee status claim in both the UN Refugee Convention and the aforementioned fourth paragraph of the French 1946 Constitution regarding asylum. The appeal was

¹⁴³Décision no 93-325 DC du 13 août 1993, 11722 JO, 18 août 1993, reproduced in Documentation-Réfugiés, No 223, 17/30 août 1993, at 11; on this Decision see Genevois, B., ibid. at 882 et seq.

¹⁴⁴See Décision, ibid. at 17; see also ibid. at 12.

¹⁴⁵Ibid. at 18. This theoretical stance put forward by the Constitutional Council's decision was however qualified by the new constitutional Article 53-1 which amended the French Constitution and brought thus France into line with the EU legal developments regarding the responsibility of EU states vis-à-vis asylum applications; see text of Article 53-1 in 16296 JO 26 novembre 1993, in Documentation-Réfugiés, No 230, 23 Novembre/6 Décembre 1993, at 13. See also supra Introduction to the thesis, n. 1.

¹⁴⁶CRR, Sections réunies, 17 December 1993, reported in 98 RGDIP (1994) 234. See also note by Alland, D., ibid. at 235.

dismissed on evidential grounds, but the Commission des Recours, although not empowered by French law to examine the case on the basis of the French constitutional provision¹⁴⁷, adopted an interpretational stance indirectly favouring the notional subjugation of the constitutional provision's refugee concept to the concept of refugeehood established in the 1951/1967 Refugee Convention. The Commission des Recours des Réfugiés in an obiter indeed regarded the 'activities in the cause of freedom', for which the French Constitution provides protection, solely as one of the 'different forms that may be taken on by the political activities' carried out in the country of origin by a refugee applicant¹⁴⁸. The Commission thus appeared to subscribe to the opinion that the French constitutional provision is of a rather limited range and use in French asylum adjudication. This is to be viewed as a correct stance, given that, apart from the fact that the issue of the agent of persecution is not limited by the French Constitution to the state mechanism, as happens in principle in the case of the UN Refugee Convention, the factual prerequisites regarding the activation of the French constitutional provision are indeed restrictive. They require, specifically and exclusively, the existence of the asylum seeker's persecution on the ground of 'activities in the cause

¹⁴⁷See Conseil d'Etat, Assemblée générale (Section de l'intérieur), Avis No 355 113 - 23 septembre 1993, in Conseil d'Etat, Rapport Public 1993, 317, at 319, which mentions the possibility of a (future) statutory provision regarding asylum claims based on the French constitutional provision on asylum.

¹⁴⁸98 RGDIP (1994) 234.

of freedom' on the territory of her/his country of origin¹⁴⁹.

Unlike British and French refugee status case law, one of the most controversial issues discussed in German refugee status case law and doctrine has been the question of interplay between the basic German asylum provision, according to which all persons 'persecuted on political grounds' enjoy the right to asylum in Germany, and the concept of refugeehood as contained in the UN 1951/1967 Refugee Convention¹⁵⁰. German

¹⁴⁹See relevant detailed analysis in Teitgen-Colly, C., 'Le droit d'asile: la fin des illusions', Actualité juridique-Droit administratif, 20 février 1994, 97, at 107 et seq.; see also Luchaire, F., 'Le droit d'asile et la révision de la Constitution', 110 Revue du Droit Public (1994) 5, at 6 et seq., Classen, C.D., 'Asylrecht in Frankreich: Zur Bedeutung der verfassungs- und völkerrechtlichen Vorgaben', 46 Die Öffentliche Verwaltung (1993) 227, at 228-9, Alland, D., loc. cit. supra n. 146, at 237.

¹⁵⁰On the long debate regarding the legal relationship of the German constitutional asylum provision and the international refugee concept of the 1951/1967 Refugee Convention see Marx, R., 'The criteria for determining refugee status in the Federal Republic of Germany', 4 IJRL (1992) 151 infra, Marx, R., 'Konventionsflüchtlinge ohne Rechtsschutz-Untersuchungen zu einem vergessenen Begriff-' 12 ZAR (1992) 3 infra, Koisser, W., Nicolaus, P., 'Die Zuerkennung des Konventionsflüchtlingsstatus nach dem neuen Ausländergesetz-Eine Analyse aus der Sicht des UNHCR', 11 ZAR (1991) 9, Weides, P., Zimmermann, P., 'Neubestimmung des politischen Charakters einer Verfolgung im Sinne des Art. 16 Abs. 2 Satz 2 GG', 105 DVBl (1990) 410, Nicolaus, P., 'Artikel 1 der Genfer Flüchtlingskonvention - eine vergessene Begriffsbestimmung des Flüchtlings?', in O. Benecke Stiftung e.V. (Hrsg.), Vierzig Jahre Asylgrundrecht-Verhältnis zur Genfer Flüchtlingskonvention, Baden-Baden, Nomos, 1990, at 41 infra, Köfner, G., Nicolaus, P., 'Die Genfer Flüchtlingskonvention im Schatten des Grundgesetzes', 6 ZAR (1986) 11, Kemper, G.-H., 'Probleme des Asylrechts in der Rechtsprechung des Bundesverwaltungsgerichts', 6 ZAR (1986) 3, Marx, R., 'Der Begriff des politischen Flüchtlings nach Völkerrecht und dem Recht der Bundesrepublik Deutschland', 13 Zeitschrift für Rechtspolitik (1980) 192 infra, von Pollern, H.-I., 'Grenzen des bundesdeutschen Asylrechts (Art. 16 II 2 GG) in völkerrechtlicher und grundgesetzlicher Sicht', 17 Association for the Study of the World Refugee Problem Bulletin (1979) 16,

asylum law currently provides for granting of legal protection to two basic categories of alien asylum seekers: first, those who qualify for full refugee status and consequently for 'protection as political persecutees according to Article 16 a Abs.1 of the Basic Law'¹⁵¹; and second, those who are not to be deported, according to the German Aliens Law (AuslG), to a state where their 'life or freedom is threatened by reason of [their] race, religion, nationality, membership of a particular social group or [their] political opinion'¹⁵². This provision derives from the non-refoulement provision of Article 33 (1) of the 1951/1967 Refugee Convention, and has thus brought German refugee status law much closer to the theoretical concept of refugeehood contained in the above Convention¹⁵³.

Franz, F., 'Das Asylrecht im Schatten des Flüchtlingskonvention', 81 DVBl (1966) 623, Fastenrath, U., 'Problementschärfung durch Genfer Flüchtlingskonvention?', Frankfurter Allgemeine Zeitung, 28 September 1992, at 5, Mallet, N., 'Deterring asylum seekers: German and Danish law on political asylum', 5 Immigration & Nationality Law & Practice (1991) 115, at 118-9, Richter, S., 'Selbstgeschaffene Nachfluchtgründe und die Rechtsstellung von Konventionsflüchtlings nach der Rechtsprechung des Bundesverfassungsgerichts zum Grundrecht auf Asyl und dem Gesetz zur Neuregelung des Ausländerrechts', 51 ZaöRV (1991) 1, at 4-8, Roth, A., 'Die Genfer Flüchtlingskonvention im Schatten des Grundgesetzes', 8 ZAR (1988) 164, Köfner, G., Nicolaus, P., Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Band 1, Mainz, München, Grünewald/Kaiser, 1986, at 201 et seq.

¹⁵¹See § 1(1) of the Asylverfahrensgesetz, in der Fassung der Bekanntmachung vom 27. Juli 1993, in Sartorius I, Verfassungs- und Verwaltungsgesetze der Bundesrepublik, Band I, 2. Teil; see also supra Introduction to the thesis, n. 2.

¹⁵²See § 51 (1) of the Ausländergesetz (AuslG), 9. Juli 1990, ibid.

¹⁵³ On the role of § 51 Abs. 1 AuslG in German asylum law see analysis in ZDWF (Hrsg.), Schriftenreihe der Rechtsberaterkonferenz- "§ 51 Abs. 1 AuslG und der

German refugee jurisprudence has emphatically acknowledged that the source of the national constitutional asylum provision is the institution of asylum, as established in international law at the time of the creation of the 1949 German Constitution (Grundgesetz). Even though the right to seek territorial asylum was transformed in Germany, through the Grundgesetz, into an 'individual subjective fundamental right', thus surpassing the frame of the relevant international legal principles, its substance was to remain attached to the institution of asylum as established in international law¹⁵⁴. Accordingly, as early as 1957, the German Federal Administrative Court, in its case law, established that the basis of the granting of asylum on German territory should also be, apart from Article 16.2.2

Verfolgungsbegriff der Genfer Flüchtlingskonvention", Bonn, ZDWF, September 1992. See also Bundesverwaltungsgericht, judgment of 18 January 1994, 9 C 48.92, in 47 Die Öffentliche Verwaltung (1994) 479, at 480-2 (see analysis of this judgment infra).

¹⁵⁴See judgment of the Federal Constitutional Court of 26 November 1986, 2 BvR 1058/85, 74 BVerfGE 51, at 57. See also judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 334 and 343, judgment of 23 January 1991, 2 BvR 902/85 and 515,1827/89, 83 BVerfGE 216, at 230. See also judgment of Federal Administrative Court, 17 January 1957, I C 166.56, 4 BVerwGE 238, at 241. See also judgment of 7 October 1975, BVerwG I C 46.69, 49 BVerwGE 202, at 203-4, and 208-210 where the Court emphasised the lack of 'inherent limits' ('immanente Schranken') of the constitutional right to asylum, and its potential exterior limitation through consideration of other fundamental rights, or 'legal values', like state security, of a constitutional standing. See also judgment of 17 May 1983, BVerwG 9 C 36.83, 67 BVerwGE 184, at 185. See also Zinn of the Ausschluß für Grundsatzfragen, 4. Sitzung am 23.9.1948, in Kreuzberg, H., Warendorf, V., Grundrecht auf Asyl Materialien zur Entstehungsgeschichte, Köln etc., Carl Heymanns Verlag KG, 2. Auflage, 1992, at 30: 'The concept of asylum law is firmly defined by general international law'; accord, Dr. von Mangoldt, ibid. at 31, Dr. Heuss, and Dr. Schmid, ibid. at 36.

Grundgesetz, that of the refugee definitional provision of the 1951 Refugee Convention, the latter having an active auxiliary role to play in the refugee status determination procedure¹⁵⁵. The above Supreme Court, in a serious effort to express its conviction about the reconcilability, excluding identifiability, of the national provision on asylum with the international refugee concept, indeed accepted the international refugee definition as one comprising 'all conceivable cases of political persecution' and, thus, able to provide the 'political persecution' of the constitutional provision with further definitional/interpretational support¹⁵⁶.

¹⁵⁵See judgment of 17 January 1957, I C 166.56, 4 BVerwGE 238, at 241-2, judgment of 25 November 1958, I C 122.57, 7 BVerwGE 333, judgment of 1 October 1985, BVerwG 9 C 19.85 (transcript copy) at 6-7, judgment of 18 March 1986, BVerwG 9 C 207.85 (transcript copy) at 14; see also judgment of 25 October 1988, BVerwG 9 C 76.87 (transcript copy) at 5: 'The granting of the right to asylum requires the well-founded fear of political persecution in the asylum seeker's country of origin. Well-founded fear is to be assumed when the asylum seeker is threatened by political persecution with a considerable probability through a sensible assessment of the overall facts of his case...protection...to an asylum seeker who has already endured political persecution may only be denied if there is no serious doubt about his security against threatening persecution.'

¹⁵⁶See judgment of 7 October 1975, I C 46.69, 49 BVerwGE 202, at 204-7. The potential alternation of the international with the national refugee status provision was made clear by the same Court in its judgment of 31 March 1981, 9 C 6.80, 62 BVerwGE 123, at 123-4, where it was pointed out that 'The right to asylum for deliberate political persecution may also be claimed by an individual who is not personally affected in one of his protected interests of the Geneva Refugee Convention'. See also judgment of 17 May 1983, BVerwG 9 C 36.83, 67 BVerwGE 184, at 185-6 where the Court designates the international refugee definition's grounds of persecution as ones of an 'exemplary character for the assessment of whether a persecution is political'. See also judgment of 18 October 1983, BVerwG 9 C 158.80, 68 BVerwGE 106, at 107, judgment of 12 July 1983, BVerwG 9 B 10542.83, 5 InfAuslR (1983) 257, judgment of 17 May 1983, 9 C 874.82, 67 BVerwGE 195, at 197, judgment of 19 May 1987, BVerwG 9 C 130.86 (transcript copy)

Nevertheless, the German Federal Constitutional Court has always used the terminology of, and has thus indirectly incorporated into its jurisprudence, the 1951/1967 Refugee Convention. It has employed in its refugee status adjudication the notion of 'justified fear' ('Die Befürchtung...ist berechtigt')¹⁵⁷, a notion non-existent in Article 16 GG, but reminiscent of, and indeed emanating from, the 'well-founded

at 7, judgment of 19 May 1987, BVerwG 184/86, 6 NVwZ (1987) 895, at 896-7, judgment of 7 July 1987, BVerwG 9 B 170.87 (transcript copy) at 2-3. See also judgment of 15 March 1988, BVerwG 9 C 278.86, 79 BVerwGE 143, at 144-5 where although the Court emphasised the reference to the Refugee Convention definition when applying the constitutional asylum provision, it stated that 'This does not mean however that a political persecution in the sense of Art. 16 Abs. 2 Satz 2 GG would be exclusively and solely limited to violations on the ground of the personal characteristics expressly named in Art. 1 A Nr.2 of the Geneva Convention. What was decisive for the actual orientation of the notion of the [individual] persecuted on political grounds towards the refugee notion of the Geneva Convention in the case law of the Federal Administrative Court was that on the granting of asylum according to the Constitution is reflected the direct experience of innumerable persecutions and expulsions especially during the period of the national socialists, as well as after 1945, while the Geneva Refugee Convention, on the other, likewise refers to historically experienced persecutions...and the human characteristics and behaviours named in Art. 1 A Nr.2 of the Geneva Convention are accordingly such that according to historical experience have constituted and constitute the most frequent and decisive points of reference and connection for the repression and persecution of people who are different and think differently.'. The Court went on (ibid. at 146-7) to state expressly that Article 16 2.2 GG did not exclude from its ambit characteristics other than those, but of the same unalterable nature, mentioned in Art. 1 (A).2 of the UN Refugee Convention. It reached, thus, the conclusion that homosexual orientation must also be counted among such personal properties. On this judgment see Kimminich, O., Anmerkung, 43 Juristen Zeitung (1988) 713, and infra Chapter XI Section 2.

¹⁵⁷Judgment of 4 February 1959, 1 BvR 193/57, 9 BVerfGE 174, at 182. See also judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 360-1, where the Court takes into account and assesses previous persecution suffered by a refugee applicant, in accordance with Article 1 C. (5).2 of the UN Refugee Convention.

fear of persecution' of the UN Refugee Convention. In its more recent case law the Bundesverfassungsgericht has made a much more explicit reference to, and has used, the international 1951/1967 refugee concept, in the context of reconfirmation of a fundamental 'legal conviction' based on the principle of inviolability of the human dignity which has been entrenched in the German Basic Law and has been directly, jurisprudentially, linked with the granting of asylum. That legal conviction proscribes the endangerment or violation by the state of the life, limb or personal freedom of the individual 'on grounds...that lie in the individual's political opinion, religious conviction or their inalienable characteristics [of importance to asylum, ('asylerberhebliche Merkmale')] that mould their difference ['Anderssein']'¹⁵⁸. In its judgment of 8 November 1990, the above Court has actually gone much further, accepting and using verbatim the United Nations 1951/1967 Convention grounds for refugee persecution¹⁵⁹.

However, the Bundesverfassungsgericht had established in 1959 that Article 16.2.2 GG was in a position to play a wide role, supplementary to the 1951/1967 refugee concept. Giving a

¹⁵⁸Judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 333 and 343. See also judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143 at 157-8; see also judgment of 4 December 1991, 2 BvR 657/91, 11 NVwZ (1992) 561 at 562, where the Bundesverfassungsgericht reconfirmed its view that of importance to an asylum application are not only the 'inalienable characteristics [of the refugee applicant] that mould his difference but also 'the political conviction or the basic religious faith'.

¹⁵⁹Judgment 2 BvR 933/90, 13 InfAuslR (1991) 25, at 28.

seemingly wide functional range to the constitutional notion of 'persecution on political grounds', the Court pointed out that political persecution may exist, and refugee status may consequently be recognised, when the prerequisites of the 1951 Refugee Convention definition of Article 1 (A).2 are not fulfilled. Any such rejection, consequently, based on the international legal concept of refugeeism should not be 'prejudicial' for an asylum claim based on the German constitutional provision¹⁶⁰. The wording of the Court's judgment makes it more than clear that the constitutional provision was considered by the Court as providing a sound basis for the development of a wide interpretation of the refugee concept, beyond the limits of international law¹⁶¹.

The actual substantial and substantive superior, or autonomous¹⁶², nature of the protection provided by Article 16.2.2 GG over the 1951/1967 international legal regulation regarding refugee status, as well as over the relevant law of other states of the international society, has been emphasised by the German Federal Constitutional and Administrative Courts

¹⁶⁰Judgment of 4 February 1959, 1 BvR 193/57, 9 BVerfGE 174, at 181. See also judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 356.

¹⁶¹Judgment of 4 February 1959, 1 BvR 193/57, 9 BVerfGE 174, at 181.

¹⁶²See Kokott, J., Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten, Berlin etc., Springer-Verlag, 1993, at 349-350.

on a number of occasions¹⁶³. This superiority has been attributed by the German Supreme Courts to the fact that the right (or claim [Asylanspruch]) to asylum has been entrenched in the Grundgesetz as an 'individual public right ['subjektives öffentliches Recht']...binding upon the legislature, the administration and the jurisprudence'¹⁶⁴. However, the differentiation between the constitutional asylum provision and the refugee definitional provision of the 1951/1967 Refugee Convention (which in Germany has basically an ordinary law status inferior to the constitutional provision) appears to have been considered as transcending problems of a typical status classification regarding legislative provisions that are to be applied by courts. The German Federal Constitutional Court, drawing upon the 'well-founded fear of persecution' which is a prerequisite of the international refugee definition and thus 'takes into account the subjective element of the fear of persecution' for which there must be 'good reasons', has emphasised the different nature of the asylum provision of the German Basic Law. The latter regulation is based, in the words of the above Court, on an 'objective assessment of the danger of persecution'. In the former international provision the cause of refugee flight is the 'threatening political persecution of the individual', while in the latter constitutional provision a different

¹⁶³See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 356, judgment of 25 February 1981, 1 BvR 413, 768,820/80, 56 BVerfGE 216 at 235. See also judgment of 13 January 1987, BVerwG 9 C 53.86, 75 BVerwGE 304 at 305.

¹⁶⁴Idem.

theoretical assessment is to take place which may be extremely difficult in some cases. What should be assessed according to the constitutional provision is 'whether the endangerment of the asylum seeker has already objectively, in concrete terms, shown that the assumption of a persecution is justified'¹⁶⁵. However, in a later judgment the Federal Constitutional Court made use of an intermediate reasoning, taking openly into account not only objective persecutory elements but, moreover, the individual refugee's well-founded fear of persecution based on that objective situation. The Court has thus laid down the principle that an individual may lay claim to the 'fundamental individual right of asylum' only when 'he himself, individually, has suffered political persecution, since he has become victim of intensive violations of law, aimed at him and related to characteristics of significance to the granting of asylum, and which exclude him from the predominant peace order of the state, and because he is obliged for these reasons, with a well-founded fear [*'in begründeter Furcht'*] of a hopeless situation, to flee his country and to search for protection abroad; on that occasion the imminent impending danger of persecution is equal to the persecution which has already occurred'¹⁶⁶. The same Court went on to point out that in such a case consideration must be

¹⁶⁵See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 359. Accord, BVerwG, judgment of 18 January 1994, 9 C 48.92, 47 Die Öffentliche Verwaltung (1994) 479, at 482.

¹⁶⁶See judgment of 23 January 1991, 2 BvR 902/85 and 515, 1827/89, 83 BVerfGE 216 at 230, emphasis added. See also judgment of 20 February 1992, 2 BvR 633/91, 14 InfAuslR (1992) 226, at 228.

given to all the facts that are objectively suitable to cause [the refugee's] well-founded fear of (threatening) persecution. This fear may arise from measures aimed by the persecutor at [the refugee] himself, provided that they affect him in relation to a characteristic of significance to the granting of asylum, and that they show the necessary intensity. Individual political persecution may also be acknowledged when such measures have not, as yet, taken their toll on him, but they threaten to do so shortly, since the persecutor has an eye on him'¹⁶⁷. Accordingly, the Federal Constitutional Court in its judgment of 11 May 1992 acknowledged that 'the expressed, serious threat of harm, relevant to [the refugee's] political activism, which [harm], such as the injury or killing of [the refugee's] own child, when materialised has a character of significance to the asylum procedure, presents...an impending danger of political persecution'¹⁶⁸.

With the above case law it has become clear that contemporary jurisprudence of the German Federal Constitutional Court has shifted towards a cautious but clear subscription to the thesis that the international legal notion of well-founded fear of persecution (the substance of the Convention refugeehood) is able to constitute an integral part of the legal basis of the granting of asylum in the context of the

¹⁶⁷83 BVerfGE 216, at 230-1.

¹⁶⁸Judgment of Federal Constitutional Court, 11 May 1992, 2 BvR 1549/91, 14 InfAuslR (1992) 294, at 295-6.

German Basic Law as well. The above Court's refugee case law has thus accepted the universality of the concept of refugeehood as contained in the international Refugee Convention, and the constructive role that the international legal concept of refugeehood may play, and has played, in domestic asylum adjudication. Despite the already mentioned political circumstances that have moulded the spirit and letter of the above Convention there is no doubt that the refugee concept, as entrenched therein, includes, in the words of the German Federal Constitutional Court, 'every human characteristic and behaviour that, according to history, have constituted, and continue to constitute, the most common and crucial starting-points and points of reference for the oppression and persecution of dissidents and of persons of a different nature'¹⁶⁹.

The above discernible shift of the German Federal Constitutional Court towards an elimination of the dualism regarding the concepts of refugeehood deriving from the 1951/1967 Refugee Convention and the German Constitution was actually reinforced by the German Federal Administrative Court's judgment of 18 January 1994¹⁷⁰. In this case this Court dealt with the question of the agent of persecution. With the above judgment the Court established, first, the

¹⁶⁹See judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143 at 157; see also judgment of 13 January 1987, BVerwG 9 C 53.86, 75 BVerwGE 304, at 306.

¹⁷⁰BVerwG 9 C 48.92, 47 Die Öffentliche Verwaltung (1994) 479.

identifiability of, on the one hand, Articles 1 A. (2), and 33 (principle of non-refoulement) of the UN Refugee Convention and, on the other, the above-mentioned non-refoulement provision of § 51 (1) AuslG, in the context of the state-centred, according to the above Court, character of persecution¹⁷¹. However, the second and most significant point of the above judgment is found in the Federal Administrative Court's obiter in which, while reconfirming the substantive theoretical differentiation between Convention and German constitutional refugeehood, the Court stressed their common characteristics which surface in legal practice, that is, in German judicial interpretation. The Court emphasised that despite the fact that 'Art. 1 A Nr.2 of the Geneva Convention is based upon the subjective element of fear of persecution, whilst the German right to asylum, including the right to protection from deportation [non-refoulement], takes as its starting-point, in the case of the question of the danger of persecution, an objective approach', it does not lead 'in the practical application of law...to substantial differentiations ['zu unterschiedlichen Abgrenzungen']'¹⁷². The Court was cautious not to overstretch its analysis and thus lead to a complete identification of the Convention and Constitution refugee concepts, which would affect the judicial interpretation of all the aspects of refugeehood. It limited the practical coincidence of the above two concepts to the

¹⁷¹Ibid. at 481-2. On the issue of agents of persecution see infra Chapter VI.

¹⁷²Ibid. at 482.

problem of evaluation (prognosis) of the danger of persecution; however, this is the main question that has provoked, in effect, the refugee conceptual dualism debate in Germany. Accordingly, the Federal Administrative Court pointed out that, similarly to the Refugee Convention, the German constitutional right to asylum 'takes into account whether...fear of persecution may be caused to a reasonable man if he were in the situation of the asylum seeker.' The Court thus concluded that 'in the end, what is also determinant in the case of the [constitutional] right of asylum is the issue of reasonableness of a return to the home country'¹⁷³. With this judgment the Bundesverwaltungsgericht introduced and established, indirectly but clearly, the notion of well-founded fear of persecution, one of the fundamental aspects of the Convention refugeehood, in the German refugee concept based on the Bonn Basic Law. Although retaining the basic initial theoretical differentiation (based on the fundamental legal right status of the German right to asylum) between the above two concepts, the Court confirmed their substantial inherent common nature, corresponding to the need of protection of every individual having a well-founded fear of persecution in her/his country of origin, a conceptual coincidence which does become evident, as shown in detail later in the thesis, in the practical course of German asylum adjudication.

However, the exceptional nature of the interpretational

¹⁷³Idem.

context of German refugee status case law, in contradistinction to British and French case law, has been accentuated by the occasional but express reference to, and use by the two Federal Supreme Courts of canons of interpretation in the course of asylum adjudication. The Bundesverfassungsgericht has accepted that the meaning of the constitutional asylum provision may not be determined solely on the basis of its wording, which may be subjected to various interpretations. The Court has thus attributed particular weight to the content that the drafters of the Constitution wished the asylum provision to have. In order to find out this particular content, it is necessary to clarify the 'meaning and purpose' with which the drafters of the German Basic Law intended to provide the 'normative prescription' regarding asylum. To this end, the Federal Constitutional Court has made use of two basic tools: first, the background of the institution of asylum ('Regelungstradition'); and second, the travaux préparatoires ('Entstehungsgeschichte') of the constitutional asylum provision¹⁷⁴. Based on the background/tradition of the above institution, German case law has thus emphatically recognised that the substance of the national asylum provision is based on the international legal institution of asylum. However, it is not merely a substantial liaison between international and national institutions that

¹⁷⁴See judgment of 26 November 1986, 2 BvR 1058/85, 74 BVerfGE 51, at 57; see also judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 334. See also the following judgments of the Federal Administrative Court: 7 October 1975, I C 46.69, 49 BVerwGE 202, at 203-4, 2 August 1983, 9 C 599.81, 67 BVerwGE 314, at 315-6, 2 August 1983, 9 C 818.81, 67 BVerwGE 317.

has been reaffirmed. This liaison has been also tightly tied by the jurisprudence to a chronological proviso. That is to say, the substance of the national institution regarding territorial asylum, albeit transformed to an individual fundamental right, was to correspond also chronologically to its 'ancestor', i.e. the asylum institution as accepted and established in international law at the time of creation of the national asylum regulation¹⁷⁵. Nevertheless, both the Federal Constitutional and Administrative Courts have, on numerous occasions, made use of the German parliamentary travaux relating to the constitutional provision on asylum, in the course of interpretation of the constitutional right to asylum and, consequently, the concept of refugeehood. However, in an early (1959) judgment, the Bundesverfassungsgericht made it clear that the travaux were of little help to any interpretation of the notion of 'persons persecuted on political grounds' included in Article 16 GG. The apparent reason for that was, according to the Court, that there had been no general agreement among the participants in the meetings which led to the creation of the Grundgesetz on a series of issues referring to the scope of the asylum provision¹⁷⁶. However, what the Court saw as having clearly emerged from the travaux was the consensus according to which the constitutional right to asylum should not be 'defined

¹⁷⁵Idem; see also judgment of 1 July 1987, 2 BvR 478/86, 2 BvR 962/86 (transcript copy) at 17.

¹⁷⁶See judgment of 4 February 1959, 1 BvR 193/57, 9 BVerfGE 174; see also judgment of Federal Administrative Court, 26 March 1962, I C 80.59, 78 DVBl (1963) 147.

narrowly or be definitely limited to a specific circle of individuals'¹⁷⁷. The Federal Constitutional Court has thus established a general rule of interpretation valid in asylum adjudication, according to which a restrictive interpretation of the right to asylum, that is, the concept of refugeehood, does not constitute the appropriate one. As pointed by the same Court, a 'wide interpretation' ('weite Auslegung') is the only one that corresponds to the spirit of the framework in which the asylum provision was conceived¹⁷⁸, that is, a spirit of a protective, humanitarian nature which has imbued the German Constitution in general¹⁷⁹. However, in its early case law, the Bundesverfassungsgericht had connected the above liberal interpretation of refugeehood with one more element, i.e. the 'socio-political situation' at which asylum aimed, a situation characterised by 'profound socio-political and ideological conflicts among states that have developed fundamentally different inner structures'. These 'fundamentally differently structured states' were, according to the above Court, those where 'for the accomplishment and safeguarding of political and social revolutions the executive power is used in such a manner that contradicts the principles

¹⁷⁷9 BVerfGE 174, at 179-180. See also judgment of the German Federal Court of Cassation, 21 January 1953, 4 ARs 2/53, 3 Entscheidungen des Bundesgerichtshofes in Strafsachen 392 at 393-4. See also 74 BVerfGE 51 (supra n. 174) at 60-63, and judgment of Federal Administrative Court, 26 March 1962, I C 80.59, 78 DVB1 (1963) 147.

¹⁷⁸9 BVerfGE 174, at 180.

¹⁷⁹See judgment of Federal Administrative Court, 7 October 1975, I C 46.69, 49 BVerwGE 202, at 206.

of a free democracy'¹⁸⁰. This was one of the 'plights' to which the asylum provision should be applicable and should be interpreted accordingly, as emphasised by the early case law of the German Federal Constitutional, as well as the Administrative, Court. There can be no doubt that this frame of judicial interpretational mind is tainted by the political ideology that reigned during the cold war period. The above case law represents the apotheosis of that ideology founded upon the sharp dichotomy of the post-World War II period between the 'free democratic' states of the West and the other 'fundamentally different' countries of the East¹⁸¹. However, the liberal spirit of pro-individual liberty that dominates this case law and the relevant prescriptive interpretational rules is undoubtedly to be considered as still valuable to contemporary refugee status case law.

More recent case law of the Federal Constitutional Court, as well as of its administrative counterpart, has made an effort to neutralise its terminology which has correspondingly provided asylum adjudication with a politically neutral

¹⁸⁰Judgment of 4 February 1959, 1 BvR 193/57, 9 BVerfGE 174, at 180. See also judgment of Federal Administrative Court, 17 January 1957, I C 166.56, 4 BVerwGE 238, at 242 where it is pointed out that 'asylum protection is to be accorded...[to individuals] that are persecuted on political grounds, contrary to the principles of the free democratic order ['freiheitlich-demokratische Ordnung']'; see also judgment of 26 October 1971, BVerwG I C 30.68, 39 BVerwGE 27, at 29-30.

¹⁸¹See also judgment of Federal Administrative Court of 26 March 1962, I C 80.59, 78 DVB1 (1963) 147 where it is stated that the international legal basis of the German constitutional right to asylum was directly linked to the 'difficult situation between East and West'.

character. Accordingly, in 1980 the Bundesverfassungsgericht stated expressis verbis that the constitutional asylum claim is dependent neither on 'the origin and the political convictions of the persecuted individual nor on the political ideology ['politische Richtung'] dominant in the state of persecution'¹⁸². The right to asylum should always be applied in a politico-ideologically neutral manner without being limited to 'specific categories of politically persecuted individuals'¹⁸³. The functional (interpretational) neutrality of the protective asylum provision was reinforced by the same Court when it rejected the 'motivation theory' exposed by the Federal Administrative Court, which had placed particular weight on the subjective, individual motive(s) of persecution ('Verfolgungsbeweggrund') of the agent of persecution, and consequently has imposed the relevant burden of proof, detrimentally, on the refugee applicant¹⁸⁴. Accordingly,

¹⁸²Judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 356-7; see also judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 338-9. See also judgment of 19 August 1986, BVerwG 9 C 322.85, 102 DVB1 (1987) 47 at 48, where the Court rejected the claim that forced implementation of the state army draft regulations of a totalitarian or military regime may in itself provide a sound ground for a refugee status claim; see also judgment of 21 June 1988, BVerwG 9 C 12.88, 79 BVerwGE 347 at 351.

¹⁸³Judgment of 26 November 1986, 2 BvR 1058/85, 74 BVerfGE 51, at 63; see also judgment of 17 May 1983, BVerwG 9 C 874.82, 67 BVerwGE 195, at 197, judgment of 13 January 1987, BVerwG 9 C 53.86, 75 BVerwGE 304, at 305-6.

¹⁸⁴See judgment of 17 May 1983, 9 C 36.83, 67 BVerwGE 184 at 189, and 193-4, judgment of 17 May 1983, 9 C 874.82, 67 BVerwGE 195 at 199, judgment of 26 June 1984, 9 C 185.83, 69 BVerwGE 320, at 321-2, judgment of 22 January 1985, BVerwG 9 C 1113.82 (transcript copy) at 9, judgment of 3 December 1985, BVerwG 9 C 33/85 etc., 5 NVwZ (1986) 307 at 308, judgment of 16 April 1985, BVerwG 9 C 109.84, 7 InfAuslR (1985) 244, at 244-5, judgment of 16 April 1985, BVerwG 9 C 111.84 (trans-

German case law has made it clear that persecution should always be assessed 'only on the basis of the character of its content according to the discernible direction of the [persecutory] measures, not according to the subjective grounds or motives that lead the persecutors to that action'¹⁸⁵. The reasoning upon which the above opinion of the

cript copy) at 9-10, judgment of 19 August 1986, BVerwG 9 C 322.85, 102 DVB1 (1987) 47, judgment of 17 January 1989, BVerwG 9 C 62.87, 11 InfAuslR (1989) 163 at 164-5. Contra: judgment of 20 November 1990, BVerwG 9 C 74.90, 106 DVB1 (1990) 541. See also judgment of 15 May 1990, BVerwG 9 C 17.89, 12 InfAuslR (1990) 312 at 313: 'According to the case law of the Bundesverfassungsgericht it is required that the asylum-related measures should affect the individuals exactly in relation to characteristics of significance to asylum. Whether there exists in this sense a specific aim that constitutes persecution 'because of' an asylum characteristic, this is to be assessed, accordingly, on the basis of its [the persecution's] inherent character in accordance with the identifiable direction of the [persecutory] measures themselves, but not according to the subjective grounds or motives that lead on that occasion the persecutors...'. The Federal Administrative Court thus followed also the objective criterion of the 'identifiable direction of the measures and of the persecution because of an asylum characteristic'; see also judgment of 20 November 1990, BVerwG 9 C 73.90, 13 InfAuslR (1991) 181 at 182; see also judgment of 30 October 1990, BVerwG 9 C 72.89 (transcript copy) at 13, judgment of 25 June 1991, BVerwG 9 C 131/90, 11 NVwZ (1992) 274, judgment of 23 July 1991, BVerwG 9 C 154.90, 13 InfAuslR (1991) 363 at 363-4, judgment of 21 January 1991, BVerwG 9 C 92.90 (transcript copy) at 9, judgment of 3 December 1991, BVerwG 9 C 15.91 etc. (transcript copy) at 7, judgment of 30 June 1992, BVerwG 9 C 24.91 (transcript copy) at 10.

¹⁸⁵See judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315 at 335; see also judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143 at 157 and 166 *et seq.*, judgment of 20 December 1989, 2 BvR 958/86, 9 NVwZ (1990) 453 at 454 (and in 81 BVerfGE 142 at 151-2), judgment of 6 March 1990, 2 BvR 937,1289 *et al.*/89 (transcript copy) at 6, judgment of 7 December 1990, 2 BvR 525/90, 13 InfAuslR (1991) 136, judgment of 13 July 1990, 2 BvR 280/87, 12 InfAuslR (1990) 280, judgment of 4 April 1991, 2 BvR 1497/90, 13 InfAuslR (1991) 262, judgment of 26 June 1991, 2 BvR 427/91, 13 InfAuslR (1991) 360 at 362, judgment of 20 May 1992, 2 BvR 205/92, 11 NVwZ (1992) 1081, at 1082, judgment of 28 January 1993, 2 BvR 1803/92, 15 InfAuslR (1993) 142, at 145, judgment of 11 May 1993, 2 BvR 2245/92, 109 DVB1 (1994) 38, at 39.

Constitutional Court was based is found in the constitutional travaux in which a consensus had been established that asylum should be granted to that 'alien...who can longer live in his own country, because the political system has deprived him of his liberty, his life or his property'¹⁸⁶. The Bundesverfassungsgericht made it clear that the operation of the institution of asylum should be politically neutral: 'the adjective 'political' [of the German constitutional asylum provision] should not denote a demarcated subject field of politics, but a characteristic that all areas can take on at any time under certain circumstances'¹⁸⁷.

From the above analysis it is clear that the normative interpretational framework established in the refugee status case law of the German Supreme Courts has been basically of the same nature as the one provided by Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties¹⁸⁸. While partially based on the objective interpretational school of textual ordinary meaning, German case law has actually transcended the constructive limitations of this school,

¹⁸⁶See judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143 at 156-7.

¹⁸⁷Idem. See also judgment of Federal Administrative Court, 17 May 1983, 9 C 36.83, 67 BVerwGE 184, at 188.

¹⁸⁸Article 31 of the Vienna Convention on Treaties has been expressly (and thus rather uniquely in its asylum jurisprudence) employed by the Federal Administrative Court in a restrictive manner, in order to establish the state as the primary agent of persecution established in the UN Refugee Convention, see judgment of 18 January 1994, BVerwG 9 C 48.92, 47 Die Öffentliche Verwaltung (1994) 479, at 480-1; see relevant analysis infra Chapter VI.

focusing not only on the consensual frame of mind of the drafters of the Grundgesetz, viewed through the supplementary means of interpretation (travaux, and circumstances of conclusion of the asylum provision), but, moreover, on the humanitarian object and purpose, that is, the teleological nature, of the asylum provision itself on which a liberal ('wide') refugee status interpretation should be founded. Thus, it is beyond any serious doubt that the appropriate liberal and politically neutral manner of interpretation which has been established in German refugee status case law has, to a great extent, owed its theoretical background to the teleological theory of interpretation. The teleological interpretational paradigm constitutes indeed the most effective context of interpretation in asylum law, given its flexibility, which enables the interpreting organ not only to place emphasis on the fundamentally humanitarian character of the refugee protection and legislation but, moreover, to apply the legal text concerning the concept of refugeehood to actual situations of refugeeism that transcend the factual boundaries of refugee reality encountered by the (domestic or international) legislative drafters almost half a century ago.

CONCLUSION

The concept of refugeehood, as established by the 1951/1967 Refugee Convention, and judicially applied (directly or indirectly) in domestic fora, including the European judicial fora under consideration in the present thesis, constitutes an international legal (stipulative) synthetic definition with a

unique inherent notional dynamism. Its dynamic character lies in the conceptual porousness of its constitutive elements, a fact that is clearly demonstrated in the following chapters. This is a condition that enables the Convention's conceptualisation of refugeehood to surpass, in practice, the legal formalism of the treaty text which, in many cases, is not in a position in itself, as it currently stands, to respond to the demands of modern refugee morphology. In consequence, the challenge facing the domestic fora in the course of contemporary interpretation is indeed real and concurrently grave.

Judicial interpretation should always be founded on sound and generally established relevant rules. In the case of interpretation of the porous refugee concept, no more appropriate and useful interpretational guidelines may be provided than those contained in the rule and supplementary means of treaty interpretation of the 1969 Vienna Convention on the Law of Treaties, an almost completely forgotten, albeit legally binding, instrument in domestic asylum jurisprudence. With the exception of the German refugee status jurisprudence, where (subjective [relating to legislative drafters' intentions] and teleological) interpretational rules have been occasionally employed, British and French asylum case law has never actually utilised any canons of interpretation.

The Refugee Convention, in which the established legal conceptualisation of refugeehood is contained, constitutes a

multilateral convention of the 'legislative/normative treaty' genus, that bears a particularly sensitive and demanding humanitarian character. This is a treaty which, albeit clearly marked by narrow state-centred, post-war political considerations, was concluded in order to surpass, as demonstrated by the Convention's Final Act, in domestic, national practice its chronological factual constraints. The textual approach to treaty interpretation, although the first step in an interpretational process, has never been adequate in and of itself. The Vienna Treaty Convention itself has made it dependant on the context of the treaty, a second interpretational approach which relies heavily on the subjective theses of a treaty's party states. In the case of a treaty like the UN Refugee Convention, the subjective interpretational approach may not be regarded as sufficient either. The establishment of a generally accepted thesis of the party states with regard to the real practical nature and effect of a multilateral 'treaty compromise' like the aforementioned one is impossible, simply because there was no such thesis, as shown in Chapter I. As a consequence, the only interpretational method which may reasonably be propounded as a sound basis/guide for the construction of refugeehood is the teleological one, which supports the developmental application of a treaty according to its fundamental object and purpose. The humanitarian and, lato sensu, human rights character of the above Refugee Convention may lead an interpreter to the application, in principle, only of this theoretical approach, already established in contemporary international human rights

law. Conventions of this nature exist to serve, in the best possible (that is to say, in an effective) manner, unprotected, vulnerable individuals from grave human rights violations. This is an irrefragable objective, and its realisation may depend, in the final analysis, only on the practical judicial recognition of the treaty's fullest value and effect, independently to a large extent of narrow textual or subjective initial and/or subsequent (if any) party state considerations¹⁸⁹. Only the teleological approach is consequently in a position to provide the inherently dynamic legal refugee concept with a principled basis of interpretation which will enable it to function to its full extent, i.e. in favour not only of the classic typology of refugeeism but, moreover, for the benefit of modern individual refugee applicants who are often in grave danger of their lives and who cry for the provision of immediate and effective protection.

¹⁸⁹See Dissenting Opinion of Judge Tanaka in South West Africa, Second Phase, Judgment, ICJ Reports 1966, p. 6, at 277: 'What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred from the raison d'être of a legal system, legal institution or norm.'

PART TWO

THE INTERPRETATION OF THE SUB-NOTION OF PERSECUTION IN THE
FRAMEWORK OF THE LEGAL NOTION OF REFUGEEHOOD

CHAPTER III

REFUGEE EXODUS AND THE ELEMENT OF CAUSATION BETWEEN
PERSECUTION AND FLIGHT: THEIR ROLES AND FORMS IN DOMESTIC
JUDICIAL EXAMINATION OF PERSECUTION

SECTION 1. THE PRINCIPLE OF REFUGEE EXODUS

The (well-founded fear of) persecution-based exodus of the refugee has been an established principle concerning refugee status, in both the doctrine and the jurisprudence of refugee law. Modern refugeehood derives from a situation where the 'legal bond' of nationality which unites nationals with a particular state (state of origin), through a 'social fact of attachment'¹, has been seriously, de facto and/or de iure, broken down by reason of persecution on the territory of the above state. Thus, for refugees 'nationality' ceases to operate beneficially through state protective action, not only on the international plane ('diplomatic protection'), but also, and especially, on the domestic level because of the actual lack of an effective 'internal, legal protection' which should be provided, under normal circumstances, by the state

¹See Nottebohm Case (second phase), Judgment of April 6th, 1955: ICJ Reports 1955, p. 4, at 23: 'According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.'

of nationality to its nationals². As a consequence, in order for a refugee to be provided with full legal protection by a foreign state (s)he has to find her/himself alienated from the country of nationality, or of former habitual residence, not only socially, ideologically and psychologically, but also geographically. That is, the refugee is to transcend physically the frontiers of the country of origin, and, through this exodus, is to reach the frontiers, or the actual sovereign territory of another state³.

²See Canada (Attorney General) v. Ward, Supreme Court of Canada, June 30, 1993, 153 National Reporter (1993) 321, at 339: 'International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national.' See also Weis, P., Nationality and Statelessness in International Law, Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, at 32-3. On the international protective role of nationality see also McDougal, M.S. et al., 'Nationality and human rights: The protection of the individual in external arenas', in McDougal, M.S., Reisman, W.M. (eds.), International Law Essays: A Supplement to International Law in Contemporary Perspective, Mineola N.Y., Foundation Press, 1981, at 555 infra. See also Arendt, H., The Origins of Totalitarianism, New York, Harcourt, Brace & World, Inc., 1966, at 279: '...the core of statelessness...is identical with the refugee question...'

³See Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 29 et seq., where M. Walzer's term 'alienage' is used to describe the necessary legal and/or factual alienation of refugees from their states of origins; see also Walzer, M., Spheres of Justice, Oxford, Blackwell, 1983, at 52-61. See also Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 24, Grahl-Madsen, A., The Status of Refugees in International Law, vol.I, Leyden, A.W. Sijthoff, 1966, at 150 et seq. See also Hyndman, P., 'Refugees under international law with a reference to the concept of asylum', 60 Australian Law Journal (1986) 148 at 149, Hyndman, P., 'The 1951 Convention definition of refugee: An appraisal with particular reference to the case of Sri Lankan Tamil applicants', 9 HRQ (1987) 49 at 51. See also UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, UNHCR, 1979, (hereinafter UNHCR, Handbook) at 21, para. 88. See also Romanian Refugee Case, Switzerland, Federal Council, 3 March 1969, 72 ILR (1987) 580, at 581: 'Where a refugee returns, even temporarily, to the State from which he fled and thereby

The exodus principle, which attaches particular weight to the inter-state respect of territorial sovereignty, constitutes a characteristic reflection of the reality of refugeehood as viewed and experienced during the twentieth century, and especially as institutionalised in the international legal framework through the 1951/1967 Refugee Convention⁴. The OAU Convention governing the Specific Aspects of Refugee Problems in Africa⁵ also supports the national boundary-exodus rule⁶.

submits himself to its power, he expresses his conviction that the essential ground for obtaining the status of refugee - a well-founded fear of being persecuted- has disappeared.'; see also Loss of Refugee Status Case, Switzerland, Federal Council, 9 September 1970, 72 ILR (1987) at 584. Article 1 A.(2) of the 1951/1967 Refugee Convention requires that the refugee be 'outside the country of his nationality ...or of his former habitual residence'. The UNHCR Handbook has explained that 'In this context, "nationality" refers to "citizenship".', p. 21, para. 87. On the other, 'habitual residence' usually means a residence status of individuals with rather stable territorial links with the place where they reside, and not simple residence where dwelling in a place for a certain period of time has no continuity or stability, see Council of Europe, Standardisation of the Legal Concepts of "Domicile" and of "Residence", Resolution (72) 1 and Annex adopted by the Council of Ministers of the Council of Europe on 18 January 1972 and Explanatory Memorandum, Strasbourg, Council of Europe, 1972, at 27, and at 6-7. See also Grahl-Madsen, A., ibid. at 160 and 162. See also Dissenting Opinion by Judge Alvarez in Colombian-Peruvian asylum case, Judgment of November 20th, 1950, ICJ Reports 1950, p. 266, at 291: 'Until the present day, asylum has been considered as a humanitarian and transitory measure intended to protect individuals against angry mobs or even against the abusive actions of the authorities of the State on the territory of which they reside. Asylum has therefore a juridical, political and psychological aspect, and this distinction has not always been properly made.'

⁴See German Federal Administrative Court, judgment of 18 January 1994, 9 C 48.92, 47 Die Öffentliche Verwaltung (1994) 479, at 480-1.

⁵1001 UNTS 45.

⁶See Shacknove, A.E., 'Who is a refugee?' 95 Ethics (1985) 274 at 275-7. A characteristically politically tainted exception to the national exodus rule has been the discretion

This is true, despite the fact that the OAU Convention has recognised supplementary geographically internal forms of persecution, being, as already mentioned, the treaty whose supplementary refugee definitional provision represents and depicts one but very substantial contemporary form of refugeehood on a continent that has been probably the most significant refugee producer in the course of this century. The principle of refugee exodus is also in harmony with the rule established in international refugee law, and in international law in general, according to which 'national protection takes precedence over international protection'⁷.

of the US President, under the US 1980 Refugee Act, to grant refugee status to persons persecuted in their country of origin, but have not fled, for 'humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest', see Sections 201.(a) and 207.(e) of the above Act, Public Law 96-212 (March 17, 1980); see also Presidential Determination No. 8-16 of 14 April 1980, 19 ILM (1980) 714, Presidential Determination No. 80-17 of 1 May 1980, ibid. at 715, Presidential Determination No. 80-18 of 2 May 1980, ibid. at 716. On US refugee legislation and practice see, inter alia, Lentini, E.J., 'The definition of refugee in international law: proposals for the future', 5 Boston College Third World Law Journal (1985) 183 at 185 and 194 et seq., Robinson, C., Frelick, B., 'Lives in the balance: The political and humanitarian impulses in US refugee policy', IJRL, Special Issue, September 1990, 293, at 299, Pirie, S.H., 'The need for a codified definition of "persecution" in United States refugee law', 39 Stanford Law Review (1986) 187, at 212 et seq., Martin, D.A., 'Reforming asylum adjudication: On navigating the coast of Bohemia', 138 University of Pennsylvania Law Review (1990) 1247 infra.

⁷See UNHCR, Handbook, at 24, para. 106. On the similar international legal concept/requirement of exhaustion of local remedies see Ambatielos Arbitration, Greece v. UK (1956), 23 ILM (1956) 306, and in Harris, D.J., Cases and Materials on International Law, London, Sweet & Maxwell, 1991, Fourth Edition, at 593 et seq., Brownlie, I., Principles of Public International Law, Oxford, Clarendon Press, 1990, Fourth Edition, at 494 et seq.

Concurrently, the territorial asylum prerequisite of exodus from a national territory by reason of persecution has been laid down by states as a natural by-product of the 'exilic bias'⁸, established in the domain of the potential concerted, or individual, solutions the international society, or members of it, respectively, have been able or willing to offer to the refugee question during this century. Indeed, the refugee exodus principle constitutes evidence not only of the above-mentioned inter-state respect of territorial sovereignty, but also of the actual and obvious non-existence of any serious attention, on the part of the potential asylum-offering states, to the real root-causes of refugeehood which are intertwined with the socio-political reality of the refugee-producing countries⁹. Legal protection in the established form of territorial asylum has therefore limited itself to individuals who manage to flee persecution on the territory of the country of origin and who, consequently, set foot on the territory of a receiving state.

⁸See Coles, G.J.L., 'The human rights approach to the solution of the refugee problem: A theoretical and practical enquiry', in Nash, A.E. (ed.), Human Rights and the Protection of Refugees under International Law, Halifax, Canadian Human Rights Foundation, The Institute for Research on Public Policy, 1988, 195 at 213. See also Coles, G.J.L., 'Refugees and human rights', Bulletin of Human Rights 91/1, New York, UN, 1992, 63, at 64: '...from a universal perspective, traditional (or conventional) refugee law...was primarily directed, and thereby limited, to the rights of the individual in relation to the receiving country. Essentially, it was a law for the institutionalization of exile. Excluded entirely from its scope were the rights of the individual in relation to the country of nationality...'

⁹See Shacknove, A., 'From asylum to containment', 5 IJRL (1993) 516, at 517, and 529.

British refugee case law has indirectly endorsed the rule of causality which should be, in principle, present in cases of refugee flights from persecution. The High Court in Roj Singh¹⁰ emphasised that 'In law it is not necessary to establish a causal link between the period of detention and the decision to leave [the country of origin]'¹¹. However, the court went on to attach a serious qualification to its thesis, adding that 'There is...an evidential value in considering the relationship in time and in terms of cause and effect between an incident [in the country of origin] relied upon as showing a fear of persecution and the timing of the applicant's departure from [that country].' Accordingly, the court rejected the argument 'that by using the expression "causal link" the Secretary of State has applied the wrong test when considering [the refugee status] application'¹². A similar judicial reasoning had been applied earlier in R. v. Secretary of State for the Home Department ex parte Murat Akdogan¹³. In this case, the High Court rejected the appeal of a refugee applicant who had been detained and tortured once in 1978 by the authorities of his home country by reason of his political activism. No such persecution took place again thereafter, until 1989. The court accepted the conclusion reached by the

¹⁰R. v. Secretary of State for the Home Department ex parte Roj Singh, Queen's Bench Division, 14 August 1992, [1992] Imm AR 607.

¹¹Ibid. at 609.

¹²Idem.

¹³Queen's Bench Division, 21 February 1990, [1990] Imm AR 341.

Home Department, according to which the refugee status application could not succeed on the basis of persecution suffered almost ten years before the lodging of the above application¹⁴. However, British case law has emphasised that the condition of causation between persecution and exodus transcends any pure temporal limitations. Such a causation should moreover be of a substantive nature and consist of the real danger of persecution which a refugee applicant faces in the country of origin: a prognostic assessment which is to be carried out on the basis of the 'seriousness of the whole picture' provided by the individual case, and should concern 'the past and the present, and the future'¹⁵.

Relevant to the refugee-exodus principle are also two earlier cases originating in the Immigration Appeal Tribunal. In the first case, Secretary of State for the Home Department v. 'X'¹⁶, 'X', a Chilean citizen, applied at the British Embassy in Santiago, Chile, for entry clearance in order to enter Britain for an indefinite period. He supplied evidence according to which he had been detained by the Chilean authorities on suspicion of subversive activities as an active

¹⁴Accord, R. v. Secretary of State for the Home Department ex parte Kosar, Queen's Bench Division, CO/623/90, 16 March 1992 (transcript copy).

¹⁵See R. v. Secretary of State for the Home Department ex parte Halil Direk, Queen's Bench Division, 5 March 1992, [1992] Imm AR 330, at 335. Accord, Immigration Appeal Tribunal, Luis Carlos Rojas Cortes v. The Secretary of State for the Home Department, Appeal No. TH/25618/86 (6088), 1 September 1988 (transcript copy). On the question of prognosis of persecution in refugee status law see infra Chapter VII.

¹⁶[1978] Imm AR 73.

member of the Communist Party. When the case finally reached the Immigration Appeal Tribunal, the Tribunal found that it had been wrong the adjudicator's decision that allowed 'X' to apply for territorial asylum in the UK from abroad. Thus, the Tribunal established that only persons who have travelled to and presented themselves to the authorities in the UK may apply for territorial asylum. The thesis of the Tribunal had a supplementary international law basis, given that the embassy extraterritoriality theory is not any more accepted in international law¹⁷, having been replaced by the rule of inviolability of the 'premises of the mission', in accordance with Article 22 paragraph 1 of the 1961 Vienna Convention on Diplomatic Relations¹⁸. Consequently, while an individual may find refuge at the premises of a diplomatic mission, this does not entail any right to request grant of refugee status (territorial asylum) by the state of the diplomatic mission. The Immigration Appeal Tribunal reiterated its support to the refugee exodus rule in Abedom Tekle, Russo Ockbazghi v. Visa Officer, Prague¹⁹. The two Ethiopian nationals, students in Czechoslovakia, applied for refugee status at the British Embassy in Prague. The Tribunal dismissed the appeal basing

¹⁷See Harris, D.J., op. cit. supra n. 7 at 336, Orr, D.H., Public International Law in the Modern World, London, Pitman, 1987, at 161 et seq.

¹⁸500 UNTS 95. On diplomatic immunity and diplomatic asylum see Harris, D.J., op. cit. supra n. 7, at 319 et seq., Brownlie, I., op. cit. supra n. 7, at 353 et seq.. See also Barberis, J.A., 'Asylum, diplomatic', Encyclopedia of Public International Law vol.8, 1985, at 40, and Grahl-Madsen, A., 'Asylum, territorial', ibid. at 42.

¹⁹[1986] Imm AR 71.

its judgment, as in the previous case, on the refugee exodus principle (which has been included in the UNHCR Handbook) and on the international law theory of diplomatic immunity.

A crucial issue raised in Abedom Tekle was the problem an asylum seeker may face in case the country on whose territory (s)he finds her/himself is not signatory to the 1951/1967 Refugee Convention, and, thus, not bound conventionally by the principle of non-refoulement. Has a country, conventionally bound by this principle, the right to reject an asylum application made at her Embassy abroad even if the applicant faces a danger of deportation to and subsequent persecution by her/his country of origin? Abedom Tekle did not present any such danger of deportation-persecution, but the Tribunal expressed a general rule applicable in the adjudication of similar cases. It may be inferred from the judgment that the Tribunal's thesis was that even in a case of danger of refoulement a state conventionally bound by the non-refoulement principle may not be held responsible and thus bound to process an asylum application lodged abroad. In the Tribunal's words, 'the failure of one State to accept international obligations does not as a consequence require other States to accept additional obligations'²⁰. Abedom Tekle

²⁰Ibid. at 74. On the principle of non-refoulement in international refugee law see bibliography mentioned supra in Chapter II, notes 48, and 64, and accompanying text. The question raised in Tekle is also inextricably linked with the rule of the subsidiarity of asylum which will be dealt with in Chapter IV.

was affirmed by the High Court in Sritharan²¹, a case concerning Sri Lankan asylum seekers who claimed refugee status in the UK, while they were on the territory of Oman. In this case, McCullough J accepted that 'there was no obligation on the Secretary of State to consider applications for political asylum from those who had not arrived in the United Kingdom.'²² As for the principle of non-refoulement, the court confirmed the opinion of the Home Office, according to which 'article 33 (1) does not refer, and has never been understood to refer, to someone who has not yet arrived [in the UK], even if he has already left the country from which he seeks to flee and even if the refusal to permit him to come here leads to his physical return by some other country to the country from which he is fleeing.'²³

French refugee case law has also established the principle of refugee exodus laying emphasis on the actual physical alienage of the refugee applicant vis-à-vis the state of origin. As pointed out by the Commission des Recours des Réfugiés in M.Gampez²⁴, it is reasonable and legitimate to reject an asylum claim in case the applicant has shown her/himself able to have unhindered access to the territory of the country of

²¹R. v. Secretary of State for the Home Department ex parte Robert Denzil Sritharan and Benet Marianayagam, Queen's Bench Division, 24 February 1992, [1993] Imm AR 184.

²²Ibid. at 185.

²³Ibid. at 186.

²⁴CRR No.116.286, 11 January 1991, (transcript copy).

origin, thus demonstrating no real fear of being persecuted²⁵. However, what French case law has emphasised with reference to the refugee exodus principle is the actual breakdown of the socio-legal protective bond between the two basic constitutive parts of a state's society, and especially the cease of the refugee's effective protection by the state of origin. Accordingly, in Mme Ramos Furtado the Commission des Recours des Réfugiés rendered a positive decision in favour of the applicant, on the ground that the latter was not able to 'avail herself usefully of the protection of the authorities of her country of nationality'²⁶. The Commission pointed out that the bond between a state and its national should be considered to be broken, and be regarded as having the potential to found an asylum application in cases where the 'useful', that is, real, effective, protection available by the state is not any more offered by the state to the refugee applicant. A general presumption of protection offer on the part of the state of origin, or of the unlawfulness of non-

²⁵See also Article 1 C. (4) of the 1951/1967 UN Refugee Convention where it is stipulated that the Convention ceases to apply to any person who has 'voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution'.

²⁶CRR No. 23.965, 7 June 1988 (transcript copy); see also Reiterer, M., The Protection of Refugees by their State of Asylum, Wien, Braumüller, 1984, at 7-42, Grahl-Madsen, A., 'Protection of refugees by their country of origin', 11 Yale Journal of International Law (1986) 362, at 370 et seq., Shacknove, A.E., 'Whos is a refugee?', 95 Ethics (1985) 274 at 277 et seq., Weis, P., 'The international protection of refugees', 48 AJIL (1954) 193, Rothholz, W., 'Der Begriff der "protection juridique et politique"', 2 Archiv des Völkerrechts (1950) 404 infra, Puno, R.C., 'The basis and rationale of international refugee law', 7 Philippine Yearbook of International Law (1981) 143, at 144, and 145-6.

existence of willingness on the part of the refugee applicant to avail her/himself of that protection, is the renewal of passport by diplomatic authorities following the arrival of the applicant in the country of refuge. Any such post-arrival passport renewal has been regarded by the Commission des Recours des Réfugiés as an irrebutable presumption of state protection, which, consequently, invalidates any claim of persecution²⁷. By contrast, holding of a national passport has been regarded per se as insufficient evidence of existence of state protection which would have as a consequence the rejection of the asylum claim²⁸.

Similarly to British case law, German jurisprudence has stressed the crucial refugee exodus principle-related issue of the 'causal relationship between [impending] persecution and flight'²⁹. The basic tool of reasoning utilised by the

²⁷See M. Kharazi, CRR No. 33.936, 27 September 1985, M. Asghar, CRR No. 23.709, 12 July 1985, M. Sellayan, CRR No. 27.173, 25 March 1985, M. Schimd, CRR No. 31.965, 12 March 1985, M. et Mme Kodabandeh, CRR No. 26.915, 4 March 1985, M. Theiventheram, CRR No. 231.375, of 14 October 1992, M. Guberac, CRR No. 076.732, 6 January 1993 (transcript copies). See also second para. of Article 1 A. (2) of the 1951/1967 Refugee Convention where it is prescribed that 'a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.'; see also UNHCR accord, in para. 107 of the UNHCR Handbook, at 24-5.

²⁸See M. Badouraly Samdje, CRR No. 68.751, of 17 January 1989 (transcript copy). Accord, UNHCR, Handbook paras. 47-50, at 13-14. See also Goodwin-Gill, G.S., op. cit. supra n. 3 at 25-6.

²⁹Judgment of the German Federal Constitutional Court, 26 November 1986, 2 BvR 1058/85, 74 BVerfGE 51 at 57 et seq., emphasis added; see also judgment of 10 July 1987, 2BvR 502,1000,961/86, 80 BVerfGE 315 at 344, judgment of 15 May

Bundesverfassungsgericht in order to substantiate this thesis has been the institution of asylum as established in international law. It was this institution that allowed asylum to be granted to a fleeing individual, with the aim to 'offer him protection from a highly precarious or hopeless situation'³⁰. The plight of the individual refugee should constitute not only the cause of forced exodus and alienation of the refugee from her/his country of origin, but it should have been also, in principle, created in the country of origin and not in a territory where temporary or permanent protection has been offered. Any opposite idea would be, according to the above Court, 'alien' to the institution of asylum as established in international law, and consequently contrary to

1991, 2 BvR 1716/90, 10 NVwZ (1991) 979; see also judgment of 25 June 1991, BVerwG 9 C 131/90, 11 NVwZ (1992) 274, judgment of 23 July 1991, BVerwG 9 C 154.90, 13 InfAuslR (1991) 363; judgment of 2 July 1985, BVerwG 9 C 58/84, 5 NVwZ (1986) 485 at 487 where consideration is given to the 'connection between pre-existing persecution and the asylum request' ('Zusammenhang zwischen Vorverfolgung und Asylbegehren'); see also judgment of 20 October 1987, BVerwG 9 C 147.86 (transcript copy) at 6-7, judgment of 19 May 1987, BVerwG 9 C 130.86 (transcript copy) at 13 et seq., judgment of 19 May 1987, BVerwG 184/86, 6 NVwZ (1987) 895 at 896, judgment of 21 June 1988, BVerwG 9 C 5.88 (transcript copy) at 11-13, judgment of 6 December 1988, BVerwG 9 C 22.88, 81 BVerwGE 41 at 46, judgment of 27 June 1989, BVerwG 9 C 1.89, 82 BVerwGE 171, at 174, judgment of 30 October 1990, BVerwG 9 C 60.89, 106 DVB1 (1991) 535, judgment of 30 October 1990, BVerwG 9 C 72.89 (transcript copy) at 8, judgment of 15 May 1990, BVerwG 9 C 17.89, 12 InfAuslR (1990) 312, at 313, judgment of 6 April 1992, BVerwG 9 C 143.90, 107 DVB1 (1992) 1544, at 1545. It is worth noting that early case law of the Federal Administrative Court, based mainly on the 1951 UN Refugee Convention, had laid down that a refugee whose status has been recognised in one country signatory of the above Convention might freely move on to another such state signatory and have 'all the rights of the Convention' there as well, judgment of 25 November 1958, I C 122.57, 7 BVerwGE 333, at 335.

³⁰74 BVerfGE 51, at 57-8.

national law³¹. The causal relationship between exodus and persecutory measures has been reaffirmed by the travaux of the Constitutions of those German federal states (Länder) which have included a provision on territorial asylum, as well as by the travaux of the Basic Law of Germany. In both cases there was no indication that the drafters intended to amend in any manner whatsoever the principle of causality which had been established in international law³². Accordingly, the Federal Constitutional Court affirmed that the 'humanitarian intention' of the German Constitution was to protect individuals who have found themselves in a 'hopeless situation'. In case of an asylum seeker, this situation should find expression in the need of that individual to flee the country of origin in order to protect her/his 'liberty, life or freedom from bodily harm'. As a consequence, any other plight put forward by a refugee applicant, and which reveals no such direct causal relation between danger and her/him (the fleeing individual) was to remain, in principle, outside the framework of the asylum protection mechanism³³.

One of the most evident and significant components of the (fear of) persecution-exodus causality in German refugee law, as in the UK, has been the timing of the refugee's flight from

³¹Ibid. at 60. On the close relationship between international and German asylum law see also Kreuzberg, H., Wahrendorf, V., Grundrecht auf Asyl - Materialien zur Entstehungsgeschichte, Köln etc., Carl Heymanns Verlag KG, 1992, at 29 et seq.

³²74 BVerfGE 51, at 60-63.

³³Ibid. at 63-64.

the territory of the state of origin. It is indeed reasonable to be expected from the refugee to flee the oppressive conditions in the country of origin as soon as possible, once the grounds for the fear of persecution have arisen. However, it has been accepted in Germany that the above causality may remain intact even in cases where the refugee has remained in her/his country for some period after persecution has been once suffered, on the ground, e.g., that there was a hope of betterment of the conditions of living. This may be the case when, as in cases of collective/group persecution, following phases of acute persecution there come phases of peace which, nonetheless, do not last for long but, on the contrary, prove to be 'latent phases of endangerment'³⁴. The German Federal Administrative Court has emphasised that the causality between persecution and the post-exodus asylum request is to be assessed 'not on the basis of general life experiences...but only in appreciation of all the circumstances of the concrete facts of [the refugee's] pre-existing life'³⁵.

³⁴See judgment of 26 March 1985, BVerwG 9 C 114.84 (transcript copy) at 11.

³⁵Idem. See also judgment of 30 October 1990, BVerwG 9 C 72.89 (transcript copy) at 14: 'In any event, an alien who, approximately six years after the ended political persecution, returns to his home country because of an unsuccessful asylum procedure, without being anew threatened by political persecution there, may not be regarded as having fled as a persecuted person, when he leaves his home state again.'; see also judgment of 23 July 1991, BVerwG 9 C 154.90, 13 InfAuslR (1991) 363 at 365, judgment of 9 April 1991, BVerwG 9 C 15.90 (transcript copy) at 8, where the departure of the refugee applicant seven years following the group persecution of his religious group was not considered as providing the necessary causal relationship between persecution and flight; see also judgment of 7 April 1992, BVerwG 9 C 58.91 (transcript copy) at 10-11, where it was stressed that 'the right to asylum presupposes basically a flight from an objectively hopeless

German refugee status case law has not required the actual suffering of persecution by the refugee applicant before the lodging of the territorial asylum application. The Federal Constitutional Court has noted that an asylum claim may also be based on an 'imminent impending political persecution' ['unmittelbar drohende politische Verfolgung']³⁶. The Federal Administrative Court has elaborated further on this notion, stating that the 'imminent impending persecution' constitutes 'an endangerment that has already intensified to the extent that the person affected must actually expect to be himself persecuted at any time'. The same Supreme Court has gone further to distinguish the 'imminent impending persecution' from the 'latent situation of endangerment', that is, another type of endangerment that may not, however, provide per se a sound persecution ground, i.e. a basis for a persecution claim of the same gravity as that of the 'imminent impending persecution'. The 'latent situation of endangerment' is, according to the Bundesverwaltungsgericht, a situation where 'the alien has not yet been threatened by political attacks in his homeland before his departure with considerable probability, but, according to the circumstances taken

situation associated with political persecution'. Consequently, 'The departure must...have happened under circumstances that, by an objective assessment, still provide the outer image of a flight that took place under the pressure of the persecution suffered.' The period which lapsed between a persecution and a departure (exodus) constitutes therefore one of the objective factors that have been taken seriously into consideration in asylum adjudication, see also judgment of 30 June 1992, BVerwG 9 C 51.91 (transcript copy) at 9-10.

³⁶See judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 345.

altogether into account, they [the attacks] were not to be ruled out with sufficient certainty in the foreseeable future, because they were grounds that did not let their realization appear as totally remote. Therefore, it does not suffice the "theoretical" possibility, grounded in the statements and fears of the asylum seeker, to become a victim of an attack. It is rather required that objective grounds do not let an attack appear as a totally remote and therefore as a quite "real" possibility. Thus the "latent situation of endangerment" corresponds, in essence, to the situation where there is no sufficient security from political persecution'³⁷.

The latent persecution-related endangerment of the refugee applicant has been directly linked by German case law with the 'subjective post-flight' grounds for persecution (a sub-notion of refugeeism sur place which will be dealt with below), along with which the former has been regarded by the Federal Administrative Court as able to provide a sound basis

³⁷Judgment of 9 April 1991, BVerwG 9 C 91/90 etc., 11 NVwZ (1992) 270 at 271; see also judgment of 21 January 1991, BVerwG 9 C 92.90 (transcript copy) at 7: 'For the assessment whether an asylum seeker is persecuted on political grounds in the sense of Art. 16 Abs.2 Satz 2 GG different standards are applied, depending on whether he has fled from his home state in view of political persecution which has occurred or is imminently impending or he has arrived in the Federal Republic unpersecuted...If the asylum seeker has fled by reason of existing or imminent impending political persecution and if it was unreasonable to expect from him to avoid it in his home state, then he is entitled to asylum...[I]f the circumstances that cause the flight continue to exist at the time of the decision with no substantial alteration.' See also judgment of 9 April 1991, BVerwG 9 C 15.90 (transcript copy) at 7-8: 'The applicant may be regarded as a persecuted person if he has left his home state fleeing imminent impending or occurred political persecution, consequently, if he has fled from a hopeless situation caused by this means.'

for an asylum request. In this respect, the theory of the latent endangerment propounded by the Federal Administrative Court has been the first differentiation and breakaway from the strict early case law of the Federal Constitutional Court that demanded the existence of a strong, direct and obvious persecution link already existing in the refugee's country of origin before the exodus. The latent situation of endangerment in a case of subjective post-flight grounds for persecution is to be based, however, not only on the individual refugee applicant's fears, but also, and especially, on objective facts that may be able to justify such fears. An exemplary case before the Bundesverwaltungsgericht was the one where the refugee applicant had applied for asylum in the country of refuge and had already found himself, before leaving his home country, in a latent situation of endangerment³⁸. The Federal Administrative Court, on the basis of jurisprudence produced by its constitutional counterpart, has gone one step further away from the latent endangerment theory. The Federal Constitutional Court had noted that it was not the point in a case of a political activity in exile whether it constitutes a continuation of political conviction already existing in the country of origin, if the asylum seeker had never lived there or if (s)he was too young to have such a firm conviction. The Federal Administrative Court, based on this precedent,

³⁸See judgment of 17 January 1989, BVerwG 9 C 56.88, 81 BVerwGE 170 at 173-4; see also judgment of 31 March 1992, BVerwG 9 C 57/91, 12 NVwZ (1993) 193: '...an asylum application that results in political persecution is covered by the elements of Art. 16 II 2 GG only if the alien has found himself in a latent situation of endangerment before leaving his home state...'

prescribed in more general terms, interpreting the above Constitutional Court case law thesis, that 'a conduct of their [refugees'] own volition which has been demonstrated following the flight from the home state [and] which causes persecution, under atypical circumstances -in this respect similarly to the objective post-flight grounds- may be relevant to asylum also with no reference to an earlier latent situation of endangerment or any further conduct. This is the case when the established legal clauses [of the Federal Constitutional Court case law] on the basic insignificance [per se] of subjective post-flight grounds according to their fundamental ideas, do not fit in the given facts, and by an examination "it is [to be recognised]" the asylum-related significance of the subjective post-flight grounds that have been alleged "in accordance with the meaning and purpose of the asylum guarantee, as it corresponds to the standardization will of the constitutional legislator".³⁹ Accordingly, the Court regarded the persecution that an individual refugee would suffer in his home country, because he chose to marry to a person of a different religion, as having the potential to found a persecution claim, in accordance with the humanitarian intention of the German asylum provision. The Court stressed that any persecutory measures that would be of significance to asylum on the basis of their gravity and intensity would violate the human dignity in an especially grave manner, if they take place solely because of the refugee applicant's

³⁹Judgment of 6 April 1991, BVerwG 9 C 143.90, 107 DVBl (1992) 1544, at 1545-6.

marriage to a person of a specific religion, or because of the children's specific education⁴⁰.

SECTION 2. REFUGEEHOOD SUR PLACE AND ITS INTERPRETATION BY DOMESTIC FORA

The exception to the principle which requires the existence of causality between (well-founded fear of) persecution and refugee exodus consists of the fact that there has been no absolute requirement in refugee law that exodus should take place following the events that justify a well-founded fear of persecution. It has been an established opinion in doctrine as well as in case law that refugees may be outside their country of origin before such events happen, and may, accordingly, become unable or unwilling to return at a later stage of their residence abroad when fear of being persecuted has acquired a sound factual foundation. This is the case of refugees sur place⁴¹. The most common categories of aliens that become refugees sur place are foreign diplomats, students, and workers whose inability to be granted protection any more by their state of origin is usually grounded in their expression

⁴⁰Ibid. at 1546.

⁴¹See Grahl-Madsen, A., op. cit. supra n. 3 at 94 and 151, Goodwin-Gill, G.S., op. cit. supra n. 3 at 25, Hathaway, J.C., op. cit. supra n. 3 at 33 et seq., Köfner, G., Nicolaus, P., Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Band 1, Mainz, München, Grünewald/Kaiser, 1986, at 281 et seq., Weis, P., 'The concept of the refugee in international law', 87 JDI (1960) 928, at 972, Robinson, N., Convention Relating to the Status of Refugees: Its History, Contents and Interpretation, New York, Institute of Jewish Affairs, 1953, at 50-51. See also UNHCR, Handbook, at 22. See also Kasravi v. INS, US Court of Appeals, 9th Cir., 1968, 400 F.2d 675, at 676, Bahramania v. INS, US Court of Appeals 5th Cir., 1986, 782 F.2d 1243.

of political views, either in associations or individually, with regard to home politics⁴².

In Joshua Kofi Agyekum v. Secretary of State for the Home Department⁴³ the British Immigration Appeal Tribunal considered the case of a Ghanaian citizen claimant to refugee status, a claim based, inter alia, on his active membership in a Ghanaian opposition group in the UK. The Tribunal accepted the principle that such an activity on British territory may constitute a ground for asylum, but what weighed against that particular claim was that the appellant's membership in that opposition group post-dated his asylum application, a voluntary act that could not, according to the judgment, form the basis of the case.

The most usual forms of activities carried out by refugee applicants sur place have been participation, while in the UK, in demonstrations against their country's government, as in the cases of Ali Khoshakhlagh v. The Secretary of State for the Home Department⁴⁴, and Rostam Piltam v. The Secretary of State for the Home Department⁴⁵; distribution of political leaflets or newspapers and/or writing articles in political

⁴²See UNHCR, idem.

⁴³Immigration Appeal Tribunal, Appeal No. TH/118139/83 (3228), 2 May 1984 (transcript copy).

⁴⁴Immigration Appeal Tribunal, Appeal No. TH/3564/85 (4668), 16 June 1986 (transcript copy).

⁴⁵Immigration Appeal Tribunal, Appeal No. TH/131883/84 (4227), 19 August 1986 (transcript copy).

newspapers against the government of the country of origin, as shown in Iraj Nikray, Nahid Immani-Tehrani v. The Secretary of State for the Home Department⁴⁶. All three cases concerned Iranian citizens who were politically active against their home government, while in Britain⁴⁷. Objection to military service has been another issue connected with refugeeism sur place and propounded in Mahmood Fatemi Shirazi v. The Secretary of State for the Home Department⁴⁸. In this case, the Iranian asylum seeker claimed that he had 'a moral objection to war, and particularly to the current Iran/Iraq war... [being] a pacifist because he values human life and human rights'.

The great cautiousness required in cases of refugees sur place has been one of the significant issues emphasised in British refugee law. Accordingly, in Shirazi the Tribunal commented that they would have found the appellant 'very much more credible...if there were any evidence that he had been active in pacifist circles, or had manifested any objection to war in general, prior to his problems about his continuing studies in [the UK]...'. What British courts beware of in particular is whether all such political activities in the host country are

⁴⁶Immigration Appeal Tribunal, Appeal No. TH/6454/85 (4701), 22 July 1986 (transcript copy).

⁴⁷None of these appeals succeeded, on the ground that they had not met the refugee persecution requirements of Article 1 A.(2) of the 1951/1967 Refugee Convention.

⁴⁸Immigration Appeal Tribunal, Appeal No. TH/9598/85 (4802), 30 September 1986 (transcript copy). On the issue of objection to military service on political grounds in refugee law see infra Chapter X.

'self-serving', a case that would constitute a 'very obvious objection' to a refugee status claim⁴⁹. It has been pointed out that all such activities, in any event, are to be weighed 'in the balance' as well as 'in the light of the individual's general history'⁵⁰. As emphasised in Yosief Habtu v. The Secretary of State for the Home Department⁵¹ '[t]he weight given to the activities [in the UK] may and will depend upon the context of those activities but this is a matter of fact'⁵². The judicial cautiousness vis-à-vis such applications was much more obvious in Ahmad Yavari v. The Secretary of State for the Home Department⁵³, where the Tribunal dismissed the appeal of an Iranian citizen who claimed refugee status basically on the ground of his participation in a demonstration, a march and a political meeting organised by the Mujaheddin in the UK. The Immigration Appeal Tribunal, in a rather over-cautious tone, pointed out that 'a person's conduct in the host country will often have been designed to produce self-serving evidence'⁵⁴. It is worth noting that in

⁴⁹Ibid. at 2.

⁵⁰Ibid. at 4.

⁵¹Immigration Appeal Tribunal, Appeal No. TH/15427/86 (5321), 15 July 1987 (transcript copy).

⁵²Ibid. at 7; see also Jonathan Tetteh Ofei and others v. The Secretary of State for the Home Department, Appeal No. TH/10281/85 (6215), 31 October 1988 (transcript copy).

⁵³[1987] Imm AR 138.

⁵⁴Ibid. at 141. See also Roland Paterson Mensah v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/2027/85 (5147), 15 April 1987 (transcript copy) at 6: 'evidence of ...[political] activities [in the UK] can properly be put into scales, but how much weight can be accorded to such evidence must depend upon the

Ahmad Yavari was used, apparently for the first time, in support of the Tribunal's decision a case of the European Commission of Human Rights. The case was A. v. Switzerland⁵⁵ which concerned an asylum seeker in the respondent state. What was employed by the Tribunal was the European Commission's, allegedly, point that an asylum seeker 'must restrict his political activities [in the host country] in his own interest, otherwise he must bear the consequences'⁵⁶. This 'obiter', however, does not exist in the actual official publication of the decision of the European Commission of Human Rights⁵⁷. It was, nonetheless, indirectly and erroneously, accepted and applied, inter alia, by the Immigration Appeal Tribunal in order to dismiss the above

facts of every particular case. As such evidence must by its very nature be self-serving, such evidence will probably not usually be very compelling.'; see also Bernard Benjamin Ossei v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/3246/85 (5717), 25 January 1988 (transcript copy), where it was mentioned (p.8) that the Ghanaian asylum seeker had been photographed while he participated in a political activity in Britain. The Tribunal dismissed any claim based on his evidence, since they considered that in the photographs 'the appellant has drawn attention to himself in a blatant manner. Wearing a red shirt, standing centre front of the few demonstrators present, he is a big man and was bound to be noticed.'; see also Kasim Mohammed Taqi Ali and others v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/28977/87 (6728), 29 June 1989 (transcript copy), and Davood Tat-Damzabadi v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/28531/87 (6350), 3 February 1989 (transcript copy).

⁵⁵Application No 11933/86, decision of 14 April 1986, European Commission of Human Rights, Decisions and Reports (DR) 46, at 257.

⁵⁶[1987] Imm AR at 141.

⁵⁷See DR 46, 257, at 269-271.

appeal⁵⁸.

Particular difficulty and interest have presented cases where refugee status is claimed by individuals who, although never politically active in their own country, have been so for the first time while in the host country. In Ahmad Banihashemi v. The Secretary of State for the Home Department⁵⁹ the Iranian appellant had never been involved in 'anti-Khomeini' political activities in Iran. He had actually supported the 'Iranian revolution'. The activities in which he indulged in the UK were similar to those presented in Ahmad Yavari. The significant point stressed by the Tribunal in Ahmad Banihashemi was that 'there must be some substantive evidence produced by the appellant which indicates that any apprehension [of persecution] he has amounts to a well-founded fear of persecution because of his activities [in the UK]'⁶⁰. Thus the Immigration Appeal Tribunal accepted that first-time-post-exodus political mobilisation may constitute a valid ground for persecution and, consequently, for granting refugee status. The publicity which is attached to the political, or of any other similar character, activities of the refugee applicant in the country of the asylum application has been regarded by case law in the UK as an important factor

⁵⁸See also Ahmad Ali Yavari v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/4839/88 (6170), 21 October 1988 (transcript copy).

⁵⁹Immigration Appeal Tribunal, Appeal No. TH/18616/86 (5156), 6 March 1987 (transcript copy).

⁶⁰Ibid. at 6.

that is to be taken into account both by the administration and the courts, as it was pointed out in Massis Bonyadi v. The Secretary of State for the Home Department⁶¹.

British case law has therefore provided a pragmatic prism to refugeeism sur place, attaching particular weight to the actual potential persecution that a refugee may suffer in the country of origin. However, what really has been at issue in cases concerning a refugee sur place is the 'genuineness of [his] beliefs and the effect which [his] actions would have should [he] return to his country', as stressed by the Immigration Appeal Tribunal in Abdulfatah Said Ahmed v. The Secretary of State for the Home Department⁶². An important relevant rule of thumb was presented by the UNHCR Representative in London in Akram Raof Hawiz v. The Secretary of State for the Home Department⁶³. The rule regards the judgment of the genuineness of the beliefs and the concomitant actions of an asylum seeker sur place. According to this rule, 'political activities undertaken by an applicant in his country of asylum should be assessed in the light of his general circumstances and previous history to see if they are in keeping with the actions and beliefs prior to the submission of an asylum claim. In other words a distinction

⁶¹Immigration Appeal Tribunal, Appeal No. TH/20912/86 (5677), 27 January 1988 (transcript copy).

⁶²Immigration Appeal Tribunal, Appeal No. TH/22755/86 (5967), 7 June 1988 (transcript copy).

⁶³Immigration Appeal Tribunal, Appeal No. TH/27162/87 (5482), 5 October 1987 (transcript copy).

should be made between an individual who has been politically active in the past, either in his own country or another and because of his commitment to his political ideals finds himself unable to discontinue totally after he has submitted an asylum application, and someone who has never expressed his political views but who suddenly becomes vocal and active in his country of asylum after having submitted an application for leave to remain.'⁶⁴ This rule was, in effect, accepted by the Queen's Bench Division in R. v. Immigration Appeal Tribunal ex parte 'B'⁶⁵. In this case the court did not accept the aforementioned 'maxim' of the European Commission of Human Rights, describing it as being too wide and harsh⁶⁶. Nevertheless, what 'B' established was that, first, bad faith on the part of the refugee applicant will always disqualify her/him from grounding a refugee status claim on political, lato sensu, activities in the host country, and second, that the conduct of the refugee applicant in the above country should never be unreasonable, the latter being left by the court to be decided on 'a case by case basis'⁶⁷.

Unlike British refugee case law that has attached particular weight to the evidential question regarding the genuineness of the refugee's political, lato sensu, stance, French refugee

⁶⁴Ibid., at 5; see also R. v. Immigration Appeal Tribunal ex parte Barfour Adjei-Barwuah, Queen's Bench Division, CO/916/88, 8 December 1988 (transcript copy).

⁶⁵[1989] Imm AR 166.

⁶⁶Ibid. at 171.

⁶⁷Ibid. at 172.

case law has made a clear typological distinction between two categories of refugeehood sur place. The first category regards those refugees whose fear of persecution is created following a u-turn in the political situation of their country of origin, while they find themselves in the country of refuge⁶⁸. This fear may be related to activities of the applicant on the territory of the country of refuge, activities that either commence for the first time after that political change, or they simply continue. The second (and most common) category of refugeem sur place in French case law has been the one associated with no major political change in the country of origin. Here, the political situation remains the same as prior to the departure of the refugee, but the latter gets involved in political activities for the first time in the country of refuge, or continues such activities that may spark off persecution in the country of origin. As in British case law, the majority of the French sur place cases are related to political activism of the applicant, that usually takes an anti-governmental (vis-à-vis the country of origin) form⁶⁹. Moreover, religious activities linked with a persecuted ethnic or religious minority have provided the

⁶⁸See M. Rahman, CRR No. 23.981, 23 September 1985 (transcript copy).

⁶⁹See M. Momtaz-Azad, CRR No. 22.354, 30 July 1984, M. Etessami, CRR No. 20.075, 13 September 1985, M. Ensanyar, CRR No. 33.964, 15 September 1986, M. Haidar, CRR No. 39.920, 15 September 1986, M. Shanmuqam, CRR No. 32.079, 18 April 1986, M. Agodjro, CRR No. 35.021, 21 March 1986, M. Saliiani, CRR No. 38.195, 21 March 1986, M. Rachidi, CRR No. 47.765, 1 October 1987, M. Salimy-Moghaddam, CRR No. 47.533, 10 July 1987, M. Phoba, CRR No. 47.091, 13 March 1987, Mle Ahmadi, CRR No. 51.018, 2 March 1987, M. Oruk, CRR No. 161.480, 26 March 1991, M. Gundaq, CRR No. 213.239, 7 April 1992 (transcript copies).

basis for refugeehood sur place⁷⁰. There are three general rules which have been considered as significant and have been, accordingly, applied to all French refugee sur place cases. Firstly, any activity of the refugee in the country of refuge should be directly related to the political, lato sensu, situation of the country of origin, and not of the country of refuge⁷¹. Secondly, that activity should have become known to the potential agents of persecution, usually in the country of origin, so that persecution may be regarded as a serious prospect⁷². Finally, the refugee must produce evidence substantiating a personal and real threat arising out of the above-described forms of activism abroad, and emanating from the country of origin-related, potential or actual, agents of persecution⁷³.

As far as German case law regarding refugees sur place is concerned, it resembles more the French than the British one. The Federal Constitutional Court which, especially in its early jurisprudence, has, unlike its administrative counterpart, utilised, in principle, in its refugee status interpretation the 'objective' persecution thesis of the

⁷⁰See M. Jeganathan, CRR No. 60.029, 1 December 1989 (transcript copy).

⁷¹See M. Alumba, CRR No. 113.222, 2 July 1990, M. Gurcan, CRR No. 227.971, 8 January 1993 (transcript copies).

⁷²See M. Lufuanikenda, CRR No. 146.541, 13 December 1990 (transcript copy).

⁷³See M. Nourani, Mme Nourani, CRR Nos. 22.476, 22.660, 6 May 1985, M. Savarimuthu, CRR No. 21.769, 19 November 1985, M. Gundag, CRR No. 213.239, 7 April 1992 (transcript copies).

asylum provision of the German Basic Law and not the 'subjective' refugee definition of the 1951/1967 Refugee Convention, has laid particular emphasis on persecution actually suffered by the refugee applicant in the country of origin. The Federal Administrative Court, by contrast, has adopted a different stance, on the basis of the international legal concept of refugeehood. What has been considered as important by the latter Court is not the actual past persecution suffered by the refugee, but 'whether [political persecution] is to be feared upon a return to the home country at present or in the near future. All the circumstances that lie in the past may take on in this assessment only a character of an indication for the prognosis of an actual danger of persecution which is of significance to the decision'⁷⁴. However, despite this differentiation between the two German Supreme Courts, both fora have accepted and established that an extension of the constitutional asylum protection to 'post-flight facts' may be possible, on condition that this extension 'is demanded in accordance with the meaning and purpose of the asylum guarantee, as this corresponds to the standard-setting will of the drafters of the [German] Constitution'⁷⁵. The express acceptance of post-flight facts as a legitimate basis of fear of persecution by the Federal Constitutional Court has brought its jurisprudence

⁷⁴Judgment of 26 March 1985, BVerwG 9 C 107.84, 71 BVerwGE 175, at 177-8.

⁷⁵Judgment of 26 November 1986, 2 BvR 1058/85, 74 BVerfGE 51, at 64; see also judgment of 7 October 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 344-6.

closer to that of the Federal Administrative Court.

The Bundesverfassungsgericht has established in German, similarly to French, refugee case law a basic distinction between two kinds of 'post-flight facts' ('Nachflucht-tatbestände') and, accordingly, two kinds of refugeeism sur place. First, the 'objective post-flight facts' are recognised. These are events in the refugee's country of origin, which are of great significance to the asylum adjudication and are independent of the individual asylum seeker's volition. The usual basis for such an objective refugeeism sur place has been the change of the political regime in the country of origin while the refugee applicant is absent. This change, according to the above Federal Court, should have taken place in such a manner that the asylum seeker would fear to be persecuted in case of return, because e.g. of an earlier political stance (s)he had made public there, or because (s)he belonged to a group which is now persecuted in the country of origin. Even though there lacks an actual causality between exodus and persecution, the Bundesverfassungsgericht has refused to apply strictly the aforementioned principle of causality in cases of objective refugeehood sur place. The Court has emphasised that such an application would be unreasonable, and would contravene the 'meaning and purpose as well as the humanitarian intention of the asylum gurantee', since the situation of persecution, albeit related to no political activity of the asylum seeker inside the country of origin, or to her/his 'group

characteristics', has not been created by the asylum seeker's personal involvement⁷⁶.

Opposed to the objective refugeehood sur place has been the subjective one, which may be encountered in cases where the asylum seeker has created on her/his own volition the factual persecution-related circumstances, following the exodus from the country of origin, that may arguably create a basis of

⁷⁶74 BVerfGE 51, at 64-5; see also judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143 at 163-4. See also judgment of 25 October 1988, BVerwG 9 C 37.88 (transcript copy) at 13, judgment of 25 June 1991, BVerwG 9 C 131/90, 11 NVwZ (1992) 274. A complicated type of objective change of circumstances may be considered to represent cases where a refugee applicant fears persecution by the authorities of the country of origin in a third country into which the former state has de facto penetrated and exercises its authority, see judgment of 15 May 1991, 2 BvR 1716/90, 10 NVwZ (1991) 979 (the case concerned a Syrian Jehovah's Witness who lived in Lebanon which was invaded by Syria). See also judgment of 5 November 1991, BVerwG 9 C 41.91, 107 DVB1 (1992) 830, at 831-2: 'Since the right of asylum...is grounded upon the idea of refuge, thus on the causal relationship persecution-flight-asylum and since, moreover, the notion of "political persecution" implies that it [persecution] emanates from someone bearing a superior, as a rule sovereign power, to which the person affected is subject...the element "flight" or "departure" indicates in the system of the asylum claim requirements that conduct through which the alien has escaped from the...area of power of the persecuting state. This conduct exists usually in cases of crossing of the territorial borders of the persecuting state, since the spatial range of the area of power regularly coincides with the state territory. If this is not applicable to an individual case, because the persecuting state exercises effective area power also on territories exceeding its own state territory, then the alien escapes from the area power of the home state that persecutes him only through the additional departure from the occupied territory...In cases where for the first time the exodus from the third state ruled by the home state shows the "flight" or the "departure", a persecution, that the home state has carried out against the asylum seeker on the territory of the third state, has the character of a (pre-flight) persecution; the alien who frees himself from that through abandonment of the third state constitutes a persecuted emigrant in a sense corresponding to the system of asylum claims.'

fear of persecution. Like British and French courts, the Federal Constitutional Court has recommended, in these 'exceptional cases'⁷⁷, an attitude of 'utmost reserve'⁷⁸, due to the danger of abuse that may take place. For this reason, the above Court has also prescribed the application, in such cases, of 'especially stricter standards' in the relevant substantive as well as procedural examination phases⁷⁹. But, unlike the courts in the two other above-mentioned European states, the above German Supreme Court went on to expressly lay down a general proviso, according to which subjective post-flight facts may operate successfully in an asylum application 'if [they] appear as an expression and continuation of a firm conviction which already existed and was made visible during the residence in the country of origin, and they [the post-flight facts] therefore appear to be a necessary consequence of a permanent lifestyle that moulds the identity of the individual and which has been

⁷⁷Judgment of 26 November 1986, 2 BvR 1058/85, 74 BVerfGE 51, at 66.

⁷⁸Ibid. at 65. See also judgment of 19 February 1975, 1 BvR 449/74, 38 BVerfGE 398, at 402. Accord, Federal Administrative Court, judgment of 21 October 1986, 9 C 28.85, 75 BVerwGE 99, at 104-5, where the Court, on the basis of the constitutional principle of invulnerability of the human dignity with which the right to asylum is directly connected, concluded that 'A weighing up of a reprehensible conduct of the [refugee applicant], on the one side, and, on the other, his need to be protected from the conditions which are to be expected in his home state must...lead to the grant of asylum protection.'

⁷⁹74 BVerfGE 51, at 66.

publicly expressed'⁸⁰. Such a previous firm conviction existing in the country of origin may, for example, be shown by political activism in that country which may continue in the country of refuge⁸¹. As stressed by the Federal Administrative Court, self-made, subjective post-flight

⁸⁰Idem. On this judgment see Schumacher, P., Anmerkung, in 102 DVB1 (1987) 60. See also Richter, S., 'Selbstgeschaffene Nachfluchtgründe und die Rechtsstellung von Konventionsflüchtlingen nach der Rechtsprechung des Bundesverfassungsgerichts zum Grundrecht auf Asyl und dem Gesetz zur Neuregelung des Ausländerrechts', 51 ZaöRV (1991) 1, at 9 infra, Treiber, W., 'Das Ende der Nachfluchtgründe?', 7 ZAR (1987) 151, Brunn, B., 'Nachfluchtgründe und Asylgrundrecht in der Bundesrepublik Deutschland', 6 NVwZ (1987) 301, Hofmann, R., 'Nachfluchtgründe und Flüchtlingsvölkerrecht', 6 NVwZ (1987) at 299 infra. See also judgment of 17 November 1988, 2 BvR 442/88 (transcript copy) at 4-5; see also judgment of 15 March 1990, 2 BvR 496/89, 12 InfAuslR (1990) 197, at 198, judgment of 31 January 1992, 2 BvR 1621/90, 11 NVwZ (1992) 559, at 560; see also judgment of 22 June 1988, BVerwG 9 B 65/88, 7 NVwZ (1988) where the Federal Administrative Court judged that there was missing a connection between pre- and post-flight political activities of the refugee, since there was a ceasing of such activities during many years of residing in the country of refuge. See also judgment of 22 June 1988, BVerwG 9 B 189/88, 7 NVwZ (1988) 1036, at 1037 where it was emphasised that the continuation of the political opinion in the country of refuge 'requires the correspondence between the essence of the earlier practised opinion and the essence of the one which is continued.'; see also judgment of 27 June 1989, BVerwG 9 C 1.89, 82 BVerwGE 171, at 174.

⁸¹Judgment of Federal Constitutional Court, 22 May 1990, 2 BvR 1036/89, 13 InfAuslR (1990) 79, at 80-81. See also judgment of 23 April 1985, BVerwG 9 C 75.84, 7 InfAuslR (1985) 276 at 277, judgment of 25 October 1988, BVerwG 9 C 76.87 (transcript copy) at 7, judgment of 24 November 1992, BVerwG 9 C 70.91, 15 InfAuslR (1993) 154 at 155. Contra: in its judgment of 29 November 1977, 1 C 33.71, 55 BVerwGE 82 at 85, the Federal Administrative Court had appeared less strict in a case of subjective refugeehood sur place, since it relied not on the German constitutional provision, but mainly on the 1951/1967 international refugee definition. Thus, it considered that what was decisive for the recognition of refugeehood was not the firm, long-term convictions of the refugee applicant, but whether 'by assessing all the circumstances [it may be concluded that] there is a well-founded fear that the entry into an emigrant organisation may have as a consequence a persecution aiming at the political opinion of the asylum seeker.'

grounds for persecution may be accepted 'if upon their existence, corresponding to the situation created by the pre-flight grounds, [and] where there has appeared a predicament for the alien as a consequence of the event before the flight, there has been a predicament that, as always in facts of significance to asylum, must have been caused for political reasons...'⁸².

However, the above-mentioned established proviso of the Federal Constitutional Court has had a general but not an over-restrictive character. Given the humanitarian intention of the constitutional asylum provision, according to which asylum and subsequent effective protection should be granted to every one who has found themselves in a 'desperate situation', an exception to the above proviso concerning subjective refugeehood sur place has been laid down. The Federal Administrative Court has, accordingly, accepted that 'Since there is a post-flight conduct, in the form of an asylum request, causing persecution, there has been in any event a desperate situation for the alien since the time [of creation] of that post-flight fact if [the] asylum application at that time was insofar objectively justified, as the alien was then threatened from political persecution and he needed protection from that persecution'⁸³. The above German Supreme Court therefore has not alienated the asylum request from the

⁸²Judgment of 5 November 1991, BVerwG 9 C 41.91, 107 DVB1 (1992) 830, at 831.

⁸³Judgment of 30 August 1988, BVerwG 9 C 80.87, 80 BVerwGE 131, at 134.

actual danger of persecution risked by the applicant at the time of the asylum request. It has not accepted the above request per se as a legitimate refugeehood ground. The Court in cases of this nature has required the existence of at least a latent danger of persecution before the factual framework of which consists the specific case of subjective refugeehood sur place. As emphasised in a case of 'Republikflucht', the refugee exodus in such cases could be of significance 'if the asylum seeker has found himself in danger before his illegal exodus [from the country of origin] for political reasons, which [danger] should have existed at least latently in the sense of a political persecution which is admittedly not yet threatening with considerable probability, however [it is] also not excluded in the near future according to the overall circumstances'⁸⁴.

However, German case law has recognised that there may well exist exceptional cases of subjective refugeehood sur place where it would be de facto unreasonable to demand the existence, on the part of the refugee applicant, of 'a lifestyle that decisively moulds [her/his] personality and identity'. This would be the case, for example, if the refugee applicant has not actually lived in the country where persecution is feared, or if (s)he has arrived in the country of refuge at such a young age 'that it could not be expected the holding [on the refugee's part] of a firm political

⁸⁴Judgment of 6 December 1988, BVerwG 9 C 22.88, 81 BVerwGE 41, at 47; see also judgment of 30 May 1989, BVerwG 9 C 44.88 (transcript copy) at 19-20.

opinion'⁸⁵.

German case law has moreover stressed that in cases of subjective refugeehood sur place it should not be required that the asylum seekers expose themselves to extraordinary dangers in order to prove the authenticity of their convictions, or of their general political stance vis-à-vis the regime in the country of origin. The Bundesverfassungsgericht has indeed acknowledged that 'an engagement of minor significance [the Court referred to the evidence of the case which regarded participation of the refugee applicant in demonstrations, and distribution of leaflets and newspapers for a political organisation in the country of asylum] may represent, according to the individual lifestyle of the applicant, the circumstances of the development of his political opinion [and] the durability or further facts that have shaped the identity of the applicant, the expression of a firm political opinion...whose continuation and expression must be displayed by the post-flight facts created in the country of asylum...'. Unlike French case law, the above German Supreme Court has also pointed out that in such cases it is not absolutely necessary that the expression of the political opinion be known to the authorities of the persecuting state, an opinion not accepted, however, by the

⁸⁵Judgment of Federal Constitutional Court, 20 December 1989, 2 BvR 749/89 (transcript copy) at 5-6; the refugee applicant in this case had arrived in the FRG at the age of fourteen. See also judgment of 15 May 1991, 2 BvR 1716/90, 10 NVwZ (1991) 979, at 980. See also judgment of 4 December 1990, BVerwG 9 C 93.90, 106 DVBl (1991) 542, at 543.

Federal Administrative Court, or even that that expression should have the character of grounds of persecution occurred before the exodus of the refugee applicant ('Vorfluchtgründe')⁸⁶.

Finally, it is to be noted that unlike the 'objective post-flight grounds' of persecution, the 'subjective'/'self made' ones have been characterised in German jurisprudence by the principle of the identity of the person. That is to say, the person who claims asylum and the person who has created the factual grounds for persecution through her/his post-flight conduct is to be the same one. Any other conduct that causes the asylum seeker's persecution but has appeared as the creation of another individual is to be regarded as an

⁸⁶Judgment of 17 November 1988, 2 BvR 442/88 (transcript copy) at 5. See also judgment of 18 January 1990, 2 BvR 760/88, 12 InfAuslR (1990) 161, and judgment of 15 March 1990, 2 BvR 496/89, 12 InfAuslR (1990) 197, at 198, judgment of 22 February 1991, 2 BvR 1525/90, 13 InfAuslR (1991) 177, at 178. Contra: judgment of 21 October 1986, BVerwG 9 C 28.85, 75 BVerwGE 99, at 105-7 where the Federal Administrative Court conditioned the acceptance of subjective post-flight refugeehood on the existence of 'sufficiently serious grounds' concerning the reaction of the state of origin against the politically deviating refugee, as a consequence of that state's knowledge of the refugee's political activity in the state of refuge. See also judgment of 27 June 1989, BVerwG 9 C 1.89, 82 BVerwGE 171, at 175-6 where it was noted that the post-flight grounds of 'Republikflucht' and an asylum claim presuppose that 'the asylum seeker, already before his departure or before his lodging of the asylum application, has found himself in a, at least latent, situation of endangerment'; see also judgment of 17 January 1989, BVerwG 9 C 56.88, 81 BVerwGE 170, at 173-4. Contra: judgment of 12 December 1989, BVerwG 9 C 6.88, 12 InfAuslR (1990) 127: '...the question is not whether there has already been a more or less high degree of danger in the home country because of [the refugee's] activities, but solely whether the asylum seeker's political activity in exile appears as 'a necessary consequence of a lasting life-style that moulds the individual identity and which has been made public.'

objective post-flight case of persecution. Contrary to the pure subjective refugeehood sur place, the Federal Administrative Court, which has elaborated on the above-mentioned principle, has recognised a sui generis type of indirect objective (similar to subjective) refugeehood sur place in cases where behaviour of a third person in the country of refuge, like recognition of refugee status may also constitute grounds for persecution of an, e.g. relation of the above individual. In cases like this there has been an objectification of refugeehood sur place with ramifications over third persons who may, consequently, legitimately claim refugee status, in harmony with the 'ratio legis of the asylum guarantee'⁸⁷.

CONCLUSION

From the above analysis of contemporary refugee status jurisprudence of the three European state subjects of the present thesis it may be concluded that courts in all three states have founded their jurisprudence regarding the principle of (forced/violent) refugee exodus and refugeehood sur place on a rather identical theoretical foundation. That is, there has been a coincidence on the fundamentals of the above two issues regarding the application/interpretation of the legal concept of refugeehood. Accordingly, case law of all

⁸⁷See judgment of 9 April 1991, BVerwG 9 C 100/90, 11 NVwZ (1992) 272 at 273, where the substantiation of the probability of reprisals in the country of origin against the son of a refugee recognised in the country of refuge was considered to constitute an objective post-flight element of persecution of the former individual.

three states has seemed to be agreed on the necessary alienation of the individual refugee from the state of origin, and on the particular significance of this alienage to the recognition of refugeehood. Both the French and British refugee case law sets have put particular emphasis on the actual, real and serious breakdown of the socio-legal bond that unites, under normal conditions, a state with its nationals (refugees). German case law, on the other hand, using as interpretative tools international law theory, and the travaux préparatoires of the Constitutions of the German Länder, and of the German Basic Law, has insisted on, and made more obvious, the requirement of existence of a causal relationship between refugee flight and persecution (similarly to the practice of British jurisprudence). German courts have thus emphasised the crucial role that the timing of the exodus may play in a refugee status determination procedure, as well as the degree of persecution that actually provides the foundational framework to the refugee's exodus abroad.

As far as the issue of refugeeism sur place is concerned, all three national case law sets have been agreed upon the most significant element of these cases, that is, the need to establish the genuineness of the refugeehood-generating stance of the asylum seeker while on the territory of the state of refuge. Unlike British case law, French and German case law has been unanimous on the emphatic categorisation of refugeeism sur place into an objective and a subjective form. German case law has, nonetheless, differentiated itself

further from the two other national case law sets, attaching a particularly strict and burdensome general condition in cases of subjective refugeehood sur place relating to the pre-exodus 'political' stance of the refugee applicant.

However, this is not to say that German case law has been the most demanding one vis-à-vis refugee applicants in general. What distinguishes it from the British and French case law has been the principled interpretation of the exodus rule as well as of the sub-notion of refugeehood sur place. That is to say, while British and especially French refugee case law have demonstrated a complete lack of any interest to support their juridical syllogisms with any foundation of a theoretical interpretational nature, German jurisprudence, by contrast, has consistently employed a judicial interpretational process which is founded upon a sound theoretical basis consisting mainly of the international legal framework of asylum and the German Constitution. No doubt, these different national judicial stances have been direct and natural by-products and reflections of the judicial interpretation traditions dominant in each of the above three European countries⁸⁸.

⁸⁸On the British courts' interpretation methods see Higgins, R., 'United Kingdom', in Jacobs, F.G., Roberts, S. (eds.), The Effect of Treaties in Domestic Law, London, Sweet & Maxwell, 1987, 123, at 131 et seq., Mann, F.A., 'The enforcement of treaties by English courts', in Mann, F.A., Studies in International Law, Oxford, Clarendon Press, 1973, 327, at 340 et seq. On interpretation by French courts see de la Rochère, J.D., 'France', in Jacobs, F.G., Roberts, S. (eds.), ibid., 39, at 48 et seq.; see also Classen, C.D., 'Asylrecht in Frankreich: Zur Bedeutung der verfassungs- und völkerrechtlichen Vorgaben', 46 Die Öffentliche Verwaltung (1993) 227, at 230-2. On German judicial interpretation see Frowein, J.A., 'Federal Republic of Germany', in Jacobs, F.G.,

The interpretational school of thought to which German refugee case law has attached itself is indeed the subjective one which combines, however, the intentions of the drafters of the constitutional asylum provision with the teleological interpretational school. Accordingly, both the German Federal Constitutional and the Federal Administrative Courts have paid particular attention to the 'will of the constitutional legislator'⁸⁹, but at the same time they have shown a special respect for the 'humanitarian intention' and the 'ratio legis' of the constitutional 'asylum guarantee'⁹⁰. In consequence, the above German Courts have rightly established in the territorial asylum interpretational framework not only the pure subjective, but also the teleological prism of refugeehood interpretation, recognising the particular significance of the humanitarian nature and requirements, objectively laid upon the asylum provision; these are fundamental interpretational theses that have clearly demonstrated in German jurisprudence their inherent potential to provide effective and flexible protection to genuine refugee status claimants⁹¹.

Roberts, S. (eds.), ibid., 63, at 73 et seq.

⁸⁹See supra notes 31, 39 and 75 and accompanying texts.

⁹⁰See supra notes 76, and 87 and accompanying texts.

⁹¹This is, however, an interpretational potential that has not been employed by German jurisprudence in other refugee status issues. See e.g. Section 2 of Chapters VI and IX.

CHAPTER IV

THE RULE OF THE SUBSIDIARITY OF ASYLUM: ITS INTERNAL AND EXTERNAL FORMS IN THE JUDICIAL INTERPRETATION OF REFUGEEHOOD

SECTION 1. INTERNAL AND EXTERNAL ASYLUM SUBSIDIARITY IN THE INTERNATIONAL LEGAL CONTEXT

The subsidiarity of territorial asylum has become an established rule in contemporary international refugee law. It requires the refugee applicant, within the limits of reasonableness, before applying for refugee status in a state of refuge, to seek protection inside the territory of the state of origin (internal subsidiarity), or not to reject effective protection already available, or even granted, in a third host state (external subsidiarity/'principle' of the first country of asylum, or of the third host country). Unlike external subsidiarity, scarce attention has been paid to the internal form of the rule of the subsidiarity of asylum at the international level, both by refugee law doctrine and the principal international refugee protection organisation, that is, UNHCR. The reason for this imbalance should lie in the fact that -as in the case of the principle of refugee exodus and the concomitant requirement of causality between flight and (well-founded fear of) persecution, with which the asylum subsidiarity rule is directly connected- potential states of refuge are much more keen and able, de facto as well as de iure, to respond to refugee movements once refugees are on the territory of a third state with a more or less normal political life, than when they are still on the territory of their country of origin. In the latter case, the general

political situation makes any kind of intervention, or refugee movement control on the part of (members of) the international society extremely difficult, or even impossible.

UNHCR has, at least since 1979, indirectly recognised the workability of the rule of internal subsidiarity of asylum. In its Handbook on Procedure and Criteria for Determining Refugee Status¹ UNHCR recognised the fact that there may well exist cases of disturbed countries where persecution does not extend to their whole territory. The example provided by UNHCR has been situations of 'ethnic classes or...of grave disturbances involving civil war conditions' where 'persecution of a specific ethnic or national group may occur in only one part of the country'². UNHCR stipulated that in such cases it may be required by a state recipient of an asylum application that the refugee applicant should have sought refuge in a part of the country of origin where (s)he may be safe from persecution

¹Geneva, UNHCR, 1979. The Handbook has been internationally recognised as a source providing an 'authoritative guidance' in refugee status adjudication: see, inter alia, Canas-Segovia et al. v. INS, US Court of Appeals, Ninth Circuit, April 24, 1990, 902 F.2d 717, at 724, Sanchez-Trujillo et al. v. INS, US Court Appeals, Ninth Circuit, September 11, 1986, 801 F.2d 1571, at 1576; A.K. Tilmatine v. Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. HX/70370/93 (10947), 3 May 1994 (transcript copy) at 4: 'We accept that the Handbook is not part of the law. It has however some weight.'; see also Goodwin-Gill, G.S. et al., 'Canas-Segovia v. US INS Brief amicus curiae of the Office of the UNHCR', 2 IJRL (1990) 390, at 395, Bari, S., 'Refugee status determination under the Comprehensive Plan of Action (CPA): A personal assessment', 4 IJRL (1992) 487, at 500-1, Hailbronner, K., Möglichkeiten und Grenzen einer europäischen Koordinierung des Einreise- und Asylrechts, Baden-Baden, Nomos, 1989, at 36-37.

²UNHCR, ibid. at 21, paragraph 91.

on condition that 'under all the circumstances it would... have been reasonable to expect him to do so'³. UNHCR has thus pointed to an objective determination of the question of reasonableness regarding the refugee's quest for an alternative internal place of refuge before her/his flight from the country of origin. This reasoning was actually employed by the Canadian Federal Court of Appeal in Thirunavukkarasu⁴. The court, accepting that '[t]he idea of an internal flight alternative [IFA] is "inherent" in the definition of a "Convention refugee"', stressed that this idea is neither a 'legal defence' nor a 'legal doctrine' but corresponds solely to 'a fact situation in which a person may be in danger of persecution in one part of a country but not in another.'⁵ The above court provided a clearer image of what it really meant by an 'objectively reasonable' IFA saying: 'An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible

³Ibid. at 22. See also Judicial Division of the Dutch Council of State, judgment of 17 October 1981, A-2.0709- A en B (1980), abstract in 1 IJRL (1989) 388: '...the appellant is in error if he thinks that a refusal to grant refugee status because of the possibility of settling in a part of his country other than that where he was born, or had his habitual residence would imply an unlawful limitation of the scope of the Convention...To ignore that possibility would amount to an extension of the concept of refugee.'; see also judgment of the same Court, 2 September 1982, A-2.0273- A en B (1980), ibid. at 389. See also Court of Appeal of Amsterdam, judgment of 25 May, 1989, 800 KG, abstract ibid. at 569.

⁴Thirunavukkarasu v. Minister of Employment and Immigration, Federal Court of Appeal, November 10, 1993, 109 Dominion Law Reports (4th) (1994) 682.

⁵Ibid. at 683-4.

to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there.'⁶

The European Union Ministers responsible for Immigration have cursorily dealt with this issue as well in their 1992 London Resolution on manifestly unfounded applications for asylum (30 November-1 December 1992)⁷. The European Union provided a rather more sophisticated definition of the notion of the internal subsidiarity of asylum than that of UNHCR, laying down in the seventh paragraph of that Resolution, that a country recipient of an asylum application may include such an application within an accelerated examination procedure if the application refers to 'claimed persecution which is clearly limited to a specific geographical area where

⁶Ibid. at 688. The court went on to clarify its thoughts saying the following: '...claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.', idem.

⁷Text reproduced in Terlouw, A. et al. (eds.), A New Asylum Law for Europe?, Utrecht, Dutch Centre for Immigrants, 1993, at 69; see also Fernhout, R., Meijers, H., 'Asylum', ibid., 8, at 12-15, Amnesty International, 'Refugee Protection at Risk AI's recommendations to the 44th session of the Executive Committee of UNHCR', London, September 1993, AI Index: POL 33/06/93, at 7.

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, in accordance with Article 33.1 of the Geneva Convention'.

By contrast, the external subsidiarity of asylum, especially under the name 'principle of the first country of asylum', has been established as a thorny, controversial but crucial question in the doctrine and jurisprudence of contemporary refugee law⁸. The basic reason for which the above 'principle'

⁸See analysis, in the German legal framework, in Bethäuser, F. Der anderweitige Schutz vor Verfolgung im Asylrecht, Ph.D. thesis, J.W. Goethe-Universität zu Frankfurt a.M., 1983, at 78 et seq.; see also Marx, R., Asylrecht, Band 2, 1991, Baden-Baden, Nomos, at 163 et seq., Weis, P., The Legal Aspects of the Problem of De Facto Refugees, Report for the Working Group on Refugees and Exiles in Europe, Geneva, May 1974, at 21-22, Melander, G., Refugees in Orbit, Geneva, International University Exchange Fund, 1978, at 25-38, Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 52 et seq., Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 46-7, and 72-4; see also Kälin, W., 'Die Abweisung von Asylgesuchen wegen Aufnahme in einem Drittstaat-Bemerkungen zu Art. 6 Abs. 1 Asylgesetz', 78 Schweizerische Juristen-Zeitung (1982) 337, Vierdag, E.W., 'The country of "first asylum": Some European aspects', in Martin, D.A., (ed.), The New Asylum Seekers: Refugee Law in the 1980s, Dordrecht etc., Martinus Nijhoff Publishers, 1988, 73, Kjaerum, M., 'The concept of country of first asylum', 4 IJRL (1992) 514, Hailbronner, K., 'The concept of 'safe country' and expeditious asylum procedures: A western European perspective', 5 IJRL (1993) 31, UNHCR, London, The "Safe Third Country" Policy in the Light of the International Obligations of Countries vis-à-vis Refugees and Asylum-Seekers, July 1993 (unpublished report) at 10 et seq.. See also support for the principle in Rosenberg v. Yee Chien Woo (1971), 402 US 49, 28 L. Ed. 2d 592 at 598, Chim Ming v. Marks, Lim Yim Yim v. Marks, US Court of Appeals, 2nd Circuit, 1974, 505 F.2d 1173, Kare-Merat v. Belgium and Belgian Representative of the UNHCR, Belgium, Conseil d'Etat, 3rd Chamber, 25 September 1970, 69 ILR (1985) 205; see also H.N.D.M.R. v. State-Secretary of Justice, Dutch Council of State, Judicial Division, 12 July 1978, 74 ILR (1987) 405, J.A.N. v. State-Secretary of Justice, Dutch Council of State, Judicial Division, 17 August 1978, 74 ILR 406, and judgment of

has been so controversial is the actual lack of a relevant clear-cut internationally recognised definition⁹. The Executive Committee of the UNHCR Programme (EXCOM) accepted, in the form of an exception, the external subsidiarity of asylum laying down, nonetheless, some clear provisos: 'Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connexion or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State...'¹⁰.

14 January 1982, A-2.1795-A en B (1980), 1 IJRL (1989) 247 (IJRL abstract: IJRL/011) at 248, and District Court of Haarlem, The Netherlands, KG nr.281/1983, 1 IJRL (1989) 248 (IJRL/012), S.S. and eight others v. The State of The Netherlands, Supreme Court, 8 April 1988, 20 NYIL (1989) 325, Hurt v. Minister of Manpower and Immigration, Canada, Federal Court of Appeal, 24, 25 January 1978, 73 ILR (1987) 595, Matter of Soleimani, US Board of Immigration Appeals, A-26157647, 13 July 1989, 2 IJRL (1990) 284 (IJRL/0036): in all cases the courts emphasised the importance of adequate and effective protection available in the 'first country of asylum'; contra: Constantinescu v. Ministry of the Interior, Italy, Council of State, 4th Chamber, 24 June 1975, 77 ILR (1988) 578.

⁹See Melander, G., 'Responsibility for examining an asylum request', 20 IMR (1986) 220, at 221.

¹⁰Conclusion No. 15 (XXX) (1979) REFUGEES WITHOUT AN ASYLUM COUNTRY, in UNHCR, Conclusions on the International Protection of Refugees adopted by the EXCOM of the UNHCR Programme, Geneva, UNHCR, 1989, (hereinafter UNHCR, Conclusions) 31, at 33; see also the, almost identical to the above Conclusion, additional paragraph to Article 1 of the 1977 UN Draft Convention on Territorial Asylum, UN Doc. A/CONF.78/12, 21 April 1977. See also Conclusion No. 58 (XL) (1989) PROBLEM OF REFUGEES AND ASYLUM-SEEKERS WHO MOVE IN AN IRREGULAR MANNER FROM A COUNTRY IN WHICH THEY HAD ALREADY FOUND PROTECTION, in UNHCR, Conclusions, 134, at 135-6. EXCOM Conclusions have been internationally recognised as a legitimate source of reference in legal and policy issues relating to asylum, see, inter alia, Steven Miller v. Immigration Appeal Tribunal, Court of Appeal, 24 February

EXCOM has also laid down a rule valid in cases of refugees and asylum seekers who move in an irregular manner, a rule related to the substantive protection of a refugee or an asylum seeker, afforded by the first country of asylum, which should a fortiori be valid in cases of regular refugee movement. This rule prescribes two minimum prerequisites for any return of refugees to a country where protection has already been provided: firstly, 'they are protected there against refoulement'; and secondly, 'they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them...'¹¹. EXCOM has identified five main general categories

1988, [1988] Imm AR 358, at 360, Goodwin-Gill, G.S., 'The determination of refugee status: Problems of access to procedures and the standard of proof', International Institute of Humanitarian Law Yearbook, 1985, 56, at 58: 'The [conclusions]...are...good evidence of the views of states members [of the EXCOM], and of their understanding both of the law and of the content of applicable standards.'; see also Martin, D.A., 'Effects of international law on migration policy and practice: The uses of hypocrisy', 23 IMR (1989) 547, at 557-8, Sztucki, J., 'The Conclusions on the international protection of refugees adopted by the Executive Committee of the UNHCR Programme', 1 IJRL (1989) 286, at 303 et seq.

¹¹See EXCOM Conclusion No. 58 (XL) ibid. State members of EXCOM have added varying qualifications to Conclusion No. 58 (XL). Italy has clarified that for her, '...the present Conclusion is only applicable to refugees recognized as such according to the Geneva Convention of 1951 and its 1967 Protocol and in the sphere of application of said Geneva Convention and Protocol, as well as to asylum-seekers who have already found protection in the first country of asylum on the basis of the principles of said Convention and Protocol.' The Federal Republic of Germany, on the other hand, provided a different interpretative declaration: '...the wording 'they are permitted to remain there'...does not prevent repatriation to the country of first asylum even if a formal residence permit is lacking.' Greece, finally, stated that 'First asylum countries should bear the burden of refugees on an equitable basis, according to their economic or other potential', adding that 'Other considerations not to be overlooked are the status of the individual, whether he has applied for asylum or not,

of criteria that have been employed by states in order to determine the first country of asylum in which the refugee status application should have been lodged¹². First, a geographical criterion, assessing the first country of asylum on a geographical basis on condition that the refugee has passed through the territory of that country. Second, a temporal criterion of responsibility: the time that the refugee has spent on the territory of a state should be the element that determines which country is to entertain the refugee status claim. The third criterion is related to the nature of the refugee applicant's sojourn in a country, which is also directly related to the nature of the relationship established between the former and the latter. The intention of the refugee applicant to apply for refugee status recognition in a specific country has been a fourth criterion employed, a stance concordant with principle h (iii) of the 1979 EXCOM Conclusion No. 15 (XXX)¹³. This principle has established the recognition of respect, 'as far as possible', for the personality of the individual asylum seeker who may, in some cases, have close links with a specific country and, consequently, wish to establish her/himself there, where (s)he believes that prospects of a new 'normal' life appear to be

length of stay in a country when having moved from the first asylum country, etc.', UN Doc. A/AC.96/737, 19 October 1989, at 24-25.

¹²See Comité exécutif du programme du Haut Commissaire des Nations Unies pour les Réfugiés, Documents de travail présentés par le Haut Commissaire au sous-comité plénier sur la protection internationale 1977-1980, Genève, HCR, 1981, at 47.

¹³See supra n. 10.

better. The fifth and final criterion identified by EXCOM consists of a combination of the previous four criteria or, alternatively, of the prescription that no particular criterion is to be employed, but every case should be examined on its own merits.

The rule of the external subsidiarity of asylum has been extensively dealt with by the state members of the European Union, in the context of the ongoing European asylum harmonisation process. The two basic European conventions that have dealt only with the procedural aspect of the above question have been the 1990 Schengen Convention Applying the Schengen Agreement on the Gradual Abolition of Checks at the Common Borders of Belgium, France, the FRG, Luxembourg, the Netherlands and Italy¹⁴, and the 1990 Dublin Convention determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities¹⁵. Both conventions deal with the question of the state responsible for the processing of an application for asylum and have laid down detailed criteria of such a responsibility. Most of the seven basic criteria enshrined in Article 30 paragraph 1 (a)-(g) of the Schengen Convention are grounded in the rule that the contracting party that has issued a visa of any type or a residence permit to an asylum seeker will bear the responsibility for processing the application. The same issue has been dealt with in Articles 4-

¹⁴30 ILM (1991) 68.

¹⁵30 ILM (1991) 425.

8 of the Dublin Convention where, even though there has been an emphasis, by virtue of Article 4, on the asylum seeker's family ties with a specific country, the main corpus of the responsibility criteria is grounded, following the Schengen paradigm, in the valid residence/visa rule. Even though both European Conventions have emphatically reaffirmed the contracting states' obligations under the 1951/1967 UN Refugee Convention (Article 28 of the Schengen Convention, and Article 2 of the Dublin Convention), neither has dealt with the substantive aspect of the third host country rule, that is, the nature of protection that a refugee applicant should enjoy in that country before (s)he is required to return there. However, the substantive form of protection that a refugee applicant should be able to enjoy in the third state, whichever that may be, is undoubtedly of paramount importance to the legitimate function of the external subsidiarity of territorial asylum¹⁶. The EU states have, instead, limited their harmonisation attempts, through the above treaties, to the establishment of a purely procedural/admissibility framework concerning refugee status applications¹⁷. An attempt

¹⁶On the notion of refugee protection see Rothholz, W., 'Der Begriff der "protection juridique et politique"', 2 Archiv des Völkerrechts (1950) 404, at 409: '[The] content [of the notion "protection juridique et politique" of refugees] consists of the observance of the rights and interests of refugees, that is, the protection of persons who are stateless de facto or de jure.'; see also ECRE, Towards Harmonization of Refugee Policies in Europe? A Contribution to the Discussion, London, October 1988, at 10 where 'protection' is defined as 'treatment according to the standards of the 1951 Convention'.

¹⁷See, inter alia, Bolten, J.J., 'From Schengen to Dublin: The new frontiers of refugee law', in Meijers, H. et al. (eds.), Schengen Internationalisation of central chapters of the law on aliens, refugees, privacy, security and the police,

to define substantively the concept of the 'third host country' was made by the EU Ministers responsible for Immigration, through the 1992 London Resolution on a harmonised approach to questions concerning host third countries (30 November - 1 December 1992)¹⁸. The above Resolution provided, in effect, a definition of the requisite form of refugee protection in the third state, laying down three basic third host country-related prerequisites: firstly, 'the life or freedom of the asylum applicant must not be

Leiden, Stichting NJCM-Boekerij, 1992, Second edition, at 8 infra, Standing Committee of Experts on International Immigration, Refugee and Criminal Law, Schengen, Utrecht, November 1991, Woltjer, A., 'Schengen, developments and perspectives', Nederlands Centrum Buitenlanders, May 1992, (unpublished paper), Hathaway, J.C., 'The emerging politics of non-entrée', Refugees, no.91, December 1992, 40, Dedeker, R., 'Le droit d'asile dans Schengen', 6 July 1991, (unpublished paper, source: ESMV, Utrecht), Weckel, Ph., 'La Convention Additionnelle à l'Accord de Schengen', 95 RGDIP (1991) 405, Hailbronner, K., op. cit. supra n. 1, at 35 et seq., Marx, R., 'Anforderungen an ein europäisches Asylrecht', 25 Kritische Justiz (1992) 405, at 420-3. See also Dutch Council of State Opinion on the Schengen Convention, No. W02.91.0018, The Hague, April 8, 1991 (English copy supplied by ECRE), Conseil constitutionnel, France, Décision no 91-294 DC du 25 juillet 1991, "Accord de Schengen", JO, 27 juillet 1991, p. 10001, in Revue française de Droit constitutionnel (1991) no. 8, at 703, Vedel, G., 'Schengen et Maastricht', Revue française de Droit administratif 8 (2), 1992, 173, French Senate, Report on the Schengen Convention, 11 December 1991 (English copy supplied by ESMV, Utrecht). See also UNHCR, 'Ratification process of Schengen, UNHCR's position, concerns and recommendations', Brussels, 15 February 1992 (unpublished); see also UNHCR, London, op. cit. supra n. 8 at 25-26.

¹⁸Text reproduced in Terlouw, A. et al. (eds.), op. cit. supra n. 7, at 73; see also Fernhout, R., Meijers, H., 'Asylum', ibid., 8, at 16-19, Guild, E., 'Towards an European asylum law: developments in the European Community', 7 Immigration & Nationality Law & Practice (1993) 88, Amnesty International, 'Refugee Protection at Risk, AI's recommendations to the 44th session of the Executive Committee of UNHCR', London, September 1993, AI Index: POL/33/06/93, at 4-6. See also Paras. 345-7 (similar to the above EU guidelines) of the (UK) Statement of Changes in Immigration Rules (HC 395), 23 May 1994.

threatened, within the meaning of Article 33 of the Geneva Convention'; secondly, the refugee applicant 'must not be exposed to torture or inhuman or degrading treatment'; finally, 'It must either be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he is applying for asylum, or that there is clear evidence of his admissibility to a third country'. All these 'fundamental requirements' should be assessed and fulfilled conjunctively on an individual basis before the external asylum subsidiarity comes into operation. The onus of acceptance and effective protection of refugees by the third country in such cases should be squarely on the country recipient of the asylum application¹⁹.

SECTION 2. THE QUESTION OF THE INTERNAL SUBSIDIARITY OF ASYLUM IN THE THREE EUROPEAN SETS OF NATIONAL JUDICIAL FORA

As far as the issue of the internal subsidiarity of asylum is concerned there have been few relevant cases in the UK. They constitute, nonetheless, clear examples of the judicial logic which has prevailed, as well as of the direct influence that the above-mentioned UNHCR Handbook recommendations have had upon the actual British judicial practice. In Salih Kamil,

¹⁹See UNHCR, London, op. cit. supra n. 8 at 26-27.

Emine Kamil v. The Secretary of State for the Home Department²⁰ the Immigration Appeal Tribunal considered the case of a Turkish Cypriot couple who came from the southern part of the island but did not wish to return there since it was dominated, since the 1974 Turkish invasion, by the Greek Cypriot population of Cyprus and, according to the appellants, 'no single Turk could go there'. The obvious alternative to them would be to go and live in the northern part of Cyprus, occupied by Turkey and where only Turks and Turkish Cypriots lived. Kamil claimed that he could not return there either, since he had allegedly taken part in a Greek Cypriot demonstration in the UK and therefore he feared that he would be persecuted by the Turkish government in northern Cyprus. The Tribunal, employing both paragraphs 90 and 91 of the UNHCR Handbook, concluded that it was unable to apply these recommendations in favour of the appellants, since the evidence produced by the latter could not found any claim of unreasonableness regarding their return to the Turkish part of Cyprus where, moreover, other family members of the appellants were living at that time. R. v. Secretary of State for the Home Department ex parte Celal Yurekli²¹ is another similar case concerning a Turkish Alevi Kurd who was the victim of persecution by Turkish authorities in his home village. The persecution consisted of arbitrary detainment and torture while interrogated. This situation forced him to move and

²⁰Immigration Appeal Tribunal, Appeal No. TH/121506/84 (3771), 7 March 1985 (transcript copy).

²¹[1990] Imm AR 334.

settle in Istanbul where he had lived for two years before his arrival in the UK. Yurekli claimed that he was also persecuted in Istanbul, but the alleged persecution there was of a different nature, consisting of continual dismissal from jobs whenever his religious-ethnic origin was discovered. The High Court dismissed the appeal, considering the inability of the appellant to find regular and uninterrupted employment in an area away from that of his original persecution as not amounting to persecution and, consequently, as a factor that could not lead the court to consider as unreasonable the asylum seeker's return to the former part of his country of origin²². Yurekli established a precedent which was actually followed by the same court in R. v. Secretary of State for the Home Department ex parte Hidir Gunes²³, where another Turkish Kurd claimed refugee status on the ground of periodical ill-treatment that he and his family had suffered in their village. The fact, however, that weighed against this case was that the appellant had stayed in Istanbul for three months, before his arrival in the UK, seemingly having faced there no persecution. The High Court in Gunes, referring expressis verbis to and applying the UNHCR Handbook, dismissed the appeal since, similarly to Yurekli, the negative decision of the Home Office regarding the asylum application was not judged to be unreasonable under any circumstances, on the

²²Affirmed by the Court of Appeal, Celal Yurekli v. Secretary of State for the Home Department, 9 July 1990, [1991] Imm AR 153. On the substantive question of persecution in refugee law see infra Chapter V, Section 1.

²³[1991] Imm AR 278.

basis of the adduced evidence, in that particular case²⁴. The British courts in all cases concerning subsidiary internal asylum, even though utilising the word 'reasonableness' with regard to the internal asylum alternative, they have not, regrettably, attempted to provide a clear theoretical background to its utilisation, through a definition or even through mere elaboration on it, opting, instead, for a practical, case-by-case examination, thus regarding and applying it as a 'question of fact'²⁵.

French case law has also endorsed the rule of internal subsidiary asylum. The Commission des Recours des Réfugiés dealt with this issue, albeit in a cursory manner, in Mlle Nadia El Kebir²⁶. The case concerned an Algerian female refugee applicant who fled her country of origin due to her subjection to 'repeated threats and violence originating in Islamic elements because of the profession [secretary in a company] which she intended to continue, and her proclaimed refusal, despite the pressure to which she was subjected, to comply with the demands they wanted to impose on her, regarding her life style'. The above applicant had to resign

²⁴Yurekli and Gunes were applied also as precedents in R. v. Secretary of State for the Home Department ex parte Hasan Namoglu, Queen's Bench Division, CO/998/90, 25 October 1991 (transcript copy). Accord, R. v. Secretary of State for the Home Department ex parte David Siril Vigna, Queen's Bench Division, 9 October 1992, [1993] Imm AR 93, at 94.

²⁵See MacCormick, N., 'On reasonableness', in Perelman, Ch., Vander Elst, R. (eds.), Les Notions à Contenu Variable en Droit, Bruxelles, Bruylant, 1984, 131, at 144 et seq.

²⁶CRR No. 237.939, 22 July 1994, reported (in French) in 13 Refugee Survey Quarterly (1994), Nos. 2 and 3, at 198-200.

her post and flee the country after an 'unusually violent event'. The Commission upheld the appeal having concluded, inter alia, that 'the conditions in which the appellant's departure had to take place, for security reasons, made it impossible for her to search for refuge in another region of [her country of origin]'²⁷. French jurisprudence has thus endorsed the above rule on condition, as in British case law, that the internal subsidiary asylum may be regarded as reasonable to be attained, under the particular circumstances presented by each individual case.

The question of inland flight alternatives for a refugee applicant had until 1988 remained a grey area in German refugee status jurisprudence and doctrine. As in the UK and France, the issue has also been related by the Federal Constitutional Court, as well as by the Federal Administrative Court, to the notion of 'reasonableness', and to the question how this notion may find itself, in practice, in harmony with the position of refugees who even though may be able to escape persecution in an alternative part of the country of origin they are, nonetheless, obliged occasionally to live in conditions where 'the life essentials are hardly secured'²⁸. The Federal Constitutional Court had refrained until 1988 from providing a definitive, express legal answer/solution to the above grave dilemma limiting, instead, itself to recognising,

²⁷Ibid. at 199.

²⁸Bundesverfassungsgericht judgment of 20 December 1988, 2 BvR 1083/83, 11 InfAuslR (1989) 134, at 135.

thus indirectly aligning itself with, the stance of a large part of the German asylum law doctrine which had not recognised the existence of the necessary nexus between persecution and flight in cases where inland persecution-proof alternatives were available to a refugee applicant²⁹.

However, in more recent case law, the Federal Constitutional Court took a clear position in favour of the workability of the internal form of the subsidiarity of asylum. Accordingly, no individual refugee applicant may successfully claim persecution if (s)he is affected only by 'regional persecution' and does not find her/himself 'in a hopeless situation on the whole territory of the country [of origin]', on condition that flight to other parts of the country would constitute a 'reasonable flight'³⁰. The right to asylum in Germany has, thus been tied to the 'relation between the persecuted person and the state of nationality', and may be recognised only to individuals who have to search for protection abroad because they find themselves with no

²⁹ Idem.

³⁰ Judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 342; see also judgment of 23 January 1991, 2 BvR 902/85 and 515,1827/89, 83 BVerfGE 216, at 232-3. Accord, Federal Administrative Court, 2 August 1983, 9 C 599.81, 67 BVerwGE 314, at 315-6, judgment of 24 July 1990, BVerwG 9 C 78.89, 12 InfAuslR (1990) 337, at 339-340; see also judgment of 6 April 1992, BVerwG 9 C 143.90, 107 DVB1 (1992), 1544, at 1547: 'Paragraph 2 of the AsylVfG...does not allow an asylum claim when an asylum seeker voluntarily abandons the protection from persecution in another place...Art. 16 Abs. 2 Satz 2 GG does not grant any constitutional claim to double or more protection.'

protection in the whole territory of their country³¹.

German case law has referred to and liaised the question of subsidiary internal asylum with a particular type of a 'multi-faceted' ('mehrgesichtige') modern state that, contrary to the typical European or north American state typology, 'pursues in various regions different aims, sets up or allows different cultural or legal orders'. So while it would be 'natural' for such a state to take some measures in some parts of its territory in order to safeguard its functioning there, for example because of a separatist movement active in that part of the country, in other parts with no such problems it would not be so³². Consequently, in principle, any such persecution-free areas may be of significance to asylum adjudication if the refugee applicant there is 'sufficiently safe' from persecution and 'is at any rate not threatened...by other disadvantages and dangers which, because of their intensity and gravity, are tantamount to an impairment of lawful interests on political grounds...'³³. This has been a rule which is generally applied in German case law, and it is

³¹Judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 342.

³²Ibid. at 342-3.

³³Ibid. at 343-4; see also judgment of 22 March 1991, 2 BvR 1025/90, 13 InfAuslR (1991) 198, at 200, judgment of 5 September 1991, 2 BvR 1085/90, 14 InfAuslR (1992) 29, at 34, judgment of 30 December 1991, 2 BvR 406/91, 463/91 etc., 14 InfAuslR (1992) 219, at 221, judgment of 4 December 1991, 2 BvR 657/91, 11 NVwZ (1992) 561, at 562. Accord, judgment of 20 November 1990, BVerwG 9 C 72/90, 10 NVwZ (1991) 384, judgment of 15 May 1990, BVerwG 9 C 17.89, 12 InfAuslR (1990) 312, at 315, judgment of 9 April 1991, BVerwG 9 C 91.90 etc., 11 NVwZ (1992) 270, at 271.

submitted that it constitutes a workable interpretational tool with regard to the reasonableness of availability of the internal asylum subsidiarity. Accordingly, it has been stressed in German asylum adjudication that the organs adjudicating on territorial asylum should always, in each individual case, try to carry out a thorough examination of the existing balance/connection between the potential persecution and consequent 'existential threat' that an asylum seeker may have to face in the inland place of flight alternative. Only then there may be reached a conclusion on the 'reasonableness' of any such alternative³⁴. The Federal Administrative Court has indicated that potential factual gauges relating to this reasonableness may be the time concerning the political/factual change of circumstances in an area that may have the potential to be considered as a safe subsidiary area of refuge³⁵, as well as the fact that '[a]n inland flight alternative presupposes that the persecution-free flight alternative may be easily reached.'³⁶

Another persecution typology potentially connected with an interior flight alternative may come into play when there exists no direct state persecution but an indirect one

³⁴See judgment of Federal Constitutional Court, 22 March 1991, 2 BvR 1025/90, 13 InfAuslR (1991) 198, at 200; see also judgment of 6 October 1987, BVerwG 9 C 13.87 (transcript copy) at 9-11.

³⁵Judgment of 3 December 1991, BVerwG 9 C 15.91 etc. (transcript copy) at 8-9.

³⁶Judgment of 13 May 1993, BVerwG 9 C 59.92, 108 DVB1 (1993) 1025 [Leitsatz].

perpetrated by 'third persons', and which may be attributed to the state of refugee's origin by reason of 'its insufficient, albeit possible exercise of its monopoly of power and protection'³⁷. This is a typical situation in countries where regional conflicts between ethnic or religious groups arise and, consequently, the presence of the state mechanism may take on a different form in these areas from some others³⁸. Dealing with such a case (relating to persecution of a religious minority), the Bundesverfassungsgericht has pointed out that there may be no claim of an 'alternative flight sufficiently safe from persecution' if the state 'impedes the preservation of the minimum of religious existence through measures taken by it', or in case the population in that other area of the country 'makes impossible the preservation of the minimum of the religious existence through actions which are incompatible with the generally applied law', and the state remains passive³⁹. Accordingly, the Federal Constitutional Court has established that in all such cases, in order for an inland alternative area of asylum to be accepted as valid, 'the state's readiness to protect in the places of flight alternatives is to be verifiable in a concrete manner...and it

³⁷Judgment of Federal Constitutional Court, 10 November 1989, 2 BvR 403,1501/84, 9 NVwZ (1990) 254.

³⁸Idem.

³⁹Idem; see also judgment of 22 May 1990, 2 BvR 1487 etc./89, 12 InfAuslR (1990) 282, judgment of 8 November 1990, 2 BvR 945,955,1049,1068,1083/90 (transcript copy) at 7; see also infra Chapter IX.

should not be...assumed through a mere presumption'⁴⁰. In cases concerning persecution of the religious group of Turkish-Kurd Yazidis, the German Federal Constitutional Court has also emphasised that any internal flight alternative should be examined with great care by the competent courts, respecting the 'religious identity' of these individuals. The points that should then be taken into consideration would be the following: firstly, the significance attached to the cohesion of the members of the group among themselves and with their 'family of priests', in the name of the practice of their religion; secondly, the relevant necessary degree of cohesion from a space and time point of view, taking into account also the experience of the group's life in the country of asylum; thirdly, the dependency of each refugee applicant on that religious life, which should be judged according to the individual's religiousness; finally, it should always be taken into consideration in each case whether state protection is shown to be guaranteed, in a sufficiently reliable manner, against unlawful attacks on such minority groups⁴¹. In this

⁴⁰Judgment of 28 June 1991, 2 BvR 583/84, 14 InfAuslR (1992) 53, at 55; see also judgment of 6 June 1991, 2 BvR 389/85, 14 InfAuslR (1992) 56, at 58.

⁴¹See judgment of 27 June 1991, 2 BvR 352/88, 13 InfAuslR (1991) 280, at 283. Accord, judgment of 15 May 1990, BVerwG 9 C 17.89, 12 InfAuslR (1990) 312 at 315 where the Court added that 'the individual conception of oneself with relevance to the respective religious community and its requirements are not the only decisive factors in asylum law...It is further to be proved whether there exists a continuing or complete, voluntary and actual renunciation of the religious community or family in the homecountry or abroad, on the one hand, according to the conduct of the asylum seeker [which] appeared in practice in conflict between the religious commands for the preservation of his religious family, and on the other hand, according to his wish to enjoy personal security and

vein, the Federal Administrative Court has emphasised that not just any impairment of the special form of the religious practice of the Yazidis is to be considered as a persecution basis. They are to be attributed to the state, or to the hostile milieu of the religious majority. Moreover, any negative effects upon the religious cohesion of the group, which are unavoidable consequences of the adaptation process the group members have to undergo once they move to big cities may not, in and of themselves, be considered as being of significance to an asylum claim. The above Federal Court has thus rightly, in principle, pinpointed that '[t]he assumption of security from persecution may be ruled out [only] if in the Turkish towns the state or a hostile-minded Muslim milieu through an active law valid for everyone [but] incompatible with the conduct of the Yazidis prevents them to reach that degree of cohesion in a "religious family" that is required for the preservation of the minimum of their religious existence.'⁴²

SECTION 3. THE INTERPRETATION OF THE EXTERNAL FORM OF ASYLUM SUBSIDIARITY BY THE THREE EUROPEAN SETS OF JUDICIAL FORA

The external form of the subsidiarity of asylum has been a part of the asylum subsidiarity rule which has created a far

freedom...'. .

⁴²Judgment of 15 January 1991, BVerwG 9 C 82.89 (transcript copy) at 11-12; see also judgment of 30 June 1992, BVerwG 9 C 24.91 (transcript copy) at 16-17. Accord, judgment of Bundesverfassungsgericht, 30 December 1991, 2 BvR 406/91, 463/91 etc., 14 InfAuslR (1992) 219, at 222; see also infra Chapter IX Section 2.

greater activism, compared to the internal asylum subsidiarity, in the context of the examined European domestic litigation, similarly to what has happened on the international plane. The 'first country of asylum principle' has provided a guideline for many years in asylum law practice in the UK, and has been strictly followed both by the British administration and the courts. In 1990 the Home Secretary made a policy statement in the House of Commons, which was continuously and strictly applied in British refugee status adjudication⁴³. The statement had pointed out the UK's obligations under the UN Refugee Convention and the 'internationally accepted concept that a person fleeing persecution and who cannot avail himself of the protection of the authorities of a country of which he is a national should normally seek refuge in the first safe country reached'. The Home Secretary, placing particular emphasis on the similar theory and practice of other western European countries, declared that 'an application for asylum from a passenger who has arrived in the United Kingdom from a country other than the country in which he fears persecution, will not normally be considered substantively. The passenger will be returned to the country from which he embarked, or to another country to which he has been since he left the country of feared persecution or, if appropriate, to his country of nationality, unless I am satisfied that the country is one in which his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group

⁴³Hansard, 25 July 1990, col. 262-3.

or political opinion, or that it would return him to such a country'. However, the rule of external asylum subsidiarity had been established a long time before, by the judicial practice in the UK. In 1982, in R. v. Immigration Appeal Tribunal ex parte Mawji⁴⁴ the Queen's Bench Division dismissed the appeal of a refugee applicant who was driven from Uganda by the Amin regime in 1972 and went to Pakistan where he stayed for five years. Although the court accepted that the appellant still had a fear of persecution in his country of origin, it dismissed the appeal, since the appellant was able to travel back to the third host country without having any fear of being persecuted there. The Immigration Appeal Tribunal, in 1985, in Awatef Mahmoud Reslan and others v. Immigration Officer-Heathrow⁴⁵, considered a case of a Muslim mother and her children from Beirut, Lebanon, who feared persecution by other factions in their country. The Tribunal upheld the appeal having before it no evidence showing that the appellants would be admitted and protected in another country other than the country of origin.

An important relevant issue dealt with by British case law is the existence of a refugee's special links with a particular country where it would be reasonable to be expected that a refugee status application be lodged. The Immigration Appeal Tribunal in Steven Miller v. Secretary of State for the Home

⁴⁴[1982] Imm AR 97.

⁴⁵Appeal No. TH/122233/84 (3844), 5 March 1985 (transcript copy).

Department⁴⁶ dismissed the appeal of a South African citizen who had applied for asylum in the UK on the ground of his objection to performing his military service in an apartheid regime. Miller's parents were Jews and he himself had spent periods of time in Israel, two months of work and four subsequent years of study funded by the Israeli government, thus benefitting from that country's legislation on non-national Jews. The crucial question that the Tribunal set to itself was 'whether the appellant could reasonably be expected to apply to Israel for political asylum and whether...the Secretary of State could reasonably expect the appellant to apply in Israel rather than in the United Kingdom'⁴⁷. Despite the appellant's objection to his settling in Israel, the Tribunal, having no evidence that this third state had resiled from its international responsibilities under the international refugee legislation, held that the former should seek asylum first in Israel, as a country with which he had much closer connections, compared with the country of the asylum application⁴⁸. The period of time and the actual life that a refugee applicant has led in a third state was also considered to be of great significance in the application of the external asylum subsidiarity in Barmak Saemian v.

⁴⁶Appeal No. TH/120585/84 (4258), 4 November 1985 (transcript copy).

⁴⁷Emphasis added.

⁴⁸To the same conclusion came the Queen's Bench Division which adjudicated on the appeal of this case, R. v. Immigration Appeal Tribunal ex parte Steven Miller, [1988] Imm AR 1, and the Court of Appeal, Steven Miller v. Immigration Appeal Tribunal, [1988] Imm AR 358.

Immigration Officer, Heathrow⁴⁹, a case concerning a refugee applicant who had lived and studied for five years in a third host country.

A different kind of connection with a specific country may be established if protection, de iure and/or de facto, has already been offered by a specific state to a refugee applicant: Hossein Alisedaghat and another v. Secretary of State for the Home Department⁵⁰ concerned an asylum seeker coming from Iran, of undetermined nationality who feared persecution in Iran, and his wife, a Portuguese national. The facts that he had been a holder of a Portuguese travel document, had lived in Portugal in the past, and that there was no evidence that he would not be able to take up residence in that country again, weighed against making their case before the Tribunal. A stronger liaison with a third country may be established in cases where this country has provided an entry visa, as shown in R. v. Secretary of State for the Home Department ex parte Khalil Yassine and others⁵¹. The Home Office considered this case of six citizens of the Lebanon who had arrived in the UK from Cyprus in transit to Brazil, and dismissed their asylum applications, on the ground that they had obtained visas from the Brazilian authorities in Beirut,

⁴⁹Appeal No. TH/5162/89, 16 November 1990 (transcript copy), affirmed in Barmark Saemian v. Immigration Officer, Heathrow, Immigration Appeal Tribunal, [1991] Imm AR 489.

⁵⁰Immigration Appeal Tribunal, Appeal No. TH/128646/84 (4037), 12 June 1985 (transcript copy).

⁵¹[1990] Imm AR 354.

thus having established close links with the Brazilian state. Consequently, Brazil should be, according to the Home Office, the country responsible for entertaining the asylum application. The Queen's Bench Division accepted, in principle, this rule although it upheld that particular appeal, on the ground that the visas had been obtained by fraud from the Brazilian authorities. Indeed, the disqualifying effect of the application of the first country of asylum principle has been obvious in cases where the asylum seeker has not literally set foot on the territory of a state but has established formal, legal connections with it, like in the case of a valid visa enabling the former to enter its territory.

However, much more complicated have been cases where refugee applicants have already been granted territorial asylum by a state. The British Immigration Appeal Tribunal has not ruled out the possibility of granting territorial asylum to such individual refugees. The crucial condition on which this second refugee status may be granted would be the existence of a well-founded inability or lack of willingness on the part of the asylum seeker to return to the first country that has granted asylum already. The onus in such cases rests upon the refugee applicant to prove the reasonableness of the new claim. The relevant locus classicus in British refugee law has been The Secretary of State for the Home Department v. 'Two Citizens of Chile'⁵². The question posed by the

⁵²Immigration Appeal Tribunal, [1977] Imm AR 36.

Immigration Appeal Tribunal was whether refugees 'who have been granted asylum in another country, [are] entitled to come to this country and to claim political asylum here if they do not like the first country which has accepted them'⁵³. The applicants were unwilling to return to the first country of territorial asylum, a state not signatory to the 1951/1967 Refugee Convention, on the grounds that they were not allowed to work, their life there was 'unsatisfactory' and, finally, their visas from the above country had expired. The appeal was dismissed, since they could not prove that their life or freedom would face any risk at all in the country which provided them with refugee status in the first place. A similar case was Abraehet Seare v. Secretary of State for the Home Department⁵⁴. The appellant claimed that she feared to return to the country which had provided her with territorial asylum, basically by reason of the activities carried out there by political organisations with which she used to have contacts. The evidence produced by the appellant was not in a position to convince the Tribunal that she had been 'personally at risk or threatened' either by the state that had granted refugee status, or by the above-mentioned organisations⁵⁵. What has been of significance in these cases is the emphasis rightly placed by the judicial interpreter on

⁵³Ibid. at 38.

⁵⁴Immigration Appeal Tribunal, Appeal No. TH/111571/83 (3853), 26 March 1985 (transcript copy).

⁵⁵See also Belay Meaza v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/15344/86 (5148), 13 April 1987 (transcript copy).

the praxis of the country which first granted refugee status. Accordingly, no such second application may be rejected on the sole basis of the official granting of refugee status by a specific state. What is to be looked into by the competent administrative and judicial organs should be the real protection and the range of this protection afforded in the third state. The inability and/or lack of willingness of the latter to protect a refugee on its territory should lead the second country of potential asylum to a thorough examination of the merits of the case.

Of important relevance to the above question have been, in British case law, applications made for transfer of refugee status from another European country to the UK. In Jinnah Rahman v. Secretary of State for the Home Department⁵⁶ a citizen of Guyana who had secured refugee status in the Netherlands appealed to the Immigration Appeal Tribunal asking for such a transfer from the latter country 'on humanitarian grounds' which had to do with his links with the UK, such as language, family relations, his national community in the UK and work prospects. The appellant was not able to claim that he faced any serious hardship in the first country that had already protected him through territorial asylum. His case hinged upon two main treaties: the 1951/1967 Refugee Convention, and the 1980 European Agreement on Transfer of

⁵⁶Immigration Appeal Tribunal, [1989] Imm AR 325.

Responsibility for Refugees⁵⁷. Article 34 of the Refugee Convention provides for the, as far as possible, facilitation of the refugee assimilation by the contracting states which have undertaken to 'make every possible effort to expediate naturalization proceedings...'. Article 2.1 of the above European Agreement provides that 'Responsibility shall be considered to be transferred on the expiry of a period of two years of actual and continuous stay in the second State with the agreement of its authorities or earlier if the second State has permitted the refugee to remain in its territory either on a permanent basis or for a period exceeding the validity of the travel document...'. Rahman's appeal was dismissed, since neither of the above provisions were regarded by the Tribunal as being supportive of his claim. Article 34 of the UN Refugee Convention was accepted as 'a relevant factor' which could be taken into consideration by the Home Secretary, but did not, however, impose any 'duty on a party to accede to the transfer of a refugee who, by very definition, is no longer at risk'⁵⁸. As to Article 2.1 of the European Agreement, this was not accepted either as a valid basis in favour of the appellant, since although he had stayed in the UK for a period of time exceeding two years, this had happened on the basis of his status as a visitor or student

⁵⁷European Treaty Series No. 107; see also Council of Europe, Explanatory Report on the European Agreement on Transfer of Responsibility for Refugees, Strasbourg, 1980.

⁵⁸See supra n. 56, at 338.

and not as a refugee⁵⁹. Accordingly, British case law has established that transfer of refugee status in cases like the one mentioned above may be possible only when 'compassionate circumstances' may come into play and, thus, put the case 'into an exceptional category'⁶⁰. The Immigration Appeal Tribunal has shown itself willing to apply these requirements in a strict manner, bearing in mind the need to avoid any potential exacerbation of 'an already acute refugee problem'⁶¹: an open admission of the practical political issues that are inevitably taken into consideration in every refugee case, at least of that character.

The House of Lords accepted the rule of external asylum subsidiarity in its first judgment having as its subject the issue of refugee status under the 1951/1967 Refugee Convention, Bugdaycay v. Secretary of State for the Home Department and related appeals⁶². The above Court dealt, in effect, with the rule, although it did not name it, when considering the appeal of a Ugandan asylum seeker who had

⁵⁹ 'It seems to us eminently understandable that a refugee seeking to transfer the responsibility for his status to a second State should be able so to do only once that State has, as it were, agreed to let the refugee remain in its territory with full knowledge of the status. The length and purpose of the residence provide sensible guidelines for transfer of the responsibility for that status.', idem.

⁶⁰ See Shrokh Shamir v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, 26 June 1992, [1992] Imm AR 542, at 547-50. The case concerned an Iranian citizen's application for refugee status transfer from France, claiming assimilation difficulties in that country.

⁶¹ See supra n. 56, at 339.

⁶² [1987] 1 All ER (HL) 940.

remained temporarily and applied for refugee status in Kenya. This appeal was upheld on the ground that Kenya, although a first country reached by the appellant, had a poor record of refugee protection, having sent in the past Ugandan refugees back to their country of origin, in contravention to the non-refoulement provision of the 1951/1967 Refugee Convention, albeit a signatory state⁶³. The significance of the case lies, inter alia, in the emphasis placed by the House of Lords not on the mere signing of the above Convention by a potential third host state, but on its actual praxis regarding the enforcement of its protection obligations vis-à-vis refugees⁶⁴. Thus, there has been established an obligation to consider such cases taking into account the refugee protection record of a country, before any decision is reached which might entail the indirect refoulement of the refugee status applicant, that is, refoulement to a state which, albeit not the original source of persecution, may forcibly return the former to the original country of persecution. Special considerations would come into play when a third state reached by a refugee is not at all party to international refugee treaties, or when a state party has limited its obligations taking advantage of the availability of reservations to various provisions. Accordingly, in Citizen of Ethiopia v.

⁶³Ibid. at 953.

⁶⁴See also R. v. Secretary of State ex parte Shamsu, Queen's Bench Division, 20 February 1990, CO/221/90 (transcript copy) where this reasoning is applied to a case concerning a Somalian refugee who had spent 35 days in Italy before arriving in the UK; see also R. v. Secretary of State for the Home Department ex parte Mbala, Court of Appeal (Civil Division), 1 May 1991 (transcript copy).

Secretary of State for the Home Department⁶⁵ the Adjudicator upheld the appeal of an Ethiopian citizen who was unable to enter and be protected as a refugee in, among other countries, Italy since, at that time, this state had exercised the right, under the 1951 Refugee Convention, to limit its obligations to refugees created by events occurring in Europe⁶⁶. This opinion was reiterated by the Immigration Appeal Tribunal in Secretary of State for the Home Department v. Razaq Mohd Saeid Abdu Abdel⁶⁷. The case concerned another Ethiopian citizen unwilling to return to Saudi Arabia where he had stayed before his arrival in the UK. The facts, inter alia, that the former country was not a party to the 1951/1967 Refugee Convention, nor had any legislation or policy regarding the granting of territorial asylum led the Tribunal to uphold the appeal and conclude that a forcible return of the applicant to the third state would inevitably constitute a violation of the non-refoulement provision of Article 33 of the above Convention. Apart from strict respect for the principle of non-refoulement British case law has also demonstrated a high degree of cautiousness vis-à-vis the problem of creation of 'refugees in orbit'⁶⁸, a danger always present in cases where the question

⁶⁵Adjudicator, 26 October 1977, 71 ILR (1986) 500.

⁶⁶See Article 1 B. of the 1951 Refugee Convention.

⁶⁷[1992] Imm AR 152; see also Mohamad Khanis Alsawaf v. Secretary of State for the Home Department, Court of Appeal, [1988] Imm AR 410.

⁶⁸See Melander, G., Refugees in Orbit, Geneva, International University Exchange Fund, 1978, Weis, P., 'Refugees in orbit', 10 Israel Yearbook on Human Rights (1980) 157, Grahl-Madsen, A., 'Refugees in orbit: Some constructive proposals', in his Territorial Asylum, Stockholm, Almqvist &

of the external subsidiarity of asylum is under consideration. Accordingly, any administrative decision of forcible return to a third host country should examine and reaffirm that the asylum seeker will be definitely admitted and be offered protection there. Accordingly, in Kamal v. Secretary of State for the Home Department and another⁶⁹ the Court of Appeal emphasised that it would be a conditio sine qua non for the Home Office 'to demonstrate the existence of a reason to believe that the applicant will be admitted' before any forcible return to the third host country materialises.

Of particular significance have become in the UK refugee status applications by individuals who have passed through other west European/European Union states before reaching British territory. In the early 1980s British case law did not appear to apply strictly the first country of asylum rule in

Wiksell International, 1980, at 95 et seq., Zufferey, B.D., 'Les réfugiés en orbite', in Institute of International Public Law and International Relations of Thessaloniki (ed.), The Refugee Problem on Universal, Regional and National Level, Thesaurus Acroasium Vol. XIII, Thessaloniki, 1987, 887. A typical example of a refugee in orbit was R. v. Secretary of State for the Home Department ex parte Navaratnam, Queen's Bench Division, 15 March 1990, CO/434/80 (transcript copy), concerning a Tamil asylum seeker from Sri Lanka. Having spent two months in France he was returned there by the British authorities, and was subsequently sent back to the UK by France. He was finally resent back to France by the UK on the ground that the Secretary of State was satisfied that the former state would properly discharge its obligations under the 1951/1967 Refugee Convention.

⁶⁹Court of Appeal (Civil Division), 20 December 1990 (transcript copy).

such cases⁷⁰. By contrast, from the late 1980s onwards the opposite has occurred in a series of refugee status cases concerning applicants who have spent some period of time in another west European/EU state, on their way to the UK from their country of origin. The majority of these applications have been rejected by the Home Office as inadmissible on the basis of the above-mentioned policy statement of the Home Secretary and/or the 1990 Dublin Convention. In R. v. Secretary of State for the Home Department ex parte Gurmeet Singh and others⁷¹ the High Court established their right and obligation to 'consider anxiously whether the Minister was entitled to conclude that the immigrant would be accepted by the third and safe country'⁷². However, in view of the limited action that may be taken by courts at the stage of a judicial review, and because of the special burden of proof undertaken by the asylum seeker in order to prove that the administration 'did not come properly' to a negative decision, the prospect of most of these appeals has been bleak. Thus, in Charles

⁷⁰See Kamel Said Dartash and others v. Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/94291/82 (2713), 16 May 1983 (transcript copy). The case concerned an Iraqi national, his Czechoslovakian wife, and their child, all of whom had arrived and sought asylum in the UK, having travelled first through Czechoslovakia and Austria. The Tribunal allowed the appeal noting that the appellants had 'simply spent a few days in Czechoslovakia and Austria on their way to this country', since there was 'no automatic right of residence for the foreign husbands of Czech women', ibid. at 3. Thus, it concluded that on a 'balance of probability' the main appellant would have to return to his country of origin where he had a well-founded fear of being persecuted, and, consequently, the UK should provide asylum.

⁷¹Queen's Bench Division, [1987] Imm AR 489.

⁷²Ibid. at 507.

Maroum Bouzeid and others v. Secretary of State for the Home Department⁷³ the Court of Appeal dismissed the appeal of four individuals who had travelled to Austria spending one night in the Vienna airport lounge and then flown on to the UK. The court accepted the 'general principle' of the first country of asylum as it was expressed in the policy statement, as well as the Home Secretary's evidence according to which the appellants could be sent back to Austria to have their asylum applications considered by the authorities of that state⁷⁴.

⁷³[1991] Imm AR 204.

⁷⁴The administration stressed that the 'Home Office is in regular contact with both the Austrian authorities and the [UNHCR] including very recent contact and no doubt has been raised that the Austrian Government would comply with its obligations under the 1951 Convention', ibid. at 206. The Home Secretary's evidence outweighed that of the appellants, according to which the Austrian Immigration Service had informed the latter's solicitors that 'as the applicants would have spent seven days in London while the authorities here considered whether to consider the claim and time was allowed for obtaining legal advice and seeking judicial review, then the Minister of the Interior in Austria would say Britain should deal with this claim and the applicants would be returned to the United Kingdom.', idem; see also similar cases: R. v. Secretary of State for the Home Department ex parte Hasan Yildiz and Sabryie Yildaz, [1991] Imm AR 354; R. v. Secretary of State for the Home Department ex parte Huseyin Dursun, [1991] Imm AR 297, a case concerning an asylum seeker who had travelled from Turkey to Belgium in a container on a lorry, and then to the UK on a ferry. The appellant claimed that he had no opportunity to claim asylum while on the continent, being in a container until he reached Belgium. The court regarded the question of such an opportunity as not being 'relevant in the light of the policy' declared by the Home Secretary, ibid. at 298. In R. v. Special Adjudicator ex p. Linsam Kandasamy, [1994] Imm AR 333, a case concerning a refugee applicant who arrived in the UK via Sweden; Hidden J accepted that 'a person has an opportunity to apply for asylum if he is aware that he is outside the country in which he fears persecution, he is physically able, directly or indirectly, to contact the authorities of the State in which he finds himself, and there is no reason to believe that those authorities would not receive an application', ibid. at 337; see also R. v. Secretary of State for the Home Department ex parte Madetelona, Court of Appeal (Civil Division), 1 May 1992

British courts have used in a number of cases the provisions of the 1990 Dublin Convention which regulate the EU member states' responsibility with regard to asylum applications made on their territories, in order to uphold administrative decisions regarding forcible return of refugees to other EU states, even when the Convention was not yet in force, like in Bokele⁷⁵. What has been striking is the inconsistency which has characterised the practice of the British courts on this issue. Contrary to Bokele, the Court of Appeal in Kemal Karali and others v. Secretary of State for the Home Department⁷⁶ discarded a provision of the Dublin Convention that was attempted by the asylum seekers to be used in order to force

(transcript copy), R. v. Secretary of State for the Home Department ex parte Zarko Putica, [1992] Imm AR 251, R. v. Secretary of State for the Home Department ex parte Zeynel Abidan Avci, Queen's Bench Division, 6 July 1993, [1994] Imm AR 35, Leon Solcan v. Secretary of State for the Home Department, [1994] Imm AR 312.

⁷⁵See R. v. Secretary of State for the Home Department ex parte Bike Bula Bokele, [1991] Imm AR 124. It is, at least, questionable whether a Convention not yet in force may be applied by courts in domestic jurisdiction. The principle of non-retroactivity of treaties has been established in Article 28 of the 1969 Convention on the Law of Treaties, 1155 UNTS 331; see also Sinclair, I., The Vienna Convention on the Law of Treaties, Manchester, Manchester University Press, 1984, Second Edition, at 85. The Dublin Convention was not yet in force in October 1990 when its provision (Art. 5.2 regarding the granting of visa as a basis of responsibility of the third host state) was applied by the High Court in order to uphold the administrative decision to return the above asylum seeker to Belgium which, consequently, bore no legal responsibility, in the context of the above Convention, to accept the former on its territory; see also R. v. Secretary of State for the Home Department ex parte Erkhan Akyol, Huseyin Sahim and Hasan Polat, [1990] Imm AR 571, David Thevarajah and others v. Secretary of State for the Home Department, Court of Appeal, 12 March 1991, [1991] Imm AR 371, R. v. Secretary of State for the Home Department ex parte Muboyayi, 25 June 1991, [1992] 1 Law Reports: Queen's Bench Division 244.

⁷⁶[1991] Imm AR 199.

the UK to examine their refugee status applications, on exactly the basis of non-retroactivity of the treaty, an argument which had not been accepted in cases regarding the relevant obligation of third host countries⁷⁷.

What, however, should be the actual point in all such cases of external asylum subsidiarity is the effective protection that any third host country is able to provide to refugee applicants. The relevant crucial question whether fear of persecution on the territory of another EU member state may provide a sound basis for a refugee status application in the UK has been dealt with by British case law. In R. v. The Secretary of State for the Home Department ex parte Ahmed Gamzmalhalig Abdullah⁷⁸ the Queen's Bench Division granted leave to apply for judicial review to the above asylum seeker who, before his arrival in the UK, had claimed asylum in the Federal Republic of Germany and had been detained in a refugee

⁷⁷The refugee applicants had remained at the transit area of Amsterdam's airport for two days, having no transit visa, in conformity with Dutch law. Article 7.2 of the Dublin Convention stipulates that 'Pending the entry into force of an agreement between Member States on arrangements for crossing external borders, the Member State which authorizes transit without a visa through the transit zone of its airports shall not be regarded as responsible for control on entry, in respect of travellers who do not leave the transit zone.' This provision was able to operate in such a manner as to take away from the Dutch authorities the responsibility to examine the relevant asylum applications. The Home Office objected to applying the provision and the Court of Appeal upheld declaring itself 'unable to say that the Secretary of State has erred in law in not applying, or inquiring further into the facts to enable him to apply, article 7.2 of the Dublin Convention when that has not yet been ratified and made part of the law of this country', ibid. at 202.

⁷⁸Queen's Bench Division, CO/2812/91, 15 January 1992 (transcript copy).

camp there. Having spent nine months in the above third state the applicant claimed to have a well-founded fear of persecution in that state, on the ground of racist attacks against immigrants and refugees taken place in the FRG. The High Court noted that 'It may be difficult for the applicant to show that he had a well founded fear of persecution in 1991 in Germany, a member of the European Community', but went on to grant leave, acknowledging that the applicant was entitled to a proper and sufficient consideration of his claim by the administration. However, a further judicial review application was rejected by the Court of Appeal⁷⁹, on the ground that the administration's process of reasoning in that case had been 'clear and valid', having done 'all that was reasonable and necessary to discharge his duties with regard to this matter'⁸⁰. The Home Office, having consulted both the Foreign Office and UNHCR, had declined to look into the merits of the asylum application on the following grounds: first, they were 'satisfied that in Germany [the] claim to have a well-founded fear of persecution in [the country of origin] would be fully and properly considered and determined in accordance with the provisions of the 1951...Convention'; second, although accepting that there have been attacks on asylum seekers in Germany the administration did not accept that the applicant was personally a victim of any such attack. In a contradictory statement, the Home Secretary declared that even if he 'were

⁷⁹R. v. The Secretary of State for the Home Department ex parte Gamel Haliq Abdulla, 8 May 1992, L92/0100/LJC (transcript copy), reported also in [1992] Imm AR 438.

⁸⁰Ibid. at 7.

to accept that [the asylum seeker] had been the victim of assaults in Germany in the past, he would reach the same conclusion as expressed in the previous sentences as to Germany being a safe country to which to return [the applicant] now'⁸¹; thirdly, the Home Office had reports asserting the 'declining numbers of such attacks and the steps taken by the German authorities to prevent their occurrence'; finally, the Secretary of State was satisfied that the appellant's 'physical safety would be no different from that of any other black asylum seeker in Germany', and that there was 'no significant risk of [his] suffering any physical harm in Germany by reason of being an asylum seeker there', contradicting again his statement, adding that even if he were to accept that the applicant had been a victim of assaults in Germany in the past, he would reach the same conclusion as to his not having a well-founded fear of persecution in Germany⁸². The British court was not in a position to look into the merits of the asylum application, being limited by its judicial review jurisdiction. However, what Abdullah has clearly demonstrated is that a very heavy onus of proof has been placed upon every refugee status claimant who makes such a claim in the UK on the basis of lack of effective protection in a third EU member state. The Queen's Bench Division in the aforementioned judgment alluded to that difficulty, while the Court of Appeal in its later above-mentioned judgment made it abundantly clear that in order for this kind of claim to

⁸¹Ibid. at 3.

⁸²Ibid. at 3-4.

succeed, the claimant should meet not only the legal prerequisites that would allow her/his claim to succeed. (S)he should also overcome the network/bulwark of close political and legal co-operation and the concomitant confidence that have been built up by and thrived amongst state members of the European Union⁸³.

⁸³See also similar case: R. v. Secretary of State for the Home Department ex parte Singh, Queen's Bench Division, 7 April 1992, [1992] Imm AR 376. The case concerned an asylum seeker who claimed refugee status in the UK on the basis of well-founded fear of persecution in Germany where he had been temporarily accepted while his asylum application was processed, because of racially motivated attacks that took place in that third country. The court rejected the application for leave for judicial review, having, nonetheless, accepted that 'there is a possibility that in Germany a person of [the applicant's] background may come across punks and other undesirable elements who may conceivably attack him. That risk also exists in this country.', ibid. at 378. Accord, Balbir Singh et al. v. Secretary of State for the Home Department, Court of Appeal, 5 May 1992, [1992] Imm AR 426. See also R. v. Immigration Appeal Tribunal ex parte Hristo Kolev, [1992] Imm AR 528, Abdullai Osman Conteh v. Secretary of State for the Home Department, [1992] Imm AR 594: two unsuccessful cases of asylum seekers who had arrived in the UK having spent time in Belgium. See also R. v. Secretary of State for the Home Department ex parte Rubanraj, [1993] Imm AR 447, an unsuccessful case of an asylum seeker who had arrived in the UK via Bangkok, Czechoslovakia and France; see also Alimas Khaboka v. Secretary of State for the Home Department, [1993] Imm AR 484, Daniel Ghebretatios v. Secretary of State for the Home Department, [1993] Imm AR 585, Mehmet Colak v. Secretary of State for the Home Department, [1993] Imm AR 581, R. v. Secretary of State for the Home Department ex p. Shala Jahangeer et al., [1993] Imm AR 564. Since the introduction of the 1990 Dublin Convention rules regarding EU state responsibility for handling asylum applications into British law through the Immigration Rules (HC 725), British courts have consistently endorsed administrative decisions regarding return of asylum seekers to other EU states from where the former had arrived in the UK. This practice has been based on the condition that there should be no overwhelming evidence against the presumption of proper consideration of the asylum application by the third (EU) state, see R. v. Secretary of State for the Home Department ex p. F. Kitoko-Vetukala, [1994] Imm AR 377, R. v. Secretary of State for the Home Department ex parte Senay Mehari et al., [1994] Imm AR 152, at 166-171, Manickavasagar Thavathevathan v. Secretary of State for the

German refugee case law so far has been rather more liberal than the British jurisprudence in the interpretation of the external asylum subsidiarity. The Bundesverwaltungsgericht has emphasised that asylum should be provided 'so long as...[the refugee] is in need of the protection he is seeking...'⁸⁴. The refugee, according to case law of the same Court in the early 1980s, 'when more states of refuge are under consideration, is not obliged to decide for a specific one, for example the nearest or the one which by its own admission is ready to receive him. On the contrary...he is just as free in the selection of the country, which he has firstly reached after he has left the persecuting state as in the choice of the final country of refuge.' The Supreme Administrative Court went on to add, in an extremely liberal tone which was not, however, followed in subsequent jurisprudence, that 'It is not important whether [the refugee] would, already before [arrival in the FRG], have been able to find protection through asylum in a country he passed through.'⁸⁵. The Court had acknowledged, in effect, the right of the refugee to choose the most secure country of refuge. Moreover, it had pointed out that what is of great significance, once the protection request has been made in a third country, is whether the refugee has been

Home Department, [1994] Imm AR 249, R. v. Secretary of State for the Home Department ex parte Ali Cokozici, [1994] Imm AR 224, R. v. Secretary of State for the Home Department ex p. Biljana Sop, [1994] Imm AR 204, Secretary of State for the Home Department v. K.M. Abdi, A.A. Gawe, [1994] Imm AR 402.

⁸⁴Judgment of 5 June 1984, BVerwG 9 C 88.83, 69 BVerwGE 289, at 292.

⁸⁵Ibid. at 292-3.

really provided with protection which is legally safeguarded, that is, legally effective. The Court, taking into account the colossal difficulties arising in countries like those in Asia and Africa that have to cope with mass refugee inflows, concluded that no abstract standard of third country protection may be laid down. Accordingly, any such assessment should take place on an ad hoc basis, according to the facts under consideration in each individual case⁸⁶.

The question of whether a refugee could have safely resided in a third country has been tied to the 'core content' of the constitutional right to asylum. Consequently, any possibility of residence has been considered as reasonable if it may also offer the possibility of free movement as well as the possibility to find a life-style in accordance with the standards provided by the conditions of the third state. The Bundesverwaltungsgericht has provided such an exemplary minimum standard, pointing out that, in any event, no protection of the standard required by the (constitutional) right to asylum may be alleged to have been found if the refugee is exposed to death through hunger or epidemic, 'as a consequence of the inevitable way of accommodation under the

⁸⁶69 BVerfGE 289, at 293-4; see also judgment of 2 July 1985, BVerwG 9 C 58/84, 5 NVwZ (1986) 485, at 486; see also judgment of 21 June 1988, BVerwG 9 C 12.88, 79 BVerwGE 347, at 353-5 where the security from persecution, and the consequent end of flight, in a third state is conditioned on the objective assessment of the refugee's conduct during the intermediate stay in that state. Elements which should then be taken into account are the time of stay as well as the way of life in the third state which may show the refugee's actual integration into the state; see also judgment of 16 March 1990, BVerwG 9 C 97.89, 12 InfAuslR (1990) 206, at 208-210.

specific conditions [that prevail in the third country]', or if the refugee may expect there nothing but 'to drag out a miserable life on the edge of the minimum of existence in the unforeseeable future'⁸⁷, according to the prevalent standards of living in the potential third host country⁸⁸. Accordingly, the Federal Administrative Court, although demonstrating a

⁸⁷69 BVerwGE 289, at 294; see also judgment of 6 October 1987, BVerwG 9 C 13.87 (transcript copy) at 9-11, where the reasonableness of an inland flight alternative was also conditioned on the non-existence of a danger to the financial existence of the refugee. The prognosis whether a refugee would have to live under the standard of the 'minimum of existence' in the place of flight alternative is to be made in such a way that 'the court is convinced that the danger is impending with a considerable probability or, accordingly, that in case of a feared repetition of persecution it is not excluded with sufficient probability.'; see also judgment of 16 June 1988, BVerwG 9 C 1.88 (transcript copy) at 10-11, where the Court stressed that it is not the only important thing to be examined by the lower court whether the refugee has endeavoured to 'establish a life' in the place of flight alternative, but also whether 'in general at [that place] by a general examination there is a long-lasting threat to live under the minimum of existence that leads to hunger, destitution and eventually to death.' Accord, judgment of 9 February 1988, BVerwG 9 C 55.87 (transcript copy) at 10-11; see also judgment of 23 July 1991, BVerwG 9 C 154.90, 13 InfAuslR (1991) 363 at 365, judgment of 15 January 1991, BVerwG 9 C 82.89 (transcript copy) at 8-9, judgment of 7 June 1988, BVerwG 9 B 86/88, 7 NVwZ (1988) 1035, judgment of 21 November 1989, BVerwG 9 C 36.89, 12 InfAuslR (1990) 168, at 170.

⁸⁸See judgment of 30 May 1989, BVerwG 9 C 44.88 (transcript copy) at 10: 'What is decisive is whether through a general assessment the individual persecuted on political grounds can find in the third country a -even a modest- life basis, according to the standards of the living conditions existing there, and he consequently is not exposed, helpless in the third country, to death through hunger and disease, or is to expect only to drag out a miserable existence on the verge of the minimum of existence.'; see also judgment of 25 June 1991, BVerwG 9 C 131/90, 11 NVwZ (1992) 274, at 274-5: 'If there exist subsequent new dangers [while in the country where the asylum application is examined] after the voluntary abandonment of a possible security from persecution in a third state, which [dangers] may lead to an entitlement to asylum, then their asylum relevance may not be disposed of because of an earlier security from persecution in a third state.'

high level of respect for the individual refugee's volition, has laid down an objective method of assessing the end of a refugee's flight from persecution emanating from the country of origin, and the necessary relevant causation, as well as the effectiveness of protection that may be provided by a third subsidiary country of asylum⁸⁹.

⁸⁹See judgment of 21 June 1988, BVerwG 9 C 5.88 (transcript copy) at 8-9 where the Court stated that an objective security from persecution may be in place only when 'the flight of the politically persecuted has objectively ended in the third state.' The Court also noted that an asylum claim should not be rejected solely on the fact that the refugee used 'an objectively safe country merely as an escape route in order to reach' the country of refuge; see also judgment of 21 November 1989, BVerwG 9 C 36.89, 12 InfAuslR (1990) 168 at 171-2, where the Court rejected the view of the lower court that 'a stay in a third country would have the character of a harmless [for the application] intermediate stay only when the refugee had already the intention upon his departure in the home country not to remain in the third country. That construction would have as a consequence that the stay in a third state can have the character of a mere intermediate stay only in cases of refugees who have already, conclusively or at least in a definite manner, established in the country of persecution the course of their flight and the final target country.' Thus the Federal Administrative Court reconfirmed its support to the refugee's freedom to choose her/his safe final country of refuge, being able to consider and decide whether a third state may provide real safety from persecution or not. In the latter case that state would constitute only an 'intermediate station'. However, the Court stressed that 'in case of a persecuted person's stay in a third country that has objectively become stationary, the flight has ended also when the stay should have only a temporary character according to his subjective thoughts.' Criteria on which a judgment of whether there is or not a correspondence between actual reality and subjective thoughts should be especially 'attempts to establish a life, finding of long-term accommodation, or the length of the stay', ibid. at 173; see also judgment of 21 November 1989, BVerwG 9 C 55.89, 12 InfAuslR (1990) 93 at 94-6, judgment of 21 November 1989, BVerwG 9 C 54.89, 12 InfAuslR (1990) 97-9, judgment of 21 November 1989, BVerwG 9 C 53.89, 12 InfAuslR (1990) 99-102, judgment of 16 March 1990, BVerwG 9 C 97.89, 12 InfAuslR (1990) 206 at 208-210, judgment of 20 March 1990, BVerwG 9 C 6.90, 12 InfAuslR (1990) 205, at 206.

The Federal Constitutional Court, in its judgment of 20 February 1992⁹⁰, provided a more concrete guideline with reference to the standard of safety that a third subsidiary state of asylum should in any case provide to a refugee applicant. The Court accepted that the requisite causality between flight and refuge should be considered as broken 'especially if [the refugee applicant] is or would be sufficiently safe from persecution in a third state in which he has spent a long time, and if, in any event, he would not be threatened there with any other disadvantages and dangers which would equal, because of their intensity and gravity, a violation, on political grounds, of lawful interests of significance to asylum.'⁹¹ The Court linking the notion of safety in a third country with the established interpretation rules regarding the German constitutional asylum went on to say: '...the security in a third state...releases the political persecutee from the predicament on which his hopeless situation is founded, [predicament which leads one] either to abandon, conceal or deny the characteristics that provide the ground for asylum, or (moreover) to expect with certainty significant violations of [one's] legal rights because [of the above characteristics]'.⁹² However, the Court did not contain its considerations to the substantive prerequisites of asylum protection but stressed moreover the dependence of refugee safety in a third state on the refugee's

⁹⁰2 BvR 633/91, 14 InfAuslR (1992) 226.

⁹¹Ibid. at 228.

⁹²Ibid. at 228-9.

protection there from refoulement. Accordingly, the Bundesverfassungsgericht pointed out that 'in order to be assumed that there exists security in another place -excluding the natural assumption that the third state does not likewise persecute the refugee- it is at least required that it [the third state] guarantees sufficient security from further persecution by the state of origin and against refoulement [to that state] or further refoulement to another unsafe state.'⁹³ Thus, the above Court made direct and indirect non-refoulement an absolute conditio sine qua non for any reasonable assumption of refugee safety in a third potential country of asylum.

However, the whole issue of the subsidiarity of external asylum has been set in a brand new fundamental legal framework in Germany following the 1993 amendment of the constitutional asylum provision. Of significance is, firstly, the new Article 16 a (2) of the German Basic Law (GG), a provision regarding 'safe third countries'⁹⁴. According to this constitutional provision no-one may claim the constitutional right to asylum if (s)he has arrived on federal territory from an EU member state, or another third state where the application of the 1951/1967 Refugee Convention or of the European Convention on Human Rights is guaranteed. The second provision of

⁹³Ibid. at 229.

⁹⁴Text in Kommentar zum Bonner Grundgesetz, Band 3; this is to be read in conjunction with §§ 26a-30 of the Asylverfahrensgesetz (AsylVfG), 27. Juli 1993, in Sartorius I, Verfassungs- und Verwaltungsgesetze der Bundesrepublik Deutschland, Band I, 2.Teil.

significance to refugee status applications is Article 16 a (3) GG⁹⁵ which authorizes the legislator to lay down in a list 'safe countries of origin' where it would be prima facie presumed that no political persecution or inhuman or degrading treatment or punishment takes place. The touchstones/grounds on which such a list should be based is, according to the above constitutional provision, the legal framework, the application of law and the general political conditions in these third countries⁹⁶. These German constitutional provisions have put the issue of safe flight alternatives and, consequently, the relevant case law in a completely new politico-legal context.

The first friction between the above new part of the Grundgesetz and the Federal Constitutional Court has already occurred. A few months following the coming into force of the new Article 16 a GG the above Court ordered a temporary injunction, while a constitutional appeal was pending, against the execution of an entry refusal regarding an asylum seeker who had arrived in Germany from another EU state. The decision

⁹⁵Idem.

⁹⁶For an analysis of these new constitutional regulations see, inter alia, Gusy, Ch., 'Neuregelung des Asylrechts - Grundrecht oder Grundrechtsverhinderungsrecht?', 15 Juristische Ausbildung (1993) 505 infra, Huber, B., 'Das Asylrecht nach der Grundgesetzänderung', 12 NVwZ (1993) 736 infra, Voßkuhle, A., '"Grundrechtspolitik" und Asylkompromiß', 47 Die Öffentliche Verwaltung (1994) at 53 infra. See also Zimmermann, A., 'Asylum law in the Federal Republic of Germany in the context of international law', 53 ZaÖRV (1993) at 49 infra, Blay, S., Zimmermann, A., 'Recent changes in German refugee law: A critical assessment', 88 AJIL (1994) at 361 infra.

of injunction was based on substantiated evidence regarding not only persecution in the country of origin, but also a real danger of creation of a 'refugee in orbit' situation through the alleged lack in the third EU state of an 'effective protection from a further shove' by this state, because the asylum seeker had not arrived there directly from the original country of persecution⁹⁷.

In contrast to British and German, French refugee status case law has not accepted, to date, the rule of the external subsidiarity of asylum as an admissibility condition of the refugee status application. The French Conseil d'Etat established this thesis in Conté⁹⁸. The case concerned a refugee applicant who, after the escape from his country and before arriving in France, lived in another third state for four years. This was the ground on which it had been based the decision of the Commission des Recours des Réfugiés to dismiss the asylum application. The Conseil d'Etat annulled the Commission's negative decision, on the ground that it was not possible to deprive one of the recognition of one's refugee status on the sole fact that one had lived in another third country for the above-mentioned period of time. As a consequence, the French Supreme Administrative Court established a principle that proscribes the conditioning of

⁹⁷See judgment of 13 September 1993, 2 BvR 1938/93, 109 DVBl (1994) 44; see also (unpublished) report on the case: Amnesty International German Section, Zur Sicherheit von Drittstaaten (Beispiel Griechenland), Bonn, 19 January 1994.

⁹⁸Judgment No. 20.527, 16 January 1981, Recueil des Décisions du Conseil d'Etat 1981, at 20.

the refugee status recognition solely on the refugee's residence in a third state, without examining the actual merits of the case. However, it is to be noted that the above reasoning was expressed by the above French Supreme Court in such a, typically concise, manner that may allow an interpretational extraction of exceptions. As the text of the judgment suggests, the residence in a country for a period of time may not be considered per se as an exclusion condition. Accordingly, it would be reasonable to conclude from the above judgment that such a residence would be possible to be taken into account under conditions relating to the essential and effective safeguarding of the applicant's life and liberty in the third host country. Such an effective protection which would be in a position to act in a disqualifying manner against an asylum application would consist, in the best possible case, of an actual recognition of refugee status by the third subsidiary state of asylum. However, the French accepted opinion has rejected any such restrictive interpretation of the judgment, opting for a liberal interpretation that would allow a refugee status application, even if refugee status has been already granted by a third state, on the basic ground that no such exclusion clause has been included in Article 1 C.- F. of the 1951/1967 Refugee Convention⁹⁹. This viewpoint was effectively reinforced by the

⁹⁹Conté had applied for and had been denied by the third country both refugee status and identity papers. For the above liberal accepted opinion on Conté see Conclusions by Alain Bacquet, commissaire du gouvernement, Actualité juridique-Droit administratif, 20 juillet-août 1981, 366, at 368-9; see also Pacteau, B., Note, Recueil Dalloz Sirey 1981, 250, at 251, Julien-Laferrrière, F., Note, 108 JDI (1981) 560, at 562-

Conseil d'Etat itself in a later case, Chin Wei¹⁰⁰, concerning a refugee applicant who had resided in a third state for several months before his arrival in France. Contrary to Conté, who had been denied refugee status recognition, Chin Wei had the opportunity to apply for asylum in the third state he had reached but did not do so. However, the French Supreme Court did not regard these circumstances as able to disqualify the asylum application. It rejected completely any form of the principle of the first country of asylum, establishing in French refugee status case law that the only significant issue which should be examined is the relation between the refugee applicant and her/his country of origin¹⁰¹. The Commission des Recours des Réfugiés has followed and applied the same reasoning in its contemporary case law¹⁰².

CONCLUSION

From the foregoing analysis it is clear that the rule of the subsidiarity of asylum has become an established rule in

563.

¹⁰⁰Judgment No. 21.154, 27 March 1981 (transcript copy), cited in Recueil des Décisions du Conseil d'Etat 1981 at 751.

¹⁰¹See Julien-Laferrière, F., loc. cit. supra n. 99 at 564-6. The same reasoning which excludes the applicability of the principle of the first country of asylum was applied by the Greek Council of State in Halil Regai Aksoy v. Minister of Public Order, judgment 830/1985, abstracted in 3 IJRL (1992) 740 (IJRL/0088).

¹⁰²See Owusu, CRR No. 172.191, 12 June 1991 (transcript copy). However, a jurisprudential change is to be expected following the introduction and application in French asylum law of the 1990 Schengen and Dublin Conventions, and especially after the 1993 French constitutional amendment which was made necessary by the above Conventions, see supra Chapter II Section 3, and Introduction to the thesis, n. 1.

contemporary refugee law. The rule has been a corollary of two fundamental active elements of this legal field. Firstly, the non-existence in international law of any individual right to territorial asylum, and of any subsequent claim against the states. States constitute still the sovereign organs with the prerogative to grant asylum, in the sense of a durable effective protection to individual asylum seekers and refugees¹⁰³. Secondly, as shown in the previous chapter, the exodus of the refugee from the country of origin has been established in refugee law as a direct, in principle, result of persecution or of a well-founded fear of persecution. The

¹⁰³See inter alia, Goodwin-Gill, G.S., International Law and the Movement of Persons between States, Oxford, Clarendon Press, 1978, at 138, Garvey, J.I., 'Toward a reformulation of international refugee law', 26 HarvILJ (1985) 483, at 487, Hathaway, J.C., 'A reconsideration of the underlying premise of refugee law', 31 HarvILJ (1990) 129, at 165-8, and at 175; see also Dirks, G.E., 'Regulating the refugee flow: Some observations', in Adelman, H., Lanphier, C.M. (eds.), Refugee or Asylum? A Choice for Canada, Toronto, York Lanes Press, 1990, 88, at 89, Goodwin-Gill, G.S., 'Refugee or asylum: International law and the search for solutions to the refugee problem', ibid. 27, at 31, Martin, D.A., 'The refugee concept: On definitions, politics, and the careful use of a scarce resource', in Adelman, H. (ed.), Refugee Policy - Canada and the United States, Toronto, York Lanes Press, 1991, 30, at 31. See also Conseil constitutionnel, France, Décision no 93-325 DC du 13 août 1993 sur la loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France, 11722 Journal Officiel de la République Française, 18 août 1993, reprinted in Documentation-Réfugiés, No 223, 17/30 Août 1993, 11, at 12: 'Considerant qu'aucun principe non plus qu'aucune règle de valeur constitutionnelle n'assure aux étrangers des droits de caractère général et absolu d'accès et de séjour sur le territoire national;...'. Accord, German Federal Administrative Court, judgment of 22 March 1994, 9 C 443.93, 47 Die Öffentliche Verwaltung (1994) at 740, where the above Court, with reference to Article 14 of the Universal Declaration of Human Rights, stressed that this provision is only a guideline ('Leitgedanke') with no normative substance, 'leaving each state free to grant asylum "at its own discretion" to each individual political persecutee'.

causal relationship between these two elements of refugeehood is actually interrupted, and potentially destroyed, once the refugee finds her/himself outside of the field of persecutory action liaised with the state of origin, and is able to apply for and be provided with effective protection by another state.

The recent coordinated intensification of the asylum subsidiarity rule through treaty law in the state members of the European Union has been an exemplary action of states which view the novel forms of refugee movement not solely as a question/challenge of humanitarianism, or human rights protection, but also as one intertwined with their national security, having immediate effects upon their internal social (im)balances¹⁰⁴. This, actually defensive, stance has been reinforced by the emergence, at the international level, of the 'problem of manifestly unfounded or abusive applications

¹⁰⁴See Rogers, R., 'The future of refugee flows and policies', 26 IMR (1992) 1112 at 1113: '...today countries are redefining their conceptions of national security. The new conceptions go beyond military threats to countries' borders or threats to particular regimes, to include concerns such as the populations' quality of life or whether governments are able to preserve their full range of policy choices in all issue area...'; see also Desbarats, J., 'Institutional and policy interactions among countries and refugee flows', in Kritiz, M.M. et al. (eds.), International Migration Systems A Global Approach, Oxford, Clarendon Press, 1992, 279, at 292 et seq., Shacknove, A., 'From asylum to containment', 5 IJRL (1993) 516, at 523-6; see also Collinson, S., Beyond Borders: West European Migration Policy towards the 21st Century, London, Royal Institute of International Affairs, 1993, at 69 et seq.

for refugee status or asylum¹⁰⁵.

Internal and external asylum subsidiarity has been accepted and established in the contemporary jurisprudence of the UK, France (only internal subsidiarity) and, especially following the constitutional amendment, of the Federal Republic of Germany, as an admissibility rule concerning refugee status applications. All relevant sets of national case law have indeed conditioned the function of the above rule on two basic elements: reasonableness, and the existence of subsidiary effective protection. Any claim towards a refugee by a state to seek alternative protection is circumscribed by reasonableness, a prerequisite which consists, basically, of an objective evaluation of facts, carried out by the competent asylum adjudicating organs on an heuristic, ad hoc, basis in each individual case. The ratio legis, nonetheless, of asylum subsidiarity rests upon its second constituent element, viz. the actual subsidiary effective protection from persecution inside the territory of the state of origin, or in the third state that stands between the state of origin and the state recipient of a refugee status application. The assessment of this question by the latter state is not only of a factual nature, but also of a legal one. It combines the factual

¹⁰⁵See homonymous EXCOM Conclusion No. 30 (XXXIV), 1983, in UNHCR, Conclusions, at 68; see also Aga Khan, S., Study on Human Rights and Massive Exoduses, UN Doc. E/CN.4/1503, 31 December 1981, at 41, para. 89. See also Köfner, G., Nicolaus, P., Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Mainz, München, Grünewald/Kaiser, 1986, at 31-33; see also judgment of the Bundesverfassungsgericht, 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 357.

elements of each individual refugee case with an examination of the potential protective legal framework in the state of origin, or in the third state of asylum. In cases of external asylum subsidiarity, the ultimate ratio of this assessment should always be, as demonstrated both by British and German case law, the strict observance both by the third state and, par excellence, by the state recipient of the asylum application of the fundamental refugee law principle of non-refoulement: a principle that constitutes indeed the only effective right of a refugee, with the real inherent legal potential to develop and be transformed, in practice, into (permanent) asylum on a state's, otherwise sovereign, territory¹⁰⁶.

¹⁰⁶See Martin, D.A., loc. cit. supra n. 103, at 33: 'The political reality is that those who prove entitlement to nonrefoulement wind up also with an entitlement to asylum in the stronger sense.'; see also Goodwin-Gill, G.S., loc. cit. supra n. 103 at 31.

CHAPTER V

PERSECUTION: ITS SUBSTANCE, ROLE AND FORMS IN THE JUDICIAL INTERPRETATION OF REFUGEEHOOD

SECTION 1. THE QUESTION OF THE SUBSTANTIVE NATURE OF PERSECUTION IN THE CONTEXT OF THE LEGAL CONCEPT OF REFUGEEHOOD

The sub-notion of persecution constitutes the core of the legal definition of refugeehood and is, consequently, a question of great significance to the law of refugee status. Despite its crucial role in refugee status determination procedures, persecution was left rather deliberately by the drafters of the 1951/1967 Refugee Convention in a nebulous definitional state. There has been a general agreement in contemporary refugee law doctrine that the above conceptual vagueness reflects the willingness of the initial party states to the UN Refugee Convention to provide protection to a large number of individuals threatened with persecution, or who have been actual victims of persecutory measures in their countries of origin¹, a corollary of the 'constant evolution' to which

¹See Takkenberg, A., Tahbaz, C.C. (eds.) The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees, Amsterdam, Dutch Refugee Council, 1990, vol. III, (hereinafter Travaux) at 371 et seq. See also Grahl-Madsen, A., The Status of Refugees in International Law, Leyden, A.W. Sijthoff, 1966, vol.I, at 193, Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 38, Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 99-102. See also Weis, P., 'The concept of the refugee in international law', 87 JDI (1960) 928, at 970, Fragomen, A.T., 'The refugee: A problem of definition', 3 Case Western Reserve Journal of International Law (1970) 45, at 53-4, Zolberg, A.R., 'The formation of new states as a refugee-generating process', Annals of the American Academy of Political and Social Science, 467, May 1983, 24, at 25-7, Brill, K.D., 'The endless debate: Refugee law and policy and the 1980 Refugee Act', 32 Cleveland State Law Review (1983-4) 117, at 126-7, Aleinikoff, T.A., 'The meaning of 'persecution' in United States asylum

refugeehood has been undeniably subject to in the course of the twentieth century².

Both the current international doctrine and jurisprudence of refugee law are agreed upon the thesis that 'a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group' represents the ultimate and all-embracing form of a refugee's 'physical persecution' in which a refugee status application may be grounded³. This quasi-definition of persecution is

law', 3 IJRL (1991) 5, at 11, Martin, D.A., 'Reforming asylum adjudication: On navigating the coast of Bohemia', 138 University of Pennsylvania Law Review (1990) 1247, at 1270.

²See United Nations, A Study of Statelessness, UN Doc. E/1112, New York, 1949, at 6; see also Hartling, P., 'Concept and definition of "refugee"-legal and humanitarian aspects', 48 NTIR (1979) 125; see also supra Chapter I.

³See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, UNHCR, 1979, (hereinafter UNHCR, Handbook) at 14, para.51. See also statement of the Swiss delegate to the 1951 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Geneva, in UN Doc. A/CONF.2/SR.20, 26 November 1951, at 14, in Travaux at 391: 'The Swiss Federal Government regarded as refugees all aliens whose lives were in danger for political reasons, and who, to escape that danger, were compelled to seek refuge in Switzerland.' See also Grahl-Madsen, A., op. cit. supra n. 1 at 193 et seq., Goodwin-Gill, G.S., op. cit. supra n. 1 at 38, Hathaway, J.C., op. cit. supra n. 1, at 101-2; see also Shimada, Y., 'The concept of the political refugee in international law', 19 JAIL (1985) 24, at 25, Robinson, C., Frelick, B., 'Lives in the balance: The political and humanitarian impulses in US refugee policy', IJRL Special Issue, September 1990, 293, at 307, Tiberghien, F., note, Documentation-Réfugiés, Supplément au No 187, 20/29 Juin 1992, at 5. See also Blazina v. Bouchard, US Court of Appeals, 3rd Circuit, 1961, 286 F.2d 507, Dunat v. Hurney, US Court of Appeals, 3rd Circuit, 1962, 297 F.2d 744, Flygtningenaevnet Beslutning vedroerende A.O., Danish Refugee Appeals Board, decision 1986-2-3182, abstract in 2 IJRL (1990) 139, X. and XX., Swiss Delegate for Refugee Matters, decision N 135.687, 1988, abstract in 2 IJRL (1990) 649.

actually based on the text of Article 33 of the 1951/1967 Refugee Convention that proscribes the refoulement of a refugee in case he is threatened as described above. There is no doubt that serious threats to an individual's physical integrity and security, in the form of actual harm to one's life and/or freedom, constitute persecution, in the sense of a cause of forced individual exodus from the country of origin necessitating direct protection'. However, it is groundless, from an international law viewpoint, to apply this potential interpretational construction in a restrictive manner, so as to limit the substantive sub-notion of persecution and,

'The right to life along with freedom from torture have acquired a preeminent status of absolute rights in the contemporary legal framework regarding the international protection of human rights, especially through treaty law. With regard to the right to life see Sixth Protocol to the European Convention on Human Rights, concerning the abolition of the death penalty, text in Brownlie, I. (ed.), Basic Documents on Human Rights, Oxford, Clarendon Press, 1992, Third edition, at 350; see also 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, UN Doc. A/RES/44/128, 30 January 1990, in 29 ILM (1990) 1464, at 1466, 1990 Protocol to the American Convention on Human Rights to abolish the Death Penalty, in 29 ILM (1990) 1447. With regard to the individual freedom from torture see UN Declaration on Protection from Torture, 1975, text in Brownlie, I. (ed.), ibid. at 34, UN Convention against torture and other Cruel Inhuman or Degrading Treatment or Punishment, 1984, ibid. at 38, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987, ibid. at 383, Inter-American Convention to Prevent and Punish Torture, 1985, ibid. at 531. See also Filartiga v. Peña-Irala, US Court of Appeals, Second Cir., June 30, 1980, 630 F.2d 876 (1980) at 884 where it was acknowledged that 'official torture is now prohibited by the law of nations'; on this case see, inter alia, Blum, J.M., Steinhardt, R.G., 'Federal jurisdiction over international human rights claims: The Alien Tort Claims Act after Filartiga v. Peña-Irala', 22 HarvILJ (1981) 53, Sohn, L.B., 'Torture as a violation of the law of nations', 11 Georgia Journal of International and Comparative Law (1981) 307 infra, D'Zurilla, W.T., 'Individual responsibility for torture under international law', 56 Tulane Law Review (1981) at 186 infra.

consequently, the notion of refugeehood solely to injuries affecting an individual's life and/or freedom. Such a restrictive interpretation would undoubtedly contravene both the irrefragable liberal spirit and the teleology of the Refugee Convention itself. The 1951 Conference of Plenipotentiaries in Geneva has made it more than clear that the above treaty as a whole and, consequently, the included legal perception of refugeehood therein, should not be subject to a restrictive interpretational frame of mind, being designated as 'an example exceeding its contractual scope'⁵.

In contemporary international refugee law, the internationally accepted standards of fundamental human rights seem to have gained general recognition as a gauging basis for the

⁵See recommendation E. of the Final Act of 1951 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 UNTS 137, at 148. Accord, Grahl-Madsen, A., op. cit. supra n. 1 at 196 where it is stressed, on the basis of the preparatory history of the 1951 Refugee Convention, that '...we may look to Article 1 in order to determine the scope of Articles 31 and 33, but not vice versa.'; see also Kälin, W., Grundriss des Asylverfahrens, Basel, Frankfurt a.M., Helbing & Lichtenhahn, 1990, at 39-40. See also Grahl-Madsen, A., 'International refugee law today and tomorrow', 20 Archiv des Völkerrechts (1982) 411, at 423, Goodwin-Gill, G.S., Comment, 2 IJRL (1990) 461, at 466-7, Tsamenyi, B.M., 'The "boat people": Are they refugees?', 5 HRQ (1983) 348, at 362-4, Hathaway, J.C., 'Reconceiving refugee law as human rights protection', 4 Journal of Refugee Studies (1991) 113, at 122, Kaul, Ch., 'Bemerkungen zum Flüchtlingsbegriff der Genfer Flüchtlingskonvention', in Geistlinger, M. et al. (Hrsg.), Flucht-Asyl-Migration, Regensburg, Transfer-Verlag, 1991, 23, at 36-8. The above view has been also, in effect, supported in INS v. Luz Marina Cardoza-Fonseca, US Supreme Court, March 9, 1987, 94 L Ed 2d 434, at 442-3, and 452-3, INS v. Predrag Stevic, US Supreme Court, 81 L Ed 2d 321, at 335; see also Gunaleela and others v. Minister for Immigration and Ethnic Affairs and others, Federal Court of Australia, 23, 24 July, 21 August 1987, 74 Australian Law Reports 263, at 282.

assessment of persecution in the context of refugeehood. This is actually based on the Preamble of the 1951/1967 Refugee Convention itself which, providing the introductory legal framework of the above treaty, has stressed the 'principle that human beings shall enjoy fundamental rights and freedoms without discrimination'⁶, a principle affirmed by the UN Charter and the 1948 Universal Declaration of Human Rights. Thus, G.S. Goodwin-Gill has provided a general definition of refugee persecution stressing that persecution 'results where the [persecutory] measures...harm [fundamental, protected] interests [of individuals] and the integrity and inherent dignity of the human being to a degree considered unacceptable under prevailing international standards or under higher standards prevailing in the state recipient of an asylum application'⁷. J.C. Hathaway has laid down a similar definition, according to which persecution consists of the 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection.'⁸ In the same

⁶189 UNTS 137, at 150.

⁷See Goodwin-Gill, G.S., op. cit. supra n. 1 at 42-3; see also Hyndman, P., 'The 1951 Convention definition of refugee: An appraisal with particular reference to the case of Sri Lankan Tamil applicants', 9 HRQ (1987) 49, at 60-61.

⁸Hathaway, J.C., op. cit. supra n. 1 at 104-5. This wording is similar to the one used by the Canadian Federal Court of Appeal in Rajudeen v. Minister of Employment and Immigration, July 4, 1984, 55 National Reporter 129. The court in this case found in favour of a Sri Lankan Tamil asylum seeker whose evidence had established 'beyond doubt a lengthy period of systematic infliction of threats and of personal injury' by the Sinhalese majority in his country of origin, ibid. at 130. See also Köfner, G., Nicolaus, P., Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Band 2, Mainz, München, Grünewald/Kaiser, 1986, at 464 infra.

vein, the Australian High Court has stressed in Chan Yee Kin that the notion of persecution is directly related to the 'denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country' of the refugee origin⁹. Indeed, there seems to be a consensus in contemporary refugee law as to the direct relationship between refugee persecution and violations of fundamental human rights, since these violations are able to reach a particularly high degree of harm. This thesis is concordant with the one taken by UNHCR. In its Handbook, UNHCR has not only made use of human rights as a gauge for assessing refugee persecution, but has laid down an indirect categorisation of human rights violations that would require the granting of territorial asylum. Accordingly, on the one hand, 'threat[s] to life or freedom' based on the five established grounds of persecution are regarded as facts that always provide a sound basis for persecution, while on the other hand, claims of an individual refugee regarding other human rights violations have been considered to have the same effect on condition that they are of a 'serious' nature. This thesis has been widely accepted and established in refugee law

⁹Chan Yee Kin v. Minister for Immigration and Ethnic Affairs, 6 April, 12 September 1989, 87 Australian Law Reports 412, at 417. See also Singh et al. v. Minister of Employment and Immigration, Canada Supreme Court, judgment of April 4, 1985, [1985] 1 Canada Supreme Court Reports 177, at 205-6: '...a Convention refugee is by definition a person who has a well-founded fear of persecution in the country from which he is fleeing...to deprive him of the avenues open to him under the [Immigration] Act to escape from that fear of persecution must, at the least, impair his right to life, liberty and security of the person...'.

doctrine¹⁰. In this vein, in contrast to the international human rights law principle of indivisibility and interdependence of human rights, UNHCR has made, in effect, an indirect but substantial differentiation among human rights, in the context of refugee protection, dividing them into fundamental and secondary, derivative ones, and placing the civil rights relating to the individual refugee's life and liberty in the category of the fundamental rights that would always necessitate territorial asylum protection. By contrast, the violation of other civil and political rights, as well as of economic and social rights, accordingly, should be required

¹⁰See UNHCR, Handbook, at 14-15. See also Grahl-Madsen, A., The Emergent International Law relating to Refugees Past-Present-Future, University of Bergen, Faculty of Law-Monographs No. 10, 1985, at 23-4, Plender, R., International Migration Law, Dordrecht etc., Martinus Nijhoff Publishers, 1988, Second Edition, at 417-9, Gordenker, L., Refugees in International Politics, London, Sydney, Croom Helm, 1987, at 63-4, Summerfield, G., Le Concept de Persécution dans le cadre de la Convention relative au Statut des Réfugiés et son Interprétation par les Jurisprudences Internes, Thèse présentée pour obtenir le grade de Docteur de l'Université de Montpellier I, 1990, at 206 et seq. See also Melander, G., The Two Refugee Definitions, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Report No. 4, Lund, 1987, 9, at 13, Hathaway, J.C., Schelew, M.S., 'Persecution by economic proscription: A new refugee dilemma', 28 Chitty's Law Journal (1980) 190, at 192, Woods, P.A., 'The term "refugee" in international and municipal law: An inadequate definition in light of the Cuban boatlift', 5 ASILS ILJ (1981) 39, at 44-5, Jahn, E., 'The work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees', 27 ZaöRV (1967) 122, at 128, Dimitrijevic, V., 'An attempt to define the minimum internationally protected rights of the individual-The concept of persecution', International Problems (1968) 87, at 92-8; see also Shacknove, A.E., 'Who is a refugee?', 95 Ethics (1985) 274 at 281-2, Aleinikoff, T.A., 'The meaning of "persecution" in US asylum law', in Adelman, H. (ed.), Refugee Policy Canada and the United States, Toronto, York Lanes Press, 1991, 292, at 298, Martin, D.A., 'The refugee concept: On definitions, politics, and the careful use of a scarce resource', ibid. 30, at 41, Martin, D.A., review, 87 AJIL (1993) 348, at 350, Castel, J.R., 'Rape, sexual assault and the meaning of persecution', 4 IJRL (1992) 39, at 44-50.

to have attained a high degree of intensity, and be connected with the established aetiological framework of persecution, in order to be classified and recognised as able to trigger the protective action by a state through territorial asylum¹¹. It is submitted that this categorisation of the refugee's human rights, justified in the asylum law context, has been evident and established in the refugee status case law of all three European states that constitute the subject of the present research.

The sub-notion of persecution has been defined in British case law by the High Court in R. v. Immigration Appeal Tribunal ex parte Daniel Boahim Jonah¹². The court based its definition of persecution on the Oxford Dictionary definition of the verb 'to persecute', where this was given the meanings 'To pursue, hunt, drive' or 'To pursue with malignancy or injurious action; esp. to oppress for holding a heretical opinion or

¹¹See UNHCR, Handbook, at 14, and at 16-17, para. 63: 'Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population...the victims may according to the circumstances become refugees on leaving the country.', emphasis added. On the impossibility of an actual hierarchical classification of human rights in international human rights law see Sieghart, P., The International Law of Human Rights, Oxford, Clarendon Press, 1983, at 127, Meron, Th., Human Rights-Law Making in the United Nations, Oxford, Clarendon Press, 1986, at 173-202, Marx, R., Eine menschenrechtliche Begründung des Asylrechts, Baden-Baden, Nomos, 1984, at 151 *infra*; see also Parker, K., Neylon, L.B., 'Jus Cogens: Compelling the law of human rights', 12 Hastings International and Comparative Law Review (1989) 411, at 441-3.

¹²[1985] Imm AR 7.

belief'¹³. The Oxford Dictionary provided, according to the Queen's Bench Division, the 'ordinary meaning' of the word persecution, which would be, accordingly, from the refugee's standpoint, '[to be] subjected to injurious action and oppression'¹⁴. The court, regrettably, did not elaborate further on this definition, especially on the substantive parameters that should determine an 'injurious action' or an 'oppression'. Nevertheless, it provided a general definitional guideline that has become established as the accepted one, strictly followed by courts and tribunals in the UK. Consequently, what has been considered as 'persecution' by the asylum-adjudicating organs in the UK is a sort of harm in the form of injury and/or oppression to which a refugee applicant is liable in the country of origin. This should be linked, as emphasised by the Immigration Appeal Tribunal in Manoucher Rezvandi v. The Secretary of State for the Home Department¹⁵, with the five specific reasons of persecution enshrined in the 1951/1967 Refugee Convention, and with the 'balancing of factors' of each particular case, like evidence of persecution¹⁶, as well as inability to be provided with

¹³Ibid. at 13.

¹⁴Idem. See also In the Matter of Fritz Desir v. D.N. Ilchert, US Court of Appeals, Ninth Cir., May 26, 1988, 840 F.2d 723, at 726-7: '...persecution involves "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive"...it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate...'.

¹⁵Appeal No. TH/26177/86 (5814), 8 April 1988 (transcript copy).

¹⁶Ibid. at 5.

protection by the country of origin¹⁷. The High Court has provided, however, a further significant indication with regard to the substantial and substantive degree of individual endangerment a persecution should acquire in the context of a refugee status claim. In Parmak¹⁸ the above court, based on the persecution definition provided by Jonah, pointed out that '...one of the essential ingredients of persecution is that there should be a degree of persistence. One would not ordinarily to categorise as persecution a single incident, though there might be...cases in which even a single incident would amount to persecution.'¹⁹

In Bugdaycay v. Secretary of State for the Home Department and related appeals²⁰ the House of Lords, considering the

¹⁷See Hiwet Oqbaghierghis v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/1658/85 (4219), 10 October 1985 (transcript copy). The date of the relevant evidence that should be considered in all appeal cases is that of the decision of the Home Secretary, by which the refugee status claim has been rejected, and not the date of hearing before the competent judicial authority, see Stephen Kwabena Appia v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/108274/83 (3668), 7 January 1985 (transcript copy).

¹⁸R. v. Secretary of State for the Home Department ex parte Parmak, Queen's Bench Division, CO/702/90, 23 January 1992 (transcript copy).

¹⁹See also R. v. Secretary of State for the Home Department ex p. Rose Solomy Alupo, Queen's Bench Division, 24 May 1991, [1991] Imm AR 538, at 541-2, where the High Court, accepting the differentiation made by the Secretary of State between governmental 'systematic' ('or organised or authorised') persecution, and non-governmental 'random' ('unsystematic...or unauthorised') persecution, stated that 'the use of the word "systematic" is dictated by the allegation that there was government persecution.'

²⁰[1987] 1 All ER (HL) 940.

refoulement case of one of the appellants, pointed out that 'The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny'²¹. Indeed, the protection of the human right to life, whose most common relative right in asylum cases has been the right to physical integrity, has always been very high on the agenda of the British courts. Thus, they usually strictly apply the above reasoning of the House of Lords in all asylum cases where allegations of torture or serious ill-treatment are put forward. In R. v. The Secretary of State for the Home Department ex parte Gulabi Ozdemir²², a case concerning a refugee applicant who had been detained and tortured twice in his country of origin, the High Court accepted that these are 'grave cases with the potential for most serious consequences. Therefore, they require the most anxious scrutiny. They require the review in court to subject those decisions to a rigorous examination to ensure that the decision-making process was not flawed and also to see that the highest standards of fairness obtained, the sort of fairness and the sort of flawless process which one would expect with cases as serious as these are.'²³ Accordingly,

²¹Ibid. at 952.

²²Queen's Bench Division, CO/397/90, 31 March 1992 (transcript copy).

²³Accord, R. v. Secretary of State for the Home Department ex p. Kemal Onay, Queen's Bench Division, 24 February 1992, [1992] Imm AR 320, at 324-5. Reports on torture and ill-treatment by human rights organisations like Amnesty

evidence of actual physical violence against the refugee applicant has always put British courts on the alert, obliging them to look with particular attention into cases of such a nature²⁴. In the same vein, substantiated claims regarding serious and impending endangerment of the physical integrity of a refugee applicant, once (s)he is back on the territory of the country of origin, have also played a significant role in favour of refugee status claims²⁵.

The right to liberty and security of person has also provided a basis for refugee status litigation in the UK. However, unlike cases concerning freedom from torture or cruel, inhuman or degrading treatment, there has been an indirect recognition of the, as it were, lower status of the right to personal

International have played an important role in the evidentiary process of such cases, see R. v. Secretary of State for the Home Department ex parte Chahal, Queen's Bench Division, CO/1634/91, 2 December 1991 (transcript copy), R. v. Secretary of State for the Home Department ex parte "O", Queen's Bench Division, CO/397/90, 25 May 1990 (transcript copy), Mbangala Munongo v. Secretary of State for the Home Department, Court of Appeal, [1991] Imm AR 616.

²⁴See Vadivelu Yogaratnam v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/124368/84 (3822), 7 March 1985 (transcript copy), George Nani Nutsugah v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/2379/85 (4677), 19 May 1986 (transcript copy).

²⁵See The Secretary of State for the Home Department v. Manmohan Singh Bajaj, Immigration Appeal Tribunal, Appeal No TH/14165/88 (9581), 17 November 1992 (transcript copy), a case concerning an Indian Sikh 'chief organiser' of an outlawed Sikh separatist organisation, at 8: 'Bearing in mind the critical nature of the evidence relating to a price on the head of the respondent, [put by an Indian authority] its lack of challenge...and the need for the respondent to show only a reasonable risk of persecution, we were and are of the view that the respondent makes his case.'

liberty and security, with no substantial autonomous force to back a refugee status application, especially if this kind of persecution has acquired a collective nature. Thus, in Victoria Toff-Mensah and another v. The Secretary of State for the Home Department²⁶ the Immigration Appeal Tribunal accepted the Adjudicator's decision which had found that the arbitrary arrest feared by the two asylum seekers would not constitute a sufficient ground on which their appeal could be founded, since, although "arbitrary arrest [could]...take place in [the country of origin] and...the citizens of that country, regardless of their political views, can from time to time be in danger", this factor was "common to most people in that country and indeed in many other parts of the continent and in itself it is not a matter which entitles such a person to asylum in the United Kingdom"²⁷. The right to a fair trial has been another civil right which British case law has shown that may constitute a sound basis for an asylum claim if all the requirements of the refugee definition are met. Elvis Ameyaw v. Secretary of State for the Home Department²⁸ concerned an asylum seeker who sought asylum in the UK on the ground that he would be discriminated against if he were returned to his country to be tried for a criminal offence he was charged with. Nolan LJ accepted that there was "only one ground upon

²⁶Immigration Appeal Tribunal, Appeal No. TH/117381/83 (4568), 13 May 1986 (transcript copy).

²⁷Ibid. at 4-5. The issues of collective and individual forms of persecution will be analysed in the following section.

²⁸[1992] Imm AR 206.

which the applicant could succeed and that is the existence of a serious possibility that he will not get a fair trial upon the straightforward criminal offence of which he is accused'²⁹. The Court of Appeal dismissed the appeal, since it was not satisfied that the appellant demonstrated any serious risk of disadvantage to his procedural rights³⁰, linked with any of the constitutive elements of refugeehood that would enable the appeal to succeed. The above precedent is, nonetheless, of importance, since it accepted the possibility that the violation of the right to a fair trial may constitute a sound basis for persecution, something which had not been accepted earlier by the Immigration Appeal Tribunal in Janet Dornukle Tawiah v. The Secretary of State for the Home Department³¹. Finally, the right to manifest one's beliefs has been one more civil right which has not been considered as having the force, per se, to found an individual claim to refugeehood, as shown in a case concerning writing of

²⁹ Ibid. at 211.

³⁰ 'It is of course, a matter of concern to find that the Ghanaian Bar Association...are discouraging their members from appearing before public tribunals of the kind by which the applicant would be tried. What, however, is encouraging is to see that there appears to be no lack of organisations such as the Ghana Bar Association and Amnesty, who take a close interest in proceedings before such tribunals. It is not therefore as if the applicant is being sent into the darkness.', idem.

³¹ Immigration Appeal Tribunal, Appeal No. TH/3495/85 (4499), 24 March 1986 (transcript copy). The Tribunal pointed out in this case that 'the possibility that Miss Tawiah might be dealt with summarily and with less justice than she might expect from the courts of this country does not seem...to be a factor bringing her case within the rather narrow confines of paragraph 134 [of the Immigration Rules that regulated asylum cases]', ibid. at 3.

journalistic articles that expressed an opposition opinion. Accordingly, in Akua Appiah-Kubi v. The Secretary of State for the Home Department³² the Immigration Appeal Tribunal held that the appellant, a 'hard hitting journalist' who had been twice detained and subjected to intimidation by her country's regime, would be unsafe if returned back and would be liable to persecution because of her profession and the criticism she had expressed with regard to the above state's government.

In contrast to the protection of a refugee applicant's civil rights, British courts have employed a far more stringent reasoning in cases where the human rights in question have been of a social nature, like the right to work, as shown by the Immigration Appeal Tribunal in Thandiwe Regina Sibanda v. The Secretary of State for the Home Department³³. While the judgment in this case may be argued to be reasonable, since the employment inability of that applicant could not be linked to any constitutive element of refugeehood, one could not, nonetheless, as readily argue the same with regard to R. v. Secretary of State for the Home Department ex parte Celal Yurekli³⁴. This case concerned an individual who was continuously fired from any employment post he managed to find in his country of origin, once his minority ethnic origin and his religion were discovered. The High Court applied the

³²Immigration Appeal Tribunal, Appeal No. TH/1885/85 (6041), 15 July 1988 (transcript copy).

³³Appeal No. TH/109489/83 (3857), 20 March 1985 (transcript copy).

³⁴[1990] Imm AR 334.

persecution definition of Jonah but found itself unable to come to the conclusion that any 'injury' or 'oppression' could be the result of the appellant's inability to find regular employment because of the overt discrimination he suffered for the two aforementioned reasons³⁵.

In contrast to the UK, in French case law there has been no attempt to define persecution conceptually. The French jurisprudence regarding refugee persecution has been characteristically based on a heuristic manner of examination which has the form of a case-by-case assessment.

Cases concerning persecution in the form of violation of the individual freedom from torture have been common in the jurisprudence both of the Commission des Recours des Réfugiés and of the Conseil d'Etat. In the majority of these cases, if the refugee applicant has been in a position to produce evidence substantiating allegations of torture, connected with any of the five international definitional grounds for persecution³⁶, the litigation has resulted in a positive outcome in favour of the applicant. Accordingly, in Castrillo

³⁵Ibid. at 339-340. Affirmed by the Court of Appeal, in Celal Yurekli v. Secretary of State for the Home Department, [1991] Imm AR 153.

³⁶See M. Mbanzulu Nsemi Nestor Jose, CRR No. 27.658, 13 January 1986, M. Brefo-Antwi, CRR No. 30.441, 26 February 1986, M. Luzayadio Matudona, CRR No. 27.969, 26 February 1987, M. Cande, CRR No. 094.303, 29 October 1990, M. Ngbenqu, CRR No. 138.761, 28 November 1990 (transcript copies). See also M. Wilfred Karalasingam, CRR No. 233.673, 20 July 1993, reported in Documentation-Réfugiés, Supplément au No 239, 29 Mars/11 Avril 1994, at 1.

Alcade³⁷ the Commission des Recours upheld the appeal of a Basque militant, member of a movement working for the autonomy of the Spanish Basque country. The appellant had been arrested, interrogated and tortured while in custody for three days by the Spanish police, a treatment that was repeated while in custody later³⁸. Bekelech Haile³⁹ was another successful case, concerning an Ethiopian practising Copt who was tortured by the authorities while in detention with her father. The outcome in Ramasamy⁴⁰ was the same, concerning a Sri Lankan Tamil, supporter of a Tamil political organisation, who had been tortured while interrogated by the police in his country of origin⁴¹. A series of successful cases concerning

³⁷CRR No. 18.690, 27 November 1984 (transcript copy).

³⁸See also M. Zurutuza Oruna, CRR No. 27.260, 30 July 1984 (transcript copy).

³⁹CRR No. 32.948, 31 May 1985 (transcript copy).

⁴⁰CRR No. 19.514, 13 June 1985 (transcript copy).

⁴¹See also M. Vellayuthan, CRR No. 23.554, 13 June 1985, Sinnadorai Mohandas, CRR No. 20.850, 13 June 1985, M. Srigandan, CRR No. 30.037, 15 September 1986, Melle Lambert, CRR No. 43.599, 25 September 1986, M. Nadasabapathy Sarma, CRR No. 23.914, 23 October 1986, M. Joy Sutharsan, CRR No. 120.373, 5 July 1990, M. Thisokumar, CRR No. 072.928, 8 January 1991, Mle Thuriappah, CRR No. 072.794, 19 June 1991, M. Sivanesan, CRR No. 174.444, 14 June 1991, M. Thushyanthan, CRR No. 227.016, 10 July 1992, Mle Mariathas, CRR No. 211.944, 8 July 1992; see also M. Moshayed, CRR No. 39.274, 21 February 1986; see also M. Ndoma, CRR No. 35.614, 3 July 1986, M. Nsamu Diavula, CRR No. 31.865, 9 October 1987, M. Nascimento Mueto, CRR No. 81.505, 14 February 1989, M. Pinoki, CRR No. 139.573, 6 December 1990, M. Kumbu, CRR No. 141.021, 14 December 1990. See also M. Muamba Kasongo Niembo, CRR No. 29.141, 30 January 1987, M. Kifoyi Tete, CRR No. 20.134, 23 October 1987, M. Nduli Lembe, CRR No. 25.779, 8 October 1984, M. Mukanoa Kakesa, CRR No. 23.179, 31 August 1984, M. Kipopo Ndo Pett, CRR No. 31.213, 12 July 1985, M. Kilanda, CRR No. 110.503, 19 September 1990, M. Nsimba, CRR No. 139.473, 28 November 1990, M. Yoka, CRR No. 143.670, 7 December 1990 (transcript copies).

Turkish refugee applicants have also involved torture as the main form of persecution suffered by the refugee applicants, either on grounds solely of political opinions⁴² or on grounds related also to the ethnic origin of the persecuted individuals⁴³.

The injurious action that may constitute persecution of a refugee applicant has not, however, always reached the severity of torture in French case law. That is, the suffering or pain which has been intentionally inflicted upon the refugee has been of such a minor degree that it may not be possible to conclude that the above pain or suffering has been a severe one as in cases of torture. However, as with torture, most of the cases concerning less severe treatment, that is to say, cruel, inhuman or degrading treatment or punishment, have

⁴²See M. Afat, CRR No. 49.492, 10 July 1987, M. Cavuldak, CRR No. 45.150, 5 February 1987, M. Dogan, CRR No. 140.172, 29 November 1990, M. Sahin, CRR No. 133.550, 12 November 1990, M. Gun, CRR No. 131.953, 29 November 1990, M. Cakmak, CRR No. 145.293, 13 December 1990, M. Koyun, CRR No. 139.775, 12 December 1990, M. Ozen, CRR No. 130.884, 4 June 1991. See also M. Villablanca Novoa, CRR No. 40.914, 28 November 1988, Mme Reategui, CRR No. 40.798, 13 January 1989. See also M. Fleurissant, CRR No. 40.090, 11 October 1988, M. Akel, CRR No. 76.135, 9 June 1989, Mme Munoz, CRR No. 40.963, 20 July 1989, Melle Rose, CRR No. 93.405, 11 September 1989, Melle Heshmati, CRR No. 60.025, 19 December 1989. See also M. Djassi, CRR No. 140.190, 29 November 1990, M. Mutume, CRR No. 100.769, 7 December 1990, Mle Afriye Akua, CRR No. 127.784, 10 June 1991, M. Owusu, CRR No. 172.191, 12 June 1991. See also M. Freemans, CRR No. 163.079, 4 September 1991, M. Wali, CRR No. 182.683, 31 March 1992, M. Lababidi, CRR No. 213.177, 16 March 1992, M. Ranasinghe Arachchige, CRR No. 224.268, 1 July 1992 (transcript copies).

⁴³See M. Yilmaz, CRR No. 57.143, 2 May 1988, M. Cavuldak, CRR No. 45.150, 5 February 1987, M. Sismir, CRR No. 45.780, 25 November 1988, M. Bingol, CRR No. 138.032, 12 November 1990, M. Gorduk, CRR No. 141.645, 13 December 1990 (transcript copies).

arisen from periods of arrest, detention, or even imprisonment⁴⁴. Nevertheless, the substantive persecution-related threshold of any such ill-treatment has been kept in all cases at a high level by the French Commission des Recours des Réfugiés. In consequence, the above asylum-adjudicating organ has required not only personal suffering by the refugee applicant on (one of) the persecution grounds of the 1951/1967 Refugee Convention but, moreover, the existence of a 'sufficient gravity' that would justify a well-founded fear of persecution⁴⁵. In this vein, the Commission has accepted that forced genital mutilation of a woman may constitute, in principle, a persecutory act. This question was dealt with in

⁴⁴See M. Somay Moyengo Somy, CRR No. 20.329, 31 August 1984, M. Luntadila M'Pununu, CRR No. 28.703, 1 October 1984, M. Savirimuthu, CRR No. 19.295, 24 September 1984, M. Jeyasingham et Mme Malini, CRR Nos. 22.769 et 22.683, 30 October 1984, M. Saralegi Kornago, CRR No. 22.088, 6 November 1984, Mle Arrazola Mallona, CRR No. 21.349, 9 January 1986; see also M. Chowdhury, CRR No. 31.175, 21 March 1986, M. Ly Min, CRR No. 33.837, 9 September 1986, M. Ta Chea Houi, CRR No. 39.101, 29 September 1986, M. Ramookulanthai, CRR No. 33.238, 30 October 1986, Mme Ntieta, CRR No. 41.982, 2 February 1987, M. Kwadwo Prempeh, CRR No. 55.798, 7 July 1989, M. Michel, CRR No. 83.817, 3 February 1989, M. Rivera Velasquez, CRR No. 154.006, 17 June 1991. See also M. Bircea, CRR No. 127.123, 18 September 1990, M. Ndongala Siyala, CR No. 86.232, 23 November 1989, M. Hazarat, CRR No. 138.884, 5 December 1990, M. Nyarko, CRR No. 120.323, 3 January 1991, Mme Balungam Menetta, CRR No. 170.142, 4 June 1991, Mle Erdogan, CRR No. 177.840, 4 July 1991, M. Gurca, CRR No. 197.193, 14 November 1991, M. Salikara, CRR No.150.251, 7 January 1991. See also M. Obeng, CRR No. 171.880, 27 September 1991, M. Ocalan, CRR No. 198.797, 10 January 1992, Mle Piskova, CRR No. 207.608, 20 February 1992, M. Sarkissian, CRR No. 213.161, 16 March 1992 (transcript copies).

⁴⁵See M. Ramanathan, CRR No. 56.425, 10 May 1985, Mme Moszycka, CRR No. 91.695, 4 September 1989, M. Navarette Henriquez, CRR No. 69.888, 16 June 1989, M. Sivananthasothy, CRR No. 210.591, 25 June 1992, Mle Hassan, CRR No. 237.836, 12 January 1993, M. Diarra, CRR No. 133.710, 10 December 1990, M. Evreinoff Carrillo, CRR No. 161.554, 27 May 1992 (transcript copies).

Mlle Diop⁴⁶. The case concerned a Malian refugee applicant who claimed that she had fled her country in order to escape from 'family pressures that demanded her subjection to the customary circumcision practice and from discriminations against non-circumcised women'. This particular appeal was rejected on evidential grounds. The Commission laid down, nonetheless, two significant conditions for the recognition of refugee status in this kind of case. First, the woman should be personally and forcibly exposed to the ritual of genital mutilation. Second, this ritual should be either backed or tolerated by the state, a question related to the issue of agents of persecution which is dealt with later in the thesis. In Mlle Diop the Commission found that the above practice in Mali was 'deliberately tolerated' by the Malian authorities since, although encouraging the campaign against female circumcision, they did not try to repress the practice by any specific legislative (penal) measure. Female genital mutilations were actually practised in state hospitals. In consequence, the Commission des Recours concluded that 'a woman of Malian nationality...[under the above circumstances]...may have a well-founded claim [to recognition of her refugee status] if she has been personally exposed to such mutilation, and if, since she is not any more legally subject

⁴⁶CRR No. 164.078, 18 September 1991 (transcript copy). See also 'Mémoire de l'OFPRA devant la Commission des Recours', in Documentation-Réfugiés, Supplément au No 187, 20/29 Juin 1992, at 2, and Tiberghien, F., 'Observations', ibid. at 5. See also Oosterveld, V., 'Refugee status for female circumcision fugitives: Building a Canadian precedent', 51 University of Toronto Faculty of Law Review (1993) at 277 infra.

to parental authority, she is obviously refused any protection, by public authorities, from the above-mentioned mutilation'⁴⁷.

A special category of cases that has arisen before the Commission des Recours is that of refugee status claims related to the general, state birth-control policy in China. This policy has led to the forcible sterilisation of Chinese men, or forcible abortions of women who have not complied with the state policy of birth restriction. Despite the serious offence to the individual's freedom from inhuman or degrading treatment, perpetrated through the above state action, the Commission has shown itself unwilling, so far, to recognise the refugee status of Chinese appellants who have suffered from the aforementioned measures. In a rather over-restrictive interpretational vein, and contradicting, in effect, Mlle Diop, the above Chinese policy has been cursorily described by the Commission as one of 'general and not discriminatory' nature, not related, according to the Commission, to one of the five Convention persecution grounds⁴⁸.

⁴⁷CRR, idem.

⁴⁸See M. Huang, CRR No. 222.455, 25 June 1992, M. Hu, CRR No. 225.026, 17 June 1992, M. Zhang, CRR No. 213.045, 16 March 1992, M. Wang, CRR No. 222.270, 26 May 1992, Mme Li, CRR No. 220.647, 12 May 1992, Mme Shao, CRR No. 095.758, 14 January 1991, Mme Chang, CRR No. 063.978, 22 January 1991, M. Dong, CRR No. 67.253, 16 June 1988, M. Chen, CRR No. 67.040, 30 November 1987, M. Zhang, CRR No. 42.313, 21 March 1986 (transcript copies). See contra: Cheung et al. v. Minister of Employment and Immigration, Canadian Federal Court, April 1, 1993, 153 National Reporter 145, at 150 where the court stated that 'women in China who have more than one child, and are faced with forced sterilization because of this, form a particular social group so as to come within the meaning of

Closely related to the category of cruel, inhuman and degrading treatment have been cases where individuals have been placed under pressure consisting of threats against their lives or health in general, with the aim to alter, stem, or prevent these individuals' political activism, or general political stance. Provided that such pressure reaches a certain level of gravity, such serious harassment has constituted a sound basis for refugee status applications. Accordingly, in Noel⁴⁹ the Commission des Recours accepted that the above Haitian political activist was in real danger, following his subjection to numerous threats against his life, and the assassination of his brother⁵⁰. Harassment of a minor degree has been also considered as able to take on the character of a persecutory action, on condition that there have been numerous/repeated instances of such harassment on

the definition of a Convention refugee', on the condition that these women 'also have a well-founded fear of persecution as a result of that who can claim such status'; see also Guo v. Carroll, US District Court, DC EVa, No. CV 93-1377-A, 1/14/94, 62 Law Week 2453, where the US judge upheld the appeal of a Chinese father who faced coerced sterilisation in China, on a 'political opinion' ground, stressing that 'there can be no doubt that the phrase "political opinion" encompasses an individual's view regarding procreation'.

⁴⁹CRR No. 101.124, 13 November 1990 (transcript copy).

⁵⁰See also M. Mugica Garmenoia, CRR No. 10.131, 30 July 1984, M. Uriarte Diaz de Guerenon, CRR No. 10.636, 11 March 1985, Mme Moldovan, CRR No. 34.304, 23 September 1985, M. Balakrishnan, CRR No. 21.518, 12 July 1985, M. Serttasoglu, CRR No. 32.856, 17 October 1986, M. Aljanabi Mu Waffaq, CRR No. 20.661, 9 June 1987, Mle Yaldiz, CRR No. 45.501, 13 March 1987, M. Gharapeti Nercessian, CRR No. 43.310, 27 April 1987, M. Lapinski, CRR No. 35.488, 19 January 1987, M. Kolodziejczak, CRR No. 47.326, 21 January 1987, M. Machouch, CRR No. 21.091, 29 June 1987, M. Zamani Kord, CRR No. 110.351, 12 April 1990, Mle Cuba Samata, CRR No. 84.088, 5 September 1989 (transcript copies).

(one of) the grounds of the 1951/1967 Refugee Convention, with no protection available by the authorities of the country of origin⁵¹.

Violations of the individual right to liberty and security, especially through the forms of detention and/or imprisonment, have constituted an additional common form of persecution in French refugee case law. The injurious action in such cases has not usually reached the gravity or severity of torture or of a cruel, inhuman treatment or punishment. However, the duration and/or the repetition of the detention or imprisonment may play, and has in many cases played, such a role in French asylum adjudication that the degree of injury inflicted upon a refugee may de facto attain the gravity of a severe cruel, inhuman or degrading treatment. M. Ditunguluka⁵² was such a case, concerning a Zairean political activist who, by reason of his political activism, had been arrested and imprisoned twice for several months. The Commission des

⁵¹See Mlle Nadia El Kebir, CRR No. 237.939, 22 July 1994, reported (in French) in 13 Refugee Survey Quarterly (1994), Nos. 2 and 3, at 198. See also Mle Jacob, CRR No. 56.802, 18 September 1989, a case concerning continual harassment by state authorities. See also M. Dekran, CRR No. 18.875, 31 August 1984, Mle Abdool Rasool, CRR No. 23.432, 12 July 1985, M. Berbecaru, CRR No. 34.961, 18 April 1986, M. Ozi, CRR No. 33.567, 24 February 1986, Mle Ghegediban, CRR No. 64.100, 5 October 1987, M. Behzadi, CRR No. 50.851, 19 October 1987, Mme Marinescu, CRR No. 67.688, 21 April 1988, Mle Kaspar Sarkissian, CRR No. 41.070, 28 November 1988, Mle Brito Morais, CRR No. 41.823, 1 June 1989, M. Constantin Tirnoveanu, CRR No. 75.009, 25 May 1989, Mle Nianq, CRR No. 84.501, 14 March 1989, Mle Psarras Balescu, CRR No. 78.534, 20 April 1990, Mle Yaotha, CRR No. 56.307, 22 May 1990, Mle Dorina, CRR No. 157.103, 31 May 1991 (transcript copies).

⁵²CRR No. 25.341, 30 July 1984 (transcript copy).

Recours des Réfugiés accepted that the imprisonment that took place twice was in a position, under the circumstances of the specific case, to justify the existence of a well-founded fear of persecution on the part of the refugee applicant⁵³. Imprisonment for a long period of time, like five years, due to, e.g. political activism⁵⁴, subjection to multiple

⁵³See also M. Razouki, CRR No. 19.344, 30 July 1984, M. et Mme Brozyna, CRR Nos. 29.974 et 29.973, 30 October 1984, M. Ambroise, CRR No. 21.924, 15 November 1984, M. Celaya Gutierrez, CRR No. 24.436, 5 March 1985, Mle Villa Pereira, CRR No. 23.192, 20 May 1985. See also M. Massamba, CRR No. 25.179, 12 July 1985, M. Mbandu Di Lupoyo, CRR No. 25.756, 12 July 1985, M. Kembi, CRR No. 29.729, 20 December 1985, M. Diarra Moussa, CRR No. 27.118, 20 December 1985, M. Forouzi, CRR No. 38.604, 21 March 1986, M. Somasundaram, CRR No. 32.984, 7 July 1986, M. Abcar, CRR No. 42.038, 12 September 1986, M. Cakir, CRR No. 41.450, 17 October 1986, Mle Sharbatiam, CRR No. 62.042, 19 October 1987, Mle Guo, CRR No. 71.670, 2 March 1989, M. Abul Kalam, CRR No. 56.404, 30 June 1989, Mle Araoujo, CRR No. 85.599, 14 March 1989, M. Noundou, CRR No. 58.273, 23 November 1989, Mle Toko N'dona, CRR No. 103.413, 5 January 1990, M. Lutonadio, CRR No. 153.957, 10 June 1991. See also M. Wone, CRR No. 173.033, 14 June 1991, M. Gomes Betuncal, CRR No. 162.080, 12 June 1991, M. Jabour Sultan, CRR No. 58.483, 13 February 1990, M. Nyarko, CRR No. 120.323, 3 January 1991 (transcript copies). Multiple interrogations have also been regarded as a sound ground for fear of persecution, see M. Barati Dehdezi, CRR No. 52.526, 6 November 1987, M. Abubeker, CRR No. 47.215, 2 June 1989, M. Wielgo, CRR No. 37.917, 15 December 1987, M. Marandi, CRR No. 38.676, 26 February 1987 (transcript copies).

⁵⁴See M. Aboul, CRR No. 24.739, 31 August 1984; see also M. Antonio Luvavuki, CRR No. 29.842, 30 October 1984, M. Hezer, CRR No. 35.180, 19 December 1985, Mme Leroy, CRR No. 27.508, 20 February 1986, M. Nguyen, CRR No. 41.093, 3 July 1986, M. Yilmaz, CRR No. 136.778, 12 November 1990, M. Khorshed, CRR No. 25.865, 3 March 1986, M. Fusu Ndombasi, CRR No. 32.069, 18 April 1986, M. Benek, CRR No. 36.891, 17 October 1986, M. Seifu, CRR No. 32.820, 11 December 1986, M. Veki Kiesa, CRR No. 31.262, 9 June 1987, M. Mambuene Londo, CRR No. 82.952, 26 September 1989, M. Ozdemir, CRR No. 130.676, 19 November 1990, M. Surmeli, CRR No. 171.080, 6 June 1991 (transcript copies).

detentions⁵⁵, or to a state of arrest with no freedom of movement in one's own country⁵⁶, have all been considered by the Commission des Recours des Réfugiés to present sound civil rights violations with the potential to found a well-founded fear of persecution. As in cases of cruel, inhuman or degrading treatment or punishment, the threshold of persecution in cases regarding violations of the right to liberty and security of person has also been kept at a high level by the Commission des Recours. Accordingly, summoning and short detention in custody of a refugee applicant, following a demonstration, were considered as evidence of a very low persecution intensity in M. Giurgiu⁵⁷, a decision that may be contrasted, however, to that reached in M. Shafiq⁵⁸, a successful case involving a warrant for arrest by reason of the appellant's political activities. Indeed, cases concerning individuals wanted in their states, or subject to

⁵⁵See M. Ciennik, CRR No. 48.474, 2 March 1987, M. Celik, CRR No. 48.659, 9 July 1987, M. Singh, CRR No. 99.292, 19 January 1990, M. Thisaveerasingh, CRR No. 124.803, 26 July 1990, M. Kankesan, CRR No. 130.543, 19 November 1990, Mle Ambaute Oloto, CRR No. 143.967, 7 January 1991, Mle Hoyam Tawfiq, CRR No. 226.842, 15 September 1992 (transcript copies).

⁵⁶See Melle Dorzema, CRR No. 25.290, 30 July 1984 (transcript copy).

⁵⁷CRR No. 208.533, 17 February 1992. See also M. Kandasamy, CRR No. 26.530, 28 February 1985, Mme Smagala, CRR No. 32.957, 12 March 1985, M. Mulumba Akasha, CRR No. 63.020, 7 November 1988 (transcript copies). Detention, by contrast, for a period of ten days has been accepted as a ground of a well-founded fear of persecution, see D'Mello, CRR No. 57.033, 5 September 1989; see also M. Sahin, CRR No. 130.644, 19 November 1990 (transcript copies), where a detention in custody for fifteen days was involved.

⁵⁸CRR No. 92.326, 29 May 1989 (transcript copy).

warrants for arrest, have also led to the granting of refugee status in France, depending on the particular circumstances of each individual case. Thus, in M. Radic⁵⁹ the Commission des Recours found against the appellant, a Yugoslavian national married to an Albanian, who had participated in political activities of an Albanian movement, since he did not provide sufficient evidence proving that he was wanted by the police in his home country. By contrast, the outcome was successful for the appellant in M. Sutcu⁶⁰, a Turkish trade unionist, who was able to substantiate his fear of persecution on the ground of being wanted in his home country by reason of his political activism.

A special category of infringement of the right to liberty of person in French asylum cases has been that of internment for a long period of time in 'reeducation camps', usually combined with forced labour. Most of the cases where actual internment for forced labour of that kind has been involved have had a

⁵⁹CRR No. 63.254, 4 January 1988 (transcript copy).

⁶⁰CRR No. 89.821, 6 June 1989 (transcript copy). See also M. Nguyen, CRR Nos. 18.860 et 18.923, 30 July 1984, M. Poor Kazemi Dogouri, CRR No. 44.382, 23 December 1986, M. Rifai, CRR No. 34.964, 21 February 1986, M. Ghodsi, CRR No. 33.714, 10 July 1986, M. Moya Suarez, CRR No. 30.638, 15 September 1986, M. Nasrullah, CRR No. 20.524, 18 April 1986, M. Thurai, CRR No. 47.083, 25 February 1987, Mme Nechi, CRR No. 49.922, 7 April 1987, M. Fekih Mokhfi, CRR No. 47.487, 5 December 1988, M. Maga, CRR No. 60.962, 26 January 1988, M. Karagan, CRR No. 74.765, 23 December 1988, M. Konate, CRR No. 50.570, 18 September 1989, M. Sinnathamby, CRR No. 65.432, 15 May 1990, M. Md Sarwar Hossain, CRR No. 127.343, 8 November 1990, M. Thavapavaananthan, CRR No. 130.741, 19 November 1990, M. Disli, CRR No. 129.995, 15 November 1990, M. Birladeanu, CRR No. 171.505, 6 June 1991, M. Matumona, CRR No. 170.140, 4 June 1991 (transcript copies).

positive outcome for the refugee applicants before the Commission des Recours des Réfugiés. Thus, in Mme Thai⁶¹ the Commission recognised the refugee status of the Cambodian applicant who had been subjected by the Khmer Rouge for three years, due to her membership in a socially privileged group, to forced labour of land clearing⁶². Finally, a similar form of violation of personal liberty has been 'political reeducation' in state camps, not including necessarily forced labour. Such cases have been successful before the Commission des Recours des Réfugiés, as shown in M. Inthakhot⁶³, a case of a Laotian refugee who had been forcibly subjected by the authorities of his country to 'courses of political reeducation', due to his 'social origin'.

Attacks by state or quasi-state forces or authorities on refugees' property, and consequent violations of the latter's right to peaceful enjoyment of possessions, have constituted

⁶¹CRR No. 20.498, 21 March 1986 (transcript copy).

⁶²See also Mme Yea, CRR No. 33.495, 2 February 1987, Mme Lam, CRR No. 20.890, 25 June 1987, Mme Tan, CRR No. 36.445, 1 December 1987, M. Dang, CRR No. 46.288, 3 December 1987, Mle Sok, CRR No. 39.966, 29 May 1989, M. Mol, CRR No. 50.357, 3 November 1989. See also M. Iordache, CRR No. 43.352, 3 March 1987, Mle Vongmala, CRR No. 39.315, 7 September 1987, Mle Many, CRR No. 80.145, 19 September 1988, M. Zhong, CRR No. 70.033, 19 September 1988, M. Ma, CRR No. 111.459, 31 May 1990, M. Zhu, CRR No. 97.719, 24 September 1990. See also Mme Kordha, CRR No. 140.219, 22 October 1990, M. Lamaz, CRR No. 140.226, 22 October 1990, Mme Duri, CRR No. 140.229, 22 October 1990, Mme Kupi, CRR No. 140.223, 22 October 1990 (transcript copies).

⁶³CRR No. 21.207, 6 February 1986; see also Mle Banno, CRR No. 30.814, 23 January 1986, M. Lim, CRR No. 20.826, 6 February 1987, Mle Nguay, CRR No. 52.217, 1 June 1989, Mme Vo, CRR No. 28.186, 10 July 1987, M. Mohamed, CRR No. 32.474, 6 October 1987 (transcript copies).

an additional form of persecution recognised as a valid ground for a well-founded fear of persecution in French asylum law. Mme Thai⁶⁴ is one such example. The case concerned a Vietnamese of Chinese origin who belonged to a family of merchants and industrialists. The arbitrary confiscation of the family property by the Vietnamese authorities was the basic ground for the appellant's fear of persecution⁶⁵. The Commission des Recours has always been very cautious to distinguish between, on the one hand, really arbitrary and personally targeted measures that infringe on the right to property and, on the other, measures which belong to a general state policy regarding the use of property by the citizens of that state. It was in this vein that a rejective decision was reached in Mèlle Tram⁶⁶. The Commission stated that the confiscation by the Vietnamese government of the real estate belonging to the applicant's family was in fact part of a 'general policy of socialisation' carried out by those authorities. There was not, according to the Commission, any evidence showing that the applicant's family was subject to an individual 'discriminatory treatment' for one of the five internationally recognised reasons of persecution⁶⁷.

⁶⁴CRR No. 44.062, 25 June 1987 (transcript copy).

⁶⁵See also M. Diep, CRR No. 30.211, 19 November 1984, M. Glica, CRR No. 34.141, 12 June 1987, M. Bounthanh, CRR No. 29.291, 15 December 1987, M. Kassoum, CRR No. 167.873, 10 June 1991, M. Arulsothy, CRR No. 089.242, 10 June 1991 (transcript copies).

⁶⁶CRR No. 23.625, 6 May 1985 (transcript copy).

⁶⁷See also M. Mohamed, CRR No. 19.125, 30 July 1984, M. Ha Van Hai, CRR No. 20.503, 12 July 1985, M. Ba, CRR No. 30.851, 22 April 1985, M. Hong, CRR No. 21.178, 21 March 1986, M.

In contrast to British case law, French jurisprudence has produced a more liberal jurisprudence with reference to persecution in the form of violation of the individual right to employment. Mèlle Pedvisocar⁶⁸ concerned a Romanian national of Jewish origin who had refused to become a member of the communist party. For these reasons she remained unemployed for three years, since she was not able to find a job in her academic specialisation. The appeal was accepted by the Commission des Recours des Réfugiés⁶⁹. In Mèlle Moshi⁷⁰ the Commission found also in favour of the Iraqi applicant of Assyrian origin who had lost her job twice by reason of her refusal to join the sole political party of her country, and to renounce her religion⁷¹.

Osei, CRR no. 26.838, 16 January 1986. See also M. Kraddar, CRR No. 31.661, 22 April 1985, M. Mendes, CRR No. 144.949, 13 December 1990, M. Sissoko, CRR No. 149.758, 10 January 1991 (transcript copies).

⁶⁸CRR No. 26.346, 31 August 1984 (transcript copy).

⁶⁹See also Mme Doicescu, CRR No. 25.813, 8 October 1984, M. Nosarzewski, CRR No. 29.972, 30 October 1984 (transcript copies).

⁷⁰CRR No. 25.971, 19 November 1984 (transcript copy).

⁷¹See also M. Sinnathamby Arumugam, CRR No. 19.351, 15 November 1984, Mle Bratu, CRR No. 31.684, 11 June 1985, M. Condeescu, CRR No. 175.257, 26 June 1991, M. Gonzales de la Meza, CRR No. 20.501, 16 December 1985, M. Dayan, CRR No. 25.959, 18 February 1986, M. Sheikh, CRR No. 42.046, 18 April 1986, M. Khan, CRR No. 42.437, 9 June 1986, M. Kurzawa, CRR No. 35.449, 7 July 1986, M. Broomand, CRR No. 47.435, 11 June 1987, Mèlle Safaie, CRR No. 58.216, 21 December 1987, Mme Zambaksoy, CRR No. 55.705, 12 October 1987, M. Ahmed, CRR No. 91.934, 1 June 1989, M. Ahmad, CRR No. 86.625, 16 June 1989, Mèlle Mazambi, CRR No. 58.049, 21 January 1988, M. Chen, CRR No. 73.550, 27 May 1988, M. Sarvary, CRR No. 49.397, 14 May 1987, M. Jomeer, CRR No. 76.177, 7 October 1988, Mle Gopee, CRR No. 110.074, 12 April 1990, Mme Kecsmar, CRR No. 54.002, 20 June 1989, M. Sawadogo, CRR No. 86.645, 12 October 1989, Mle Dimitrova, CRR No. 181.466, 12 September 1991 (transcript

Severe hindrance to the enjoyment of the social right to education has also been recognised by the Commission des Recours as a valid form of refugee persecution. In Mèlle Huy⁷² the Commission interpreted as persecution the fact that the applicant was not in a position to pursue her studies any more, following measures of discrimination and threats originating in the authorities of her country. The same vein was followed in Mle Goncareenco⁷³, a case concerning a Romanian who was hindered from pursuing her studies, and her retirement pension was reduced, on the ground of her family's opposition to the home-country regime⁷⁴.

In Germany, in the beginning of the development of their contemporary asylum jurisprudence, neither the Federal Constitutional Court nor the Federal Administrative Court had attempted to provide a positive, clear-cut definition of persecution. The Bundesverfassungsgericht, nonetheless, associated persecution with four notions that may be used in a productive manner in the course of interpretation of the refugee definition. These notions are 'oppression' ['Unterdrückung'], 'discrimination' ['Diskriminierung'],

copies).

⁷²CRR No. 21.002, 3 July 1986 (transcript copy).

⁷³CRR No. 25.916, 30 October 1984 (transcript copy).

⁷⁴See also Mèlle Brozyna, CRR No. 29.975, 30 October 1984, M. Tavassoli Mohammad, CRR No. 37.648, 9 October 1987, Mèlle Berczelly, CRR No. 84.002, 13 June 1989, Mèlle Solomon, CRR No. 76.347, 23 December 1988, Mle Safa Verdi, CRR No. 53.694, 9 June 1989, M. Dadsetan, CRR No. 54.779, 15 June 1989, M. Aliou Tigampo, CRR No. 52.824, 29 June 1989.

'restriction' [Beeinträchtigung] and, finally, 'dissidents' ['Andersdenkende']⁷⁵. If these four notions are interconnected in a constructive, meaningful manner, one may reach the conclusion that a plausible general definition of the notion 'persecution' in, at least, early German refugee status case law is tantamount to the oppressive and discriminatory restriction of the personal freedom, or of the life, of dissidents⁷⁶. However, both the above-mentioned German Supreme Courts in their recent case law have put forward a generic definition of persecution which draws more upon political science than law. According to this definition, 'Persecution in the sense of Art. 16 a Abs 1 GG is a conduct through which the state uses the power conferred upon it in the interest of the internal peace, especially for the purpose of guaranteeing the peaceful settlement of conflicts, differences and disputes, in a manner that excludes the individual affected from the state order of peace'⁷⁷.

⁷⁵See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 357-8; see also judgment of Federal Administrative Court, 27 April 1982, 9 C 308.81, 65 BVerwGE 250, at 252-3.

⁷⁶'Andersdenkende' means, in a literal translation, 'people who think in a different, deviating, manner'. 'Intolerance relevant to asylum' is another notion which has been employed by the Federal Administrative Court in asylum cases, see judgment of 27 May 1986, 9 C 34.86 (transcript copy) at 14; see also judgment of 4 December 1990, BVerwG 9 C 93.90, 106 DVB1 (1991) 542, at 544, where the Court stressed the connection between the principle of the political neutrality of asylum, and the precept of tolerance in the political context of the country of refugee origin.

⁷⁷See judgment of 16 August 1993, BVerwG 9 C 7.93, 109 DVB1 (1994) 58 at 59.

German asylum law has closely connected asylum adjudication with the fundamental human rights enshrined in the Bonn Basic Law. This has been inevitable, given that the right to asylum in Germany is still (albeit qualified) part and parcel of the individual rights enshrined in the German Constitution. Accordingly, the Bundesverfassungsgericht has established that the supreme constitutional principle of the 'inviolability of the human dignity' is to constitute the fundamental parameter in asylum adjudication. Drawing upon the 'historical development' of the right to asylum in the FRG (a reference to the international, but also, and especially, to the German history during and before the years of World War II) the above Supreme Court has pointed out that the conditions of application and the scope of the constitutional right to asylum are basically determined by the above principle. The inviolability of the human dignity has therefore played a crucial role in the establishment of the 'wide-ranging asylum claim' inside the German legal framework⁷⁸.

⁷⁸See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 357. The notion of 'human dignity' has been recognised as the basis of the whole 'system of values' of the German Basic Law, see judgment of 1 July 1987, 2 BvR 478/86, 2 BvR 962/86 (transcript copy) at 12 and 17; see also judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315 at 333. See also judgment of 17 May 1983, 9 C 36.83, 67 BVerwGE 184 at 186-7, judgment of 25 October 1988, BVerwG 9 C 37.88 (transcript copy) at 7. Art. 1 Abs.1 Satz 1 GG prescribes that 'The dignity of the human being is inviolable', on the notion of Menschenwürde (human dignity) in German law see Hofmann, H., 'Die versprochene Menschenwürde', 118 Archiv des öffentlichen Rechts (1993) 353 *infra*; see also Zeidler, W., 'Einige Bemerkungen zu den Versuchen, den Begriff der "politischen Verfolgung" zu bestimmen', in Rüthers, B., Stern, K. (Hrsg.), Freiheit und Verantwortung im Verfassungsstaat, Festgabe zum 10jährigen Jubiläum der Gesellschaft für Rechtspolitik, München, C.H. Beck'sche Verlagsbuchhandlung, 1984, 551, at 557-8.

The Federal Constitutional Court has emphasised that no 'restriction [of the right to asylum] to specific lawful interests ['Rechtsgüter'] as being "worthy of asylum" is justified'⁷⁹. Thus, the above Supreme Court laid down a principle according to which it is not permissible to restrict the granting of territorial asylum to cases where only some specific human rights are infringed upon. However, the same Court, in a seemingly contradictory trajectory of reasoning, has enlisted in its case law some fundamental human rights which, in cases where their existence is threatened by persecutory measures, possess, in fact, a greater possibility or even probability to lead to the granting of refugee status, than other human rights of an arguably minor status. Consequently, according to the same Court, it is more probable to be granted territorial asylum to individuals persecuted 'on political grounds' when this persecution constitutes a 'direct danger' to their life and limb, or restricts their personal freedom⁸⁰. The same stance has also been adopted by the Bundesverwaltungsgericht, according to which 'The fundamental

⁷⁹Judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 357.

⁸⁰Idem. This has been a reiteration, in a more general manner, of the Court's thesis stated in previous judgments, see judgment of 4 February 1959, 1 BvR 193/57, 9 BVerfGE 174, at 180-1, judgment of 9 January 1963, 1 BvR 85/62, 15 BVerfGE 249 at 251. The original judgment where this principle had been laid down was that of the Federal Court of Cassation of 21 January 1953, 4 ARs 2/53, 3 Entscheidungen des Bundesgerichtshofes in Strafsachen 392, at 395. See also judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 163-4, judgment of 20 May 1992, 2 BvR 205/92, 11 NVwZ (1992) 1081 at 1082, judgment of 24 June 1992, 2 BvR 176/92 et al. (transcript copy) at 12, judgment of 4 March 1993, 2 BvR 1440,1559,1782/92 (transcript copy) at 13.

right of asylum lays down the principle, determined by the respect for the invulnerability of the human dignity, that no state has the right to endanger the life, limb or the personal freedom of the individual on grounds that lie solely in his political opinion, his religious faith or in his inalienable characteristics'⁸¹. In this interpretational vein, in its judgment of 13 May 1993⁸², the Federal Administrative Court upheld the appeal of a Pakistani Ahmadi refugee applicant who had been convicted, according to the Pakistani Criminal Code, to many years' imprisonment on the ground of using in public the Muslim call of prayer. The above Court stressed in this case that legislative provisions and their application that not only restrict religious freedom but moreover, and above all, violate the individual's 'physical freedom' cannot but take on a persecutory character⁸³.

It has been clarified by the Federal Constitutional Court that 'personal freedom' indirectly includes, in principle, derivative rights such as the rights to religious practice and to unimpeded professional and economic activities⁸⁴. However, infringement upon such derivative human rights has been recognised by German case law as able to provide a refugee

⁸¹Judgment of 21 January 1991, BVerwG 9 C 92.90 (transcript copy) at 8.

⁸²BVerwG 9 C 49.92, 92 BVerwGE 278.

⁸³Ibid. at 280.

⁸⁴Judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 357-8; see also judgment of 20 May 1992, 2 BvR 205/92, 11 NVwZ (1992) 1081 at 1082; see also judgment of 5 April 1983, BVerwG 9 CB 12.80, 5 InfAuslR (1983) 258.

status basis on certain conditions: the violation of these rights should be of such an 'intensity and gravity' that they violate the principle of human dignity and, additionally, that they surpass the point of tolerance which the citizens of the country of origin should generally be expected to have by reason of the dominant political system⁸⁵. The Federal Constitutional Court, like its administrative counterpart, has thus laid down a high standard-principle regarding refugeehood-generating impairment of human rights. Making a clear, express distinction between asylum protection on the one hand, and human rights protection on the other, German refugee law has made refugee status conditional not only on the substantial gravity of human rights infringement, but additionally on a notion of, as it were, obedience or patience which citizens of a certain country should be expected to have

⁸⁵See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 357-8; see also judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 335. See also judgment of Federal Administrative Court, 5 April 1983, 9CB 12.80, 5 InfAuslR (1983) 258, judgment of 23 April 1985, BVerwG 9 C 75.84, 7 InfAuslR (1985) 276, judgment of 16 April 1985, BVerwG 9 C 111.84 (transcript copy) at 7-8. See also judgment of 18 February 1986, BVerwG 9 C 104.85, 74 BVerwGE 41, at 46-7 where the Court stated that discriminations against Ahmadis on the job market by individual employers may be attributed to the state and thus be of relevance to the asylum request 'only if they appear to constitute a violation of the human dignity according to their intensity and gravity...if therefore the financial existence of the Ahmadis is threatened and as a consequence the existential minimum that makes up an existence worthy of a human being is not safeguarded any more.'; see also judgment of 23 July 1991, BVerwG 9 C 154.90, 13 InfAuslR (1991) 363, at 365, judgment of 9 April 1991, BVerwG 9 C 15.90 (transcript copy) at 9-10. See also judgment of 5 November 1991, BVerwG 9 C 118.90, 107 DVB1 (1992) 828, at 829: 'There may be...no doubt that a circumcision taken place against the will of the person [a Syriac Orthodox Turk during his military service] affected shows, on the basis of its intensity and gravity, a violation of his physical and psychological integrity which is of significance to asylum.'

towards the dominant political regime before an asylum claim may legitimately arise. The Bundesverfassungsgericht has justified this high standard-setting not by means of legal, or even political science, principles, but by expressly making a general asylum law policy declaration. According to this Court, the right to asylum on the ground of 'political' persecution should not be available in general to anybody who, because they are discriminated against in their country of origin and are obliged to live in poverty and hardship, leave their country in order to come to the Federal Republic of Germany in order to better their living standards⁸⁶. As a consequence, refugee status has not been, in principle, available to persons fleeing 'general conditions and effects' prevalent in the refugee's country of origin⁸⁷, that is, 'disadvantages that anyone would have to suffer because of the general conditions in their homeland, like hunger, natural disasters, but also repercussions of unrests, revolutions and

⁸⁶See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 357-8. Accord, Federal Administrative Court, judgment of 2 August 1983, 9 C 818.81, 67 BVerwGE 317 at 320, judgment of 6 March 1990, BVerwG 9 C 14/89, 9 NVwZ (1990) 1179 at 1182: '...the right of asylum does not provide protection from a long-term and gradual adaptation process that arises for the individual as a consequence of a changing situation of an environment and its milieu in his home country...Consequently, the difficulties connected with the change from a rural to an urban way of life and with the inherent threats and disadvantages to the maintenance of the religious identity as such provide no sufficient cause for the assumption of a political persecution of persons coming from rural areas, covering also the Turkish towns.'; see also judgment of 24 July 1990, BVerwG 9 C 38.89 etc. (transcript copy) at 17, judgment of 24 July 1990, BVerwG 9 C 20.89 (transcript copy) at 9.

⁸⁷See judgment of Federal Constitutional Court, 20 May 1992, 2 BvR 205/92, 11 NVwZ (1992) 1081, at 1082.

wars'⁸⁸.

Accordingly, German asylum case law has acknowledged, in a restrictive, pro-state manner, a wide margin of state action concerning the treatment of a state's nationals. The Federal Constitutional and Administrative Courts have recognised the right of a state to enforce public order on its territory and its concomitant right to restrict, to this end, some of the human rights of its citizens. As a consequence, in cases of religious persecution, the Federal Constitutional Court has left the state power a considerable space/margin to restrict public expression of a religious faith, in favour of securing public order. So far as that restriction does not infringe upon the core of the protected religious freedom (the 'minimum of religious existence'), the above state right has been recognised by German jurisprudence par excellence to theocratic states which are entitled, according to the above Supreme Court, to protect and enhance the official state religion, even if that results in the restriction of the

⁸⁸See judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315 at 335. See also judgment of Federal Administrative Court, 26 October 1971, IC 30.68, 39 BVerwGE 27 at 30-31, judgment of 3 December 1985, 9 C 22/85, 5 NVwZ (1986) 760, at 761; see also judgment of 16 August 1993, BVerwG 9 C 7.93, 109 DVBl (1994) 58, at 59: 'The granting of asylum constitutes the reaction to the abuse or non-use of the sovereign authority conferred upon the state [of refugee origin] for the protection of the individual against violations of lawful interests, but not to decisions and failures of foreign states in the fields of economy and social policy and possible thereby caused unfortunate living conditions of their population.'

public expression of a minority religion or faith in general⁸⁹. The fundamental basis of the above-mentioned state margin of action recognised by German refugee law has been the state's right to self-defence and, consequently, to maintain its integrity, as for example in cases of criminalisation of separatist or revolutionary political activities⁹⁰. However, even state self-defence measures may take on the form of refugee persecution, that depending on 'criteria tied to objective circumstances'⁹¹. German Supreme Court case law has recognised as one such criterion the 'protection of lawful interests' ('Rechtsgüterschutz'). The Bundesverfassungsgericht has endorsed a balance of interests that a state is entitled to protect in order to safeguard the preservation and continuation of its own existence. As a consequence, e.g.

⁸⁹Judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143 at 158-160. See also judgment of Federal Administrative Court of 17 May 1983, 9 C 874.82, 67 BVerwGE 195 at 200-1.

⁹⁰See judgment of Federal Constitutional Court, 20 December 1989, 2 BvR 958/86, 9 NVwZ (1990) 453 (also in 81 BVerfGE 142); see also judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 333-6. Accord, judgment of 3 December 1985, BVerwG 9 C 33/85 etc., 5 NVwZ (1986) 307, at 309-310; see also judgment of 12 July 1985, BVerwG 9 CB 104.84, 8 InfAuslR (1986) 78, judgment of 27 May 1986, BVerwG 9 C 34.86 (transcript copy) at 9-12, judgment of 9 February 1988, BVerwG 9 C 256.86 (transcript copy) at 12.

⁹¹Judgment of 20 December 1989, 2 BvR 958/86, 9 NVwZ (1990) 453; see also judgment of 11 May 1993, 2 BvR 2245/92, 109 DVB1 (1994) 38 at 39: 'Also if the fending off of terrorist attacks...comes into consideration there may...be a political persecution...That is valid especially with regard to merely anti-terrorist actions that could in effect be directed at the struggle against terrorism and the milieu that actively supports it, but are [in practice] oriented towards putting under the pressure of brutal power -in return for the terrorist actions- the civil population that has not directly participated in the existing conflict.' See also judgment of 19 May 1987, BVerwG 9 C 130.86 (transcript copy) at 7.

state prosecution of criminal offences directed against lawful interests of other citizens may not constitute refugee status-related persecution, even if the criminal offences are carried out on the basis of a political conviction. The same conclusion has also been reached in cases where it may be inferred from the objective circumstances that the prosecution of an act that aims against a 'lawful political interest' is directed not at the political opinion expressed by the crime, but at the additional, expressed criminal components to whose punishment the state praxis is related⁹². Nevertheless, even in such cases, refugee status-generating persecution may be substantiated, if the refugee applicant is in a position to prove that (s)he has been treated by state authorities in the course of a 'criminal' investigation process in such a manner that demonstrates a treatment which is 'tougher than the usual one taking place in the state of origin, and which aims at the prosecution of similar -non-political- offences of a comparable dangerousness'⁹³. Accordingly, the Federal Constitutional Court has laid down, in a rather restrictive interpretational vein, that persecution may be substantiated

⁹²Judgment of 20 December 1989, 2 BvR 958/86, 9 NVwZ (1990) 453, at 453-4; see also judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 337-8, judgment of 8 October 1990, 2 BvR 508/86, 13 InfAuslR (1991) 18, at 19-20, judgment of 25 April 1991, 2 BvR 1437/90, 13 InfAuslR (1991) 257 at 258-9. See also judgment of Federal Administrative Court, 17 May 1983, 9 C 874.82, 67 BVerwGE 195 at 199-200, judgment of 12 November 1985, BVerwG 9 C. 26.85 (transcript copy) at 14.

⁹³See supra n. 90; see also 80 BVerfGE 315 at 338. Accord, judgment of 12 February 1985, BVerwG 9 C 45.85, 7 InfAuslR (1985) 145 at 145-6, judgment of 27 April 1982, BVerwG 9 C 239.80, 65 BVerwGE 244 at 249-250.

in cases of torture during detention on criminal charges in a country where such torture is common, only if the 'use of torture...surpasses the degree which is to be expected by persons in prisons [of that country]'. It was consequently confirmed by German case law that 'an inhuman treatment such as torture may not in itself lead to the granting of asylum according to the letter and spirit [of the German constitutional asylum provision]'. This kind of treatment may constitute persecution only if 'it is used by reason of asylum-related characteristics', or if 'it is employed, with reference to these characteristics, in a more severe [than the usual] form [common in the country of origin]' and, as a consequence, it may be inferred that that treatment 'relates to the political components of the acts with which the person concerned is charged, [and] is tied to the political conviction expressed by him'⁹⁴. However, the Federal Administrative Court has expressly laid down in its jurisprudence that the practice of torture by state authorities 'may constitute an indication of the existence of a political motivation of the [authorities] that use [such kind of] force'. That is an indicative function of torture

⁹⁴Judgment of 20 December 1989, 2 BvR 958/86, 9 NVwZ (1990) 453, at 454; see also judgment of 8 October 1990, 2 BvR 508/86, 13 InfAuslR (1991) 18, at 19-20, judgment of 17 January 1991, 2 BvR 1243/90, 13 InfAuslR (1991) 133, at 135-6, judgment of 9 January 1991, 2 BvR 935/90, 14 InfAuslR (1992) 59, at 62. However, the Federal Administrative Court in earlier case law had not conditioned the use of torture and other serious ill-treatment, as substantive forms of persecution, on their more-than-usual gravity, but solely on the fact that they were attached to the refugee's personal characteristics or opinions protected by asylum law, see judgment of 27 May 1986, BVerwG 9 C 35.86 etc., 74 BVerwGE 226, at 228-9.

that may really lead to the substantiation of persecution if it may objectively be established that torture has been actually connected with the established aetiological framework of refugee persecution⁹⁵.

⁹⁵Judgment of 17 October 1989, BVerwG 9 C 58.88 (transcript copy) at 11: 'This indicative character [of torture] is attached, however, to the selectively used torture, especially [when used], for example, against members of a specific ethnic group or against people of a specific conviction...Because interrogation methods that directly harm anybody on an equal basis may be an indication of the fact that when these violations take place they affect individual personal [asylum-protected] characteristics of the person in question.' See also judgment of 17 May 1983, 9 C 36.83, 67 BVerwGE 184 at 193 where the same Court, in a case concerning allegations of torture, stated (leaving, unlike the Federal Constitutional Court, in principle, out of consideration the gravity of the torture's bodily harm) that the constitutional asylum provision does not offer protection 'from state excesses of any kind and also not simply from every disregard of the human dignity'. However, the Court accepted that the practice of torture as a means of persecution, in violation of human rights, and flagrantly contravening general principles of international law is...to constitute usually an indication of its political character', ibid. at 194. See also judgment of 22 January 1985, BVerwG 9 C 1113.82 (transcript copy) at 9-10, judgment of 1 October 1985, BVerwG 9 C 21.85 (transcript copy) at 7, judgment of 16 April 1985, BVerwG 9 C 111.84 (transcript copy) at 8. See also judgment of 27 May 1986, BVerwG 9 C 34.86 (transcript copy) at 8-9, where (at 9) it is also mentioned that use of force by state authorities during criminal investigation with the aim to discipline the investigated person may also constitute an indication of persecution, provided that it is connected with 'asylum-related characteristics' of the victim; see also judgment of 27 May 1986, BVerwG 9 C 35.86 etc., 74 BVerwGE 226 at 229-233, judgment of 23 February 1988, BVerwG 9 C 32.87 (transcript copy) at 11-12. See also judgment of 17 January 1989, BVerwG 9 C 62.87, 11 InfAuslR (1989) 163 at 165 where it was accepted the reasoning of the Appeal Court, according to which 'in a summarizing assessment of all the circumstances [the court] reaches the conclusion that for the excessive torment of political prisoners...one reason is that these are less often ready to make confessions, to pass on information and to submit themselves to disciplinary orders, another reason is nonetheless a motivation of the investigating officers based on the political opposition, and a following tendency to overreact to the political conviction of the prisoners...'. The Court concluded that asylum was to be granted in that case 'because it suffices when out of more motives only one appears to be political...and because according to the factual

Finally, the Bundesverfassungsgericht has clarified that in asylum adjudication the human rights standards enshrined in the Bonn Basic Law are not to be applicable as an assessment basis in the examination of cases of persecution in the refugee's country of origin. Consequently, in line with the above-mentioned guideline regarding the 'gravity and intensity' that a human rights violation is to reach so that it may infringe on the 'Menschenwürde' (human dignity), in a case of religious persecution, the above Federal Court emphasised that 'the restrictions and infringements...must have such gravity that they infringe upon the elementary sphere of a moral person, in which the self-determination must remain possible, in favour of an existence worthy of a human being, and the metaphysical principles of a human existence should not be ruined'⁹⁶. The Federal Constitutional Court has

statements of the Appeal Court the political motivation in accordance with the gravity does not take a second place to a 'neutral' motivation'. On the issue of torture in German asylum law see Treiber, W., Die Asylrelevanz von Folter, Todesstrafe und sonstiger unmenschlicher Behandlung, Rheinfelden, Schäuble Verlag, 1990, Ebert, J., Der Begriff des politisch Verfolgten im Sinne von Artikel 16 Absatz 2 Satz 2 Grundgesetz unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, Ph.D. thesis, Universität Würzburg, 1987, at 59 et seq.. See also Krieken, P., 'Folter und Asyl', 6 ZAR (1986) 17 infra, Marx, R., 'Politisches Strafrecht und Folter im Asylrecht', 4 ZAR (1984) 102, Huber, B., 'Legitimation der Folter in der Rechtsprechung zum Asylrecht', 16 Kritische Justiz (1983) 164, Frowein, J.A., Kühner, R., 'Drohende Folterung als Asylgrund und Grenze für Auslieferung und Ausweisung', 43 ZaöRV (1983) 537, at 550 et seq.

⁹⁶See judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 158; see also judgment of 13 May 1987, 2 BvR 1018/83 (transcript copy) at 2, judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315 at 335; see also judgment of 27 May 1986, BVerwG 9 C 35.86 etc., 74 BVerwGE 226 at 228. See also judgment of 15 March 1988, BVerwG 9 C 278.86, 79 BVerwGE 143, at 149, where the Federal Administrative Court

acknowledged that the above interpretational stance constitutes, in fact, a restriction of the protective sphere of the national asylum provision. Nonetheless, it has been justified by the sui generis 'humanitarian intention' of the right to asylum. This intention has been highlighted by both the Federal Constitutional and Administrative Courts by emphatically stating, time and again, in their jurisprudence that the German asylum institution was not designed so as to act beneficially to every individual claiming that (s)he is in need of protection, but only to those who find themselves in an 'hopeless situation'⁹⁷.

pointed out that 'It is not the duty of asylum law to transmit to other countries moral ideologies possibly altered in the Federal Republic'.

⁹⁷See judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 158. Although no definition of the notion 'hopeless situation' was given by the Federal Constitutional Court, it has, nonetheless, indicated, in a case concerning persecution of Kurdish Yazidis in Turkey, that such a situation may be acknowledged in cases where refugees are subjected to, e.g. 'ruthless raids and searches, where repeated arbitrary executions take place, as well as torture, oppression and arsons, have such an excluding [from state protection] character', judgment of 20 May 1992, 2 BvR 205/92, 11 NVwZ (1992) 1081, at 1083. See also judgment of 17 September 1986, BVerwG 9 C 96.85 (transcript copy) at 14, judgment of 25 October 1988, BVerwG 9 C 76.87 (transcript copy) at 9-10, judgment of 17 January 1989, BVerwG 9 C 44.87 (transcript copy) at 9, judgment of 8 February 1989, BVerwG 9 C 33.87 (transcript copy) at 11, judgment of 20 November 1990, BVerwG 9 C 73.90, 13 InfAuslR (1991) 181 at 183, judgment of 20 November 1990, BVerwG 9 C 75.90 (transcript copy) at 8; see also judgment of 9 April 1991, BVerwG 9 C 15.90 (transcript copy) at 10-11 where the Court stressed that a hopeless situation leading to the departure of a refugee from the home country must be based on an objective assessment, and not merely on the (refugee's) 'psychological connection' between persecution and flight: 'The departure must thus be viewed under circumstances that, by an objective examination, still provides the outer image of a flight taken place under the pressure of a suffered persecution'.

CONCLUSION

From the foregoing analysis of the three European countries' refugee status case law it has been evident that, even though courts and tribunals in the three European state subjects of the present research operate in different national legal frameworks, they have provided a more or less homogeneous image in the course of the substantive interpretation of 'persecution'. Indeed, case law in the UK, France and Germany has established the close relationship between individual human rights violations and refugee persecution. Nonetheless, it has been crystal clear that these two notions have not been regarded as identical in refugee status jurisprudence. The definition of persecution provided by British case law has expressly identified refugee persecution with subjection of the individual refugee to injurious action and/or oppression of a 'persistent', in principle, nature. Moreover, German jurisprudence with its express reference to a 'hopeless situation' in which an individual refugee should find her/himself before qualifying for refugee status, as well as the French jurisprudence consisting of a case-by-case examination of asylum requests, has substantially contributed to the establishment of the thesis that refugee persecution, in the context of the internationally established aetiology of refugee persecution, represents a serious status of human rights violations. These should be violations which have actually reached (or have objectively the capacity to reach) such a high level of endangerment that have, in practice, the effect of forcing an individual (to remain) out of the country

of origin, and that therefore act as a catalyst for the metamorphosis of that individual to a refugee in need of effective protection by another state.

This gravity of the individual refugee's harm which has been established in European refugee status case law as a conditio sine qua non has been actually based upon a de facto, indirect or direct, hierarchical classification of human rights. From the foregoing analysis of jurisprudence it has become clear that a basic three-pronged human rights categorisation has been laid down by courts. The first, prioritised, position in the framework of refugee protection has been awarded to the civil rights to life and freedom from torture. These are fundamental human rights that have always been regarded by all three national sets of jurisprudence as being in a position to trigger the grant of refugee status. The other civil and political rights (second category), as well as economic and social rights (third category) have also been included in the protective zone of asylum law. However, they have been classified as human rights that, even though worthy of protection in the asylum law context, their infringement should acquire a gravity before they are in a position to mobilise/obligate, de facto, a specific state to recognise refugee status. As a consequence, these two latter sets of rights represent human rights whose infringement should always have serious negative existential consequences for an individual refugee applicant, as in cases of violations of the right to life, and of the freedom from torture.

It is submitted that this interpretation of refugee persecution is in complete harmony with the fundamental premises and teleology of contemporary refugee law. Territorial asylum in international law has never been tantamount to minority protection or human rights protection, both of which concern protection owed, on the basis of international and/or regional human rights treaties, basically by a specific state to its nationals and individuals who happen to find themselves on its territory. Territorial asylum, in the form of durable protection through recognition of refugee status, has been a different, sui generis kind of protection available from sovereign, in principle, states to unprotected, disfranchised alien individuals. Even though directly derived from human rights violations perpetrated in the country of origin, refugee status in international law has always been linked with, and has become dependant on, the forced exodus of an individual from the above country. This sui generis typology of migratory movement of refugees has as a consequence the conditioning of refugee exodus by states of refuge, and, consequently, by international law, on a grave factual framework, associating, in effect, refugeehood with an individual state of emergency. Refugee exoduses have always been forced movements of individuals who have been actually positioned in a state of personal emergency due to serious human rights violations pertaining, first and foremost but not exclusively, to their fundamental rights to life and personal liberty and security. In consequence, what has been at issue in cases concerning refugee status claims is not the real

possibility of mere continuation of a normal life inside the refugee-producing state through enjoyment of all internationally recognised individual human rights indispensable for such a life, but the individual refugee applicant's salvation by a foreign state from a gravely endangered personal status in the country of origin that has constituted the springboard for the individual refugee's exodus. Accordingly, it is submitted that any direct or indirect hierarchical classification of human rights by refugee status case law is to be regarded, in the asylum law context, not only as legitimate but also indispensable, due to the extraordinary nature of the legal protection itself that territorial asylum has been, and should be, able to offer.

SECTION 2. THE QUESTION OF THE INDIVIDUALISTIC NATURE OF PERSECUTION AND ITS POTENTIAL CONTEXTUAL EXPANSION IN THE LAW OF REFUGEE STATUS

The legal concept of refugeehood has been accepted at the international level, basically in the context of the 1951/1967 Refugee Convention, as one founded, in principle, upon persecution suffered on an individual basis. The wording of the international definition of refugeehood itself constitutes clear evidence of the individualist conceptualisation of refugeehood in international and, consequently, national law. Article 1 A. (2) of the above treaty refers to 'any person' with a well-founded fear of persecution. Accordingly, the UNHCR Handbook has stressed that 'an applicant for refugee status must normally show good reason why he individually

fears persecution'⁹⁸. However, this has been a principle with exceptions arising out of the question of refugee cases where persecution occurs in the country of origin on an 'entire group' basis⁹⁹. In cases like this, the principle of individuality of persecution may indeed be broken. Although the well-founded fear of persecution is still required to correspond to the individual refugee applicant, this does not mean that a refugee must have been actually 'singled out', and have suffered persecutory measures before (s)he is able to apply for refugee status in the country of refuge. Any such interpretation of refugeehood runs contrary not only to the ratio legis but also the letter itself of the above international definition. The refugee applicant is not required by the 1951/1967 Refugee Convention to have already (before her/his application) been a victim of persecution. The well-founded fear is the factor that enables a refugee to claim refugee status also when there are objective elements that justify such a fear: elements closely connected with the refugee's persecution-riddled environment, that are not to be necessarily related to an individual persecution already suffered by the refugee applicant. As stressed by UNHCR, the refugee definition's well-founded fear refers 'also to those who wish to avoid a situation entailing the risk of persecution'¹⁰⁰. This seems to have been also the generally

⁹⁸See UNHCR, Handbook, at 13 para. 45.

⁹⁹Ibid. at para. 44.

¹⁰⁰Ibid. at para. 45; see also para. 44 of the Handbook where it is pointed out that in cases where 'entire groups have been displaced under circumstances indicating that

accepted opinion of the doctrine¹⁰¹ as well as of the vast majority of international case law¹⁰².

The question of whether the refugee should have been singled out and persecuted by the authorities of the state of origin, or by some other agents of persecution, has arisen in British case law, especially in cases where ethnic minorities in a

members of the group could be considered individually as refugees...[r]ecourse has...been had to so-called "group-determination" of refugee status, whereby each member of the group is regarded prima facie (i.e. in the absence of evidence to the contrary) as a refugee.'

¹⁰¹See Grahl-Madsen, A., op. cit. supra n. 1 at 181, Goodwin-Gill, G.S., op. cit. supra n. 1 at 44-45, Hathaway, J.C., op. cit. supra n. 1 at 90-97; see also Crawford, J., Hyndman, P., 'Three heresies in the application of the Refugee Convention', 1 IJRL (1989) 155, at 157-167, and at 177-8, Kälin, W., 'Refugees and civil wars: Only a matter of interpretation?', 3 IJRL (1991) 435, at 441 et seq.

¹⁰²See Gunaleela and others v. Minister for Immigration and Ethnic Affairs and others, Federal Court of Australia-General Division, 23, 24 July, 21 August 1987, 74 Australian Law Reports 263 at 284: 'Clearly enough, a particular applicant for "refugee status" might, in the circumstances of the case in hand, fall within the terms of the definition and have a valid basis for his or her fear of persecution even if not previously "sought out" or "persecuted as an individual". We do not read the materials to which we were referred as proceeding upon the footing that without that "singling out" a claim for refugee status could never succeed.'; see also Hernandez-Ortiz v. INS, US Court of Appeals, Ninth Cir., December 2, 1985, 777 F.2d 509 at 515: 'The fact that there have been a number of threats or acts of violence against members of an alien's family is sufficient to support the conclusion that the alien's life or freedom is endangered.'; see also INS v. Luz Marina Cardoza-Fonseca, US Supreme Court, March 9, 1987, 480 US 421, 94 L Ed 2d 434 at 453: 'There is simply no room in the United Nations' [refugee] definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening.' Contra, see Mohankumar v. Minister for Immigration and Ethnic Affairs, Federal Court of Australia, No. NSW G/210, 30 March 1988, cited in Crawford, J., Hyndman, P., loc. cit. supra n. 101, at 163-5.

specific state have been subjected to persecution, in particular in civil war situations like the one in Sri Lanka. The Immigration Appeal Tribunal in Mylvaganam Thillainadesan v. The Secretary of State for the Home Department¹⁰³, while it accepted that a Tamil fearing persecution in the civil war-scourged Sri Lanka should establish personal fear of persecution, a general breakdown of order being 'insufficient', qualified its view, adding that 'general instability or violence could increase the risk an asylum seeker faced'¹⁰⁴. This view was affirmed by the Queen's Bench Division in R. v. Secretary of State for the Home Department ex parte Kandiah Navaratnam and others¹⁰⁵, as well as by the Court of Appeal in R. v. Secretary of State for the Home Department ex parte Ganeshanathan¹⁰⁶.

However, British courts and tribunals have shown an

¹⁰³Appeal No. TH/1325/85 (4383), 6 January 1986 (transcript copy).

¹⁰⁴Ibid. at 5; see also R. v. Secretary of State for the Home Department ex parte Coomaraswamy and another, Queen's Bench Division, CO/331/84, 28 June 1985 (transcript copy). Cf. Mutombo v. Switzerland, UN Committee against Torture (UN-CAT), Communication No. 13/1993, Decision of 27 April 1994, 15 Human Rights Law Journal (1994) 164, at 167-8, paras. 9.3-9.5. UN-CAT found that the expulsion of the communication author from Switzerland (where he had unsuccessfully applied for refugee status) to Zaire would have 'the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured.' UN-CAT had regard to the author's objective personal background, as well as to the actual existence in Zaire (the latter's state of origin) of 'a consistent pattern of gross, flagrant or mass violations [of human rights]'.

¹⁰⁵CO/1522/87, CO/1525/87, CO/1467/87, CO/1469/87, CO/1470/87, 25 September 1987 (transcript copy).

¹⁰⁶Court of Appeal (Civil Division), 27 July 1988 (transcript copy).

inconsistency in the determination of the 'singling out question'. In Basil Vedasingh Rajamanie v. The Secretary of State for the Home Department¹⁰⁷ the Immigration Appeal Tribunal dismissed the appeal of a Tamil asylum seeker, on the ground that 'no factor specific and personal' could be identified in his case that 'would bring him within the categories of persons with a claim to political asylum'. The same conclusion was reached by the same judicial organ in the similar cases of Subramanian Moganthas and another v. The Secretary of State for the Home Department¹⁰⁸, as well as Viraj Jerome Mendis @ Malik v. The Secretary of State for the Home Department¹⁰⁹. This restrictive interpretational stance was overturned by the High Court in R. v. The Secretary of State for the Home Department ex parte Jeyakumaran¹¹⁰: a case of another Tamil refugee applicant from Sri Lanka. The court dismissed as 'startling' the contention of the Home Office that the appellant did not qualify for refugee status on the ground that he or his family 'have not been personally singled out for persecution'. The High Court stressed that 'It can be little comfort to a Tamil family to know that they are being persecuted simply as Tamils rather than as individuals. How

¹⁰⁷Immigration Appeal Tribunal, Appeal No. TH/122313/84 (3519), 18 October 1984 (transcript copy).

¹⁰⁸Immigration Appeal Tribunal, Appeal No. TH/124094/84 (3780), 5 March 1985 (transcript copy).

¹⁰⁹Immigration Appeal Tribunal, Appeal No. TH/8418/85 (4652), 3 July 1986 (transcript copy); see also Ekrem Kandemir v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/116152/83 (5116), 24 March 1987 (transcript copy).

¹¹⁰Queen's Bench Division, 28 June 1985, [1994] Imm AR 45.

can this dismal distinction bear upon whether the applicant has a well-founded fear of persecution?'¹¹¹. This stance was affirmed by the Court of Appeal in F.R. v. The Secretary of State for the Home Department¹¹². The court, once again, dismissed as wrong the test of the Secretary of State which was based on whether 'the applicant would be singled out for persecution on return to Iran'. According to the Court of Appeal, 'The question...is not whether the applicant will be singled out for persecution, the question is whether he has a well-founded fear of being persecuted for reasons of race,...'. This stance was affirmed by the same court in a later case, R. v. Secretary of State for the Home Department ex parte Surinder Paul¹¹³. The fact that the above reasoning was propounded and applied by courts in cases concerning asylum applications of individuals who belonged to a minority group obviously subject to measures of persecution in their countries of origin, may lead one to the conclusion that the case is prima facie made for every asylum seeker of such kind of groups. If the evidence adduced by the applicant may not prove that that minority group has suffered any persecution,

¹¹¹Ibid. at 48. Taylor J rejected the 'artificial and inhuman' criteria utilised by the Home Office which had commented that 'there is ample evidence of violence against the Tamil minority, but not that it was directed against the applicant's family in particular'. According to the court, 'the words "in particular" surely mean no more than "alone", in which case they are nihil ad rem. If they mean that violence had not been directed at the applicant and his family, they are totally contrary to the unchallenged evidence that the applicant and his father were beaten up and threatened with death.', idem.

¹¹²Court of Appeal, 3 June 1987 (transcript copy).

¹¹³Court of Appeal, 25 March 1988 (transcript copy).

then no prima facie case may be made and, consequently, it would be 'necessary to consider the position of each of the individual applicants to see whether or not they as individuals might be in danger', as pointed out by the High Court in R. v. Secretary of State for the Home Department ex parte Paul and others¹¹⁴. However, the above stream of case law was slightly qualified in the High Court case of R. v. Secretary of State for the Home Department ex parte Ayhan Gulbache¹¹⁵. The court did not reject the test-principle established in British refugee status law by Jeyakumaran, which does not require the singling out of a refugee for the substantiation of a persecution claim. Nevertheless, in Gulbache, the High Court, commenting on the judgment of Jeyakumaran, qualified, in effect, the above principle. The High Court stressed that they did 'not understand the learned judge [in the latter case] to be saying that the fact that the claimant for political asylum has not been personally singled out for persecution and does not claim to have been personally singled out, that is to say, he does not claim to have done some act or to have been thought by the authorities to have behaved in a particular way so that it has come to their attention and they have a reason to persecute him, is not a factor that the Secretary of State is entitled to take into account when considering whether the applicant has in fact

¹¹⁴Queen's Bench Division, CO/1813/87, CO/1814/87, CO/1815/87, 28 January 1988 (transcript copy).

¹¹⁵Queen's Bench Division, 17 May 1991, [1991] Imm AR 526.

been maltreated in the way he claims'¹¹⁶.

The individualistic, in principle, character of the well-founded fear of persecution has also been established by the French Conseil d'Etat in a series of judgments. It was in M. Ostolaza Pagoga¹¹⁷ that the above Supreme Administrative Court stated in the clearest possible manner that refugee status is 'subject to an individual examination of the risks of persecution to which the applicant is personally exposed', risks whose burden of proof rests always upon the refugee applicant¹¹⁸. Accordingly, in M. Dorsainville¹¹⁹ the same Court rejected the petition for annulment of the decision of the Commission des Recours des Réfugiés, having before it no evidence substantiating any 'actual and personal' kind of persecution¹²⁰. However, the above judicial interpretational

¹¹⁶Ibid. at 532.

¹¹⁷Judgment No. 67.804, 20 December 1985 (transcript copy).

¹¹⁸See also M. Javier Alberdi-Beristain, Conseil d'Etat (CE) No. 67.802, 20 December 1985, M. Jean-Carlos Lecertua Urrutiibeaskoa, CE No. 67.801, 20 December 1985 (transcript copies).

¹¹⁹CE No. 69.628, 22 February 1989 (transcript copy).

¹²⁰See also M. Vartanyan, CE No. 23.829, 6 May 1981, M. et Mme Eliquler, CE No. 23.646, 6 May 1981, M. Oksuz et autres, CE No. 32.745, 19 February 1982, M. Acko, CE No. 38.663, 26 July 1982, M. Yako, CE No. 42.075, 4 May 1983, M. Sathasivam, CE No. 55.532, 29 May 1985, M. Mbangui, CE No. 53.862, 29 May 1985, M. Buanda Ndongala, CE No. 45.150, 24 April 1985, M. Ebona, CE No. 62.025, 21 June 1985, Mme Kanda, CE No. 52.969, 25 January 1985, M. Kapinga, CE No. 48.410, 20 March 1985, M. Yamba, CE No. 55.080, 20 March 1985, M. Namasivayam, CE No. 54.945, 1 March 1985, Mle Ambalavanar, CE No. 62.350, 28 November 1986, Mme Jayasilan, CE No. 62.885, 10 October 1986, Mme Rabibah, CE No. 79.500, 18 November 1987, M. Alsancak, CE No. 75.050, 9 November 1987, M. Horna Santos, CE No. 58.821,

stance has not been kept by the French Conseil d'Etat in an inflexible status. The Court has recognised the validity of refugee status claims also in cases where personal persecution has not actually occurred, but only persecution affecting the refugee applicant's social circle has taken place, thus indirectly producing the applicant's well-founded fear of personal persecution. Accordingly, in Office Français de Protection des Réfugiés et Apatrides c/ M. Ly So Oai¹²¹ the Conseil d'Etat recognised the validity of the well-founded fear of a Vietnamese refugee, fear based on his long membership of the Chinese ethnic minority in Vietnam, the long absence from the country of origin, his political opinions and the imprisonment of his father in Vietnam. Thus, the above Court provided the example for a contextual interpretation/examination of a refugee status application. The Conseil d'Etat has indeed insisted on the propriety of looking into the general political situation of the refugee applicant's country, although the final granting of refugee status has always been dependant on the individual examination of the risks to which the applicant [is] personally exposed in the framework of that situation'¹²².

3 July 1987, M. Troitino, CE No. 79.069, 24 July 1987, M. Picabea Ugalde, CE No. 75.904, 24 July 1987, M. Lasa Olazabal, CE No. 75.902, 24 July 1987, Mme Huarte, CE No. 78.656, 24 July 1987, M. Bernadin, CE No. 70.086, 20 May 1987, M. Miezi, CE No. 99.053, 6 May 1991, M. Zhou, CE No. 106.473, 24 June 1992, M. Bwanda Lemba, CE No. 101.506, 13 May 1992 (transcript copies).

¹²¹CE No. 45.410, 27 September 1985 (transcript copy).

¹²²M. Akolongo, CE No. 94.624, 9 February 1990; see also M. Bwanendran Thambinather, CE No. 55.045, 27 February 1985, M. Pedro Mendes, CE No. 57.933, 13 November 1985, M. Dobaran

The Commission des Recours des Réfugiés has followed the interpretational guidelines laid down by the Conseil d'Etat in a series of cases, like M. Chau dit Mousa¹²³ where the well-founded fear of the appellant was factually based on his father's imprisonment by the Vietnamese authorities in a reeducation camp, and the father's subjection to house arrest. In M. Avdyli¹²⁴ the Commission des Recours also found in favour of a Yugoslavian appellant of Albanian origin who feared to be arrested and tortured, as it had happened to his 'mates', due to his political activism. In Mle Ha¹²⁵ the Commission allowed the appeal of a Vietnamese whose fiancé had been sent to a hard labour camp in North Vietnam and then died while in detention¹²⁶. Nonetheless, a general situation of oppression affecting a specific, e.g. ethnic, population of a country may not, per se, justify refugee status recognition.

Urtiaga, CE No. 57.174, 17 October 1986, M. Anani, CE No. 78.085, 9 November 1987, M. Irastorza Martin, CE No. 76.731, 12 June 1987, M. Trula Larranaga, CE No. 76.714, 24 June 1988, M. Narbaez Goni, CE No. 83.849, 26 June 1989, M. Vasquez de Luiz, CE No. 83.944, 26 June 1989 (transcript copies).

¹²³CRR No. 30.070, 1 April 1985 (transcript copy).

¹²⁴CRR No. 24.872, 30 September 1985 (transcript copy).

¹²⁵CRR No. 173.215, 20 June 1991 (transcript copy).

¹²⁶See also M. Abid Ali Haydari, CRR No. 23.229, 5 March 1985, M. Kashabi, CRR No. 35.325, 16 December 1986, M. Manir, CRR No. 19.688, 16 October 1986, M. Shah Nazim Hussain, CRR No. 37.687, 2 November 1987, M. Toure, CRR No. 20.392, 22 October 1987, Mme Rachildi, CRR No. 47.836, 1 October 1987, Mle Bisereko, CRR No. 43.803, 26 February 1987, Mme Nezereian, CRR No. 33.699, 20 January 1987, Mle Zhu, CRR No. 67.612, 20 April 1988, M. Zhong, CRR No. 70.034, 19 September 1988, M. Togbah, CRR No. 176.409, 30 September 1991, M. Elpenord, CRR No. 175.006, 11 July 1991, Mle Bibomba, CRR No. 148.834, 7 January 1991 (transcript copies).

Thus, in M. Ozden¹²⁷ the Commission des Recours clarified that the general situation of the Kurdish population in Turkey was not sufficient for recognition purposes, if it was not accompanied by any real personal fear¹²⁸. Nor can a general situation of oppression affecting the whole population of a particular state provide, per se, the basis for a successful asylum application, if no personal fear of persecution exists, founded on personal activism or suffering¹²⁹, or on persecution of members of a close social circle, e.g. family, to which the applicant belongs¹³⁰.

¹²⁷CRR No. 139.641, 27 November 1990 (transcript copy).

¹²⁸See also M. Balde, CRR No. 133.111, 13 November 1990, Mlle Sissout, CRR No. 133.553, 9 November 1990, M. Topbas, CRR No. 93.517, 22 February 1990, M. Thach So, CRR No. 26.971, 12 July 1985, M. Hermis, CRR No. 27.322, 9 September 1985, M. Thabyaiyah, CRR No. 22.190, 31 August 1984; see also Mile Nguyen, CRR No. 41.389, 7 November 1989 (transcript copies).

¹²⁹See M. Becic, CRR No. 127.996, 15 November 1990, Mle Kossi Akouavi, CRR No. 39.551, 2 May 1988, Mle Petthai, CRR No. 42.465, 23 September 1986, Mme Broussema, CRR No. 43.664, 15 September 1986, Mle Phaisouk, CRR No. 41.983, 18 April 1986, Mle Hamalian, CRR No. 31.794, 20 February 1986, M. Phan, CRR No. 34.957, 23 January 1986, M. Jamali, CRR No. 33.129, 16 January 1986, M. Karim, CRR No. 19.886, 31 October 1985, M. Agha Ahmadi, CRR No. 19.923, 18 October 1985, Mle Meheretab, CRR No. 25.777, 30 September 1985, M. Singh, CRR No. 33.855, 30 April 1985, M. Hou, CRR No. 23.060, 6 May 1985, M. Mohamed, CRR No. 31.931, 4 March 1985, Mme Pham, CRR No. 31.930, 4 March 1985, M. Apaolaza Azcargota, CRR No. 10.622, 11 March 1985, M. Phuong, CRR No. 19.224, 30 July 1984, M. Nakhonekham, CRR No. 24.877, 30 July 1984, Mle Zolfaghari, CRR No. 24.910, 30 July 1984, M. Quach, CRR No. 24.905, 30 July 1984 (transcript copies).

¹³⁰See M. Ly Mien, CRR No. 20.073, 12 July 1985, M. Lo Sieu Lim, CRR No. 23.579, 12 July 1985 (transcript copies). See also Conclusions of M. Bacquet, commissaire du gouvernement, in M. Mac Nair, CE No. 13.914, 18 April 1980, in Actualité juridique-Droit administratif, 20 novembre 1980, 609, at 612 where the commissaire, with reference to the refugee appellants' claim of racial discrimination in the US (their country of origin), ruled out the legitimacy of any such fear of persecution, based on a general situation of

The particularisation of persecution has also been required by French refugee jurisprudence in cases originating in civil war situations. The Commission des Recours des Réfugiés has made it clear that in such socio-political contexts personal persecution constitutes a conditio sine qua non. In Mme Chahine¹³¹ the Commission rejected the appellant's claim of fear of persecution, since it was based on the 'general situation of insecurity' prevalent in Lebanon, without claiming any 'ill-treatment of which she would be personally a victim, on the part of the authorities of her country, nor any fear of persecution perpetrated by the authorities or with their consent'. This kind of suffering required by the Commission may be encountered in situations of armed conflict, usually on condition that the refugee applicant has been personally engaged in such conflicts. This was clarified in M. Vigneswaran¹³², where the Commission rejected the appeal of a Sri Lankan Tamil who had suffered injuries from a bombardment of his house, as well as from arbitrary detentions

discrimination, and not on a legally institutionalised discrimination that would necessarily affect every individual appellant personally: 'Il n'est certes pas douteux que la ségrégation raciale existe sous diverses formes aux Etats-Unis, du moins dans certains Etats et notamment ceux du Sud dont trois des requérants sont originaires. Mais elle ne pourrait éventuellement être prise en considération, sous cette forme globale, c'est-à-dire assimilée en tant que telle à une persécution au sens de la convention que s'il était démontré qu'elle prend la forme de discriminations légales affectant nécessairement tout citoyen américain de race noire. Or cette démonstration n'était nullement faite devant la commission, qui pouvait donc à bon droit exiger la preuve de persécutions subies personnellement par chacun des requérants.'

¹³¹CRR No. 33.958, 15 September 1986 (transcript copy).

¹³²CRR No. 102.603, 25 September 1990 (transcript copy).

and imprisonment in his country of origin. The rejection was based on the fact that all this suffering was not the consequence of a personal engagement of the applicant but [was] liaised with the general situation prevailing in his country...'¹³³. However, in case no personal activism has been substantiated, an asylum claim may still be successful if the persecution in the context of an armed conflict has been based on other grounds, like the religion, or the racial/ethnic origin of the individual refugee. Accordingly, in M. Dujic¹³⁴ the Commission des Recours upheld the appeal of a Catholic Croatian who was persecuted, like all the Croatian population of the Vukovar area, by the military forces of the 'self-proclaimed Serbian Republic of Krajina', with the support of the Yugoslavian federal army¹³⁵.

In a similar vein, the German Federal Constitutional Court,

¹³³See also M. Yohannes Habte, CRR No. 20.693, 10 December 1986, Mle Nazet, CRR No. 35.657, 21 November 1985, M. Badakian, CRR No. 31.147, 11 June 1985, M. Abou Hossein, CRR No. 42.667, 17 October 1986, M. Daoud, CRR No. 43.669, 22 January 1987, M. Dbouk, CRR No. 47.054, 13 March 1987, Mle Dos Reis Borges, CRR No. 62.277, 29 January 1988, M. Atiah, CRR No. 67.920, 15 September 1988, M. Nassar, CRR No. 70.557, 13 March 1989, M. Tawil, CRR No. 130.321, 3 December 1990, Mme Hammoud, CRR No. 109.304, 12 April 1990, Mme Nanayakkara, CRR No. 079.617, 11 January 1991, M. Pereira Almeida, CRR No. 144.661, 29 January 1991, M. Puvanenthirarajah, CRR No. 070.854, 14 January 1991, M. Eli Aazzar, CRR No. 107.074, 8 January 1991, M. Khoury, CRR No. 184.991, 21 October 1991 (transcript copies).

¹³⁴CRR No. 230.571, 12 February 1993 (transcript copy), also reported in Documentation-Réfuégiés, Supplément au No 223, 17/30 Août 1993, at 8.

¹³⁵See also Mle Mari Yanayakam, CRR No. 19.918, 15 October 1987 (transcript copy). See also analysis infra Chapter VI, Section 2.

like its administrative counterpart, has established in German refugee status law the principle of individuality of persecution, a principle based upon the fact that the right to asylum, according to the Grundgesetz, constitutes an 'individual fundamental right'. In consequence, this right may be claimed by an individual only if, in the words of the former Supreme Court, 'he himself -individually- has suffered political persecution, since he had become victim of intensive violations of law, aimed at him and related to characteristics of significance to the grant of asylum, and which excludes him from the predominant peace order of the state, and because he is obliged for these reasons, with a well-founded fear [of finding himself in] a hopeless situation, to flee his country and to search for protection abroad; on that occasion, the direct danger of persecution feared [by the refugee applicant] is equal to persecution which has already occurred'¹³⁶.

Nevertheless, the Federal Constitutional Court has elaborated further on the principle of the individuality of persecution, laying down a significant exception. The Court stressed that 'The danger of an individual political persecution of an asylum seeker may also arise from measures aimed at third persons, if these third persons are persecuted by reason of their characteristics of significance to the granting of

¹³⁶Judgment of 23 January 1991, 2 BvR 902/85, 515, 1827/89, 83 BVerfGE 216, at 230. In the same judgment the Court accepted that well-founded fear of persecution may also reasonably be taken into account when evidence shows that persecution is imminent, ibid. at 230-1; see also judgment of Federal Administrative Court, 30 October 1984, 9 C 24.84, 70 BVerwGE 232, at 233.

asylum, which [characteristics] he shares with them, and if he finds himself in a situation comparable to theirs, on the basis of place, time and risk of repetition [of persecution] ['Wiederholungsträchtigkeit'] and, consequently, his sparing so far from restrictions of lawful interests [which has as a consequence the refugee's] exclusion [from state protection] is to be regarded as purely accidental'¹³⁷. The Federal Constitutional Court has emphasised that any such fear of persecution based on 'others' experiences' is to be assessed differently in every individual case, on the basis of the 'actual conditions' under which persecution takes place in the country of origin¹³⁸. Nonetheless, a rule of thumb should be, in all such cases, according to the same Court, that 'the lesser the state itself or third parties' (attributable to the state) persecutory measures are tied to a specific behaviour of the persons under consideration, the more the danger of individual political persecution grows, that is, persecution [in these cases] is not connected with a real or supposed

¹³⁷Judgment of 23 January 1991, 2 BvR 902/85, 515,1827/89, 83 BVerfGE 216, at 231; see also judgment of Federal Administrative Court, 2 August 1983, 9 C 599.81, 67 BVerwGE 314, at 315; see also judgment of 30 October 1984, 9 C 24.84, 70 BVerwGE 232, at 233: 'The distinctive feature of group persecution lies merely in that the conclusions on the individual danger of persecution for the asylum seeker are not, or not only, drawn from the experiences he has personally suffered, but from measures against a whole group to which the asylum seeker belongs.'

¹³⁸83 BVerfGE 216, at 231; see also Federal Administrative Court, judgment of 30 October 1984, 9 C 24.84, 70 BVerwGE 232, at 236, where the Court pointed out that an individual member of a group may also be in danger when 'the measures [of persecution] have not as yet taken a concrete form, or they could not have done so as a consequence of the [refugee's] absence from the home country'.

danger derived from [the refugees'] action, and is carried out regardless of whether there has been a specific occasion with which they are connected as bearers of a characteristic of significance to the granting of asylum'. Thus, based on historical and contemporary experiences, the Bundesverfassungsgericht emphasised that 'the lesser [the persecution] depends on or is moulded by individual circumstances and, apart from that, the more it is overwhelmingly or exclusively tied to collective, inalienable characteristics of the individual, the bigger is the danger for the individual to suffer individual persecution. If the persecutor totally ignores individual elements, because his persecution is directed, through the characteristics of significance to the asylum process, at the identified group as such, and thus basically at all the members of the group, then such a group direction of the persecution may have as a consequence that every member of the group in the persecuting state must expect his own persecution at any time'¹³⁹. Consequently, German case law has accepted the collective form that a persecution may take on. Based on Article 1 A. (2) of the 1951/1967 Refugee Convention, the Federal Constitutional Court has opined that, direct or indirect, state persecution may aim at 'groups of people...who are linked by common characteristics such as

¹³⁹83 BVerfGE 216, at 231-2; see also judgment of 9 April 1991, BVerwG 9 C 15.90 (transcript copy) at 8, where the Court refers to a typical example of group persecution in the form of pogroms taken place in Pakistan against Ahmadis between May and November 1974, when 27 Ahmadis died, while Ahmadi houses, mosques and shops were destroyed with no state protective intervention; see also judgment of 30 June 1992, BVerwG 9 C 51.91 (transcript copy) at 9-10.

race, religion or political opinion'¹⁴⁰. However, it is significance that in case measures are taken that may be viewed as refugee status-related persecution of a whole group of people, the starting point of examination of the case should be, as a rule, whether 'this persecution is directed [in practice] against each [individual] member of the persecuted group'. Only then a group persecution may be regarded as existing, and be distinguished from and transcend the individualistic, in principle, form of refugee persecution¹⁴¹. Accordingly, in a case of alleged religious

¹⁴⁰See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 358.

¹⁴¹Ibid. at 358-9. Accord, judgment of 30 October 1984, BVerwG 9 C 24.84, 70 BVerwGE 232 at 233-4; see also judgment of 12 November 1985, BVerwG 9 C 26.85 (transcript copy) at 11, judgment of 26 March 1985, BVerwG 9 C 58/84, 5 NVwZ (1986) 485 at 486, judgment of 16 April 1985, BVerwG 9 C 111.84 (transcript copy) at 14, judgment of 18 March 1986, BVerwG 9 C 207.85 (transcript copy) at 12. See also judgment of 18 February 1986, BVerwG 9 C 16.85, 74 BVerwGE 31, at 33-4: 'This requirement of individuality [of persecution] is valid also under the prerequisites of a group persecution. In such cases it is typical that a group connected through common characteristics constitutes as such a target of a political persecution, and from that fact derives as a rule the supposition that each individual member of the group is affected by the group's experiences that are to be feared of in the future'. See also judgment of 26 July 1988, BVerwG 9 C 51.87 (transcript copy) at 7-8 where the Court stressed that, in a case of group persecution, the use of the lowered standard of probability regarding a repetition of persecution against a member of the group in the future should not be dependant on whether the persecutory measures have been carried out against him personally. See also judgment of 4 November 1988, BVerwG 9 C 8.88 (transcript copy) at 7: '...a group persecution of all the affected persons leads to the application of the lowered standard to the prognosis of future repetition of persecution, where each member of the group which is covered by the proper supposition is to be considered as a person who has already suffered persecution, without regard to whether the persecutory measures have been carried out against him personally'; see also judgment of 15 August 1988, BVerwG 9 C 3.88 (transcript copy) at 7.

group persecution, the Federal Constitutional Court accepted that 'mere membership' in a particular religious group may provide a sound basis to a refugee status application if 'the law has penalised the group membership itself'¹⁴². In this particular case the Court made use of the term 'group discrimination...of asylum-worthy dimensions'¹⁴³. This may well be the case under the above circumstances. However, if 'only some specific behaviours, expression, or confessions are prohibited', then it may not be really alleged that every individual member of that group is affected and entitled to asylum¹⁴⁴. The German Federal Administrative Court has elaborated further on the notion of group (collective) persecution in a case concerning a Turkish Kurd belonging to the religious group of the Yazidis. The Court, drawing upon its, and its constitutional counterpart's, jurisprudence, prescribed that a group persecution is in place 'when - possibly limited with regard to time- the group as such constitutes a target of political persecution, so that with regard to the whole territory of the country, regionally or locally each individual member is to fear political persecution solely because he bears the characteristics of that specific group. If such a political persecution aims at a group of people connected through common characteristics like race or religion, then there must be an presumption that

¹⁴²Judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 160.

¹⁴³Ibid. at 166-7.

¹⁴⁴Ibid. at 160.

the persecution aims at each member of the group. Therefore, each group member covered by such a presumptive rule, [and] who has spent time in the period of the persecution in question in the area of persecution, is to be regarded as persecuted without considering whether the persecutory measures have personally affected him...The special feature and privilege of group persecution lies therefore in the fact that the conclusions on the individual danger of persecution for the group members are not reached only on the basis of their personal experiences of persecution, but on the basis of the persecutory conduct against the group as such, to which the asylum seeker belongs'¹⁴⁵. The same Court, noting that no group persecution may be presumed if it may be concluded from the actual evidence that an individual group member is excluded from persecution, went on to provide a further indication of group persecution. Basing its reasoning on the fact that this kind of persecution assumes that 'the group members in general are threatened with political persecution', the Bundesverwaltungsgericht stressed that this assumption means that 'the possibility of attacks of significance to

¹⁴⁵Judgment of 8 February 1989, BVerwG 9 C 33.87 (transcript copy) at 7-9; see also judgment of 24 August 1989, BVerwG 9 B 301.89 (transcript copy) at 3-5, judgment of 24 July 1990, BVerwG 9 C 78.89, 12 InfAuslR (1990) 337, at 338. See also judgment of 15 May 1990, BVerwG 9 C 17.89, 12 InfAuslR (1990) 312 at 313-4, judgment of 27 August 1992, BVerwG 9 B 69.92 (transcript copy) at 3. See also judgment of 2 August 1990, BVerwG 9 C 48.89 (transcript copy) at 9: 'It is however doubtful whether the required density of persecution may derive from "the numerous reports on abductions of young girls and women"...that is necessary for the presumption that e a c h female Christian in Turkey who is in a not secure financial and social position is threatened with an abduction and forced conversion with a considerable probability'.

asylum against members of the group in a specific area of persecution intensifies [becoming] a highly threatening situation for the whole group, as it may for example be assumed in cases of pogroms or actions similar to pogroms'. The Court has used the notion 'Verfolgungsdichte' ('density of persecution') as a factual touchstone employable in cases involving group persecution. What is meant by this notion is that 'in a quantitative sense the danger [corresponds to] such a large number of attacks in the area of persecution against lawful interests which lie in the protective area of asylum, that there are no more only occasional individual violations or a great number of individual violations, but the persecutory activities in the area of persecution aim at the group as a whole and they extend, are repeated and spread in such a manner that, as a consequence, there is not only the possibility, but readily the real danger of personal injury of each group member'. The above Court has also distinguished cases of regional persecution. There, the rule of persecution density should require that the 'asylum-related violations are actually spread in a qualitative and quantitative sense over the whole area of persecution and there remain no zones or areas free from persecution or clearly less endangered'¹⁴⁶.

The Federal Administrative Court has accepted that in exceptional cases group persecution that has taken place in a third country, that is, a country different from the country

¹⁴⁶Judgment of 8 February 1989, BVerwG 9 C 33.87 (transcript copy) at 7-9.

of refugee origin, may also be of importance to asylum adjudication. This may be the case if that third state is one out of `more states [that] persecute through common measures and on the same grounds a specific ethnic group residing in all these states, or when the home state of the asylum seeker and the third state belong to a block of countries where in general the members of an ethnic group or the bearers of a specific political opinion are persecuted'¹⁴⁷.

German case law has further expressly accepted that group persecution that may constitute a sound basis for an individual's well-founded fear of persecution may originate not only directly in state authorities, but also in third parties. A basic prerequisite for the acceptance of group persecution by third parties is that `members of the group experience restrictions of their lawful interests, from whose intensity and frequency every individual group member may derive his well-founded fear, so as to become immediately he himself [the refugee applicant] a victim of such persecutory measures'. The Bundesverfassungsgericht indicated that such an exemplary case could be substantiated by `massive acts of violence directed against groups, that they cover the whole country or great parts of it but also, for example, when insignificant or small minorities are persecuted with such severity, persistence and mercilessness, that each member of that minority is constantly exposed to the endangerment of his

¹⁴⁷See judgment of 18 October 1983, 9 C 158.80, 68 BVerwGE 106 at 108.

life, limb or personal freedom'¹⁴⁸.

The Federal Constitutional Court has also laid emphasis on group persecution which may be carried out by third parties and may not cover the whole territory of a country but only a region, as in cases of 'ethnic, religious, cultural or social conflicts' limited to a specific part of a state territory. The above Court paid particular attention to the sui generis character of such cases. It has therefore stressed that such tensions 'may have an effect of a different degree on the coexistence of different parts of the population. In this respect, it is often of importance a difference of development or civilisation existing inside the country. As a consequence, it is to be assumed the possibility, at any rate in group-directed persecutions by non-state forces, that such persecutions are limited regionally or locally, with the consequence that the persecution-free areas can be presented as inland flight alternatives, and that the group members who live there are to be regarded as free from persecution. To be sure, in such cases it is moreover decisive whether an existing lack of state willingness to protect may provide the basis for a danger of an expansion of persecution in areas that were up to that time free from persecution'¹⁴⁹. In a

¹⁴⁸83 BVerfGE 216, at 232; see also judgment of 11 May 1993, 2 BvR 2245/92, 109 DVB1 (1994) 38, at 39. Accord, judgment of 23 February 1988, BVerwG 9 C 85.87 (transcript copy) at 8-9.

¹⁴⁹83 BVerfGE 216, at 232-3; see also judgment of Federal Administrative Court, 30 October 1984, 9 C 24.84, 70 BVerwGE 232, at 234.

similar vein, the Federal Administrative Court elaborated further on regional group persecution perpetrated by non-state agents. The important element of this Court's judgment has been the emphasis on the degree of violence required in such cases in order to exist a well-founded fear of persecution on the part of an individual. The above Court stated that a refugee status claim would be accepted if the regional persecution 'appears in the form of massive acts of violence covering a whole area, because only in this kind of intensified persecution it is justified the expansion of the status of a person who has already suffered persecution basically over all the members of the group, regardless of the evidence of persecution which has already been suffered by or is directly forthcoming for an individual.' The Federal Administrative Court went on to provide some examples of such a regional persecution: 'Such massive acts of violence covering a whole area may be presumed as indirect, state group persecution, as a rule, first of all, in cases of events similar to a pogrom or under circumstances of a pogrom nature, because only then there exists the necessary actual danger for all members of the group. A comparable quantitative and qualitative density of persecution also exists when no eruptive events take place...in the frontier area of a state, but there occur long-lasting 'silent' controversies, reciprocal animosities and disputes among various ethnic and religious groups of people.'¹⁵⁰ The Federal Administrative

¹⁵⁰Judgment of 24 July 1990, BVerwG 9 C 78.89, 12 InfAuslR (1990) 337, at 339.

Court in a later judgment, however, tried to qualify the above stance, providing a general standard of such an assessment of persecution: '[The Court] has not adopted the view...that the required persecutory density is to be accepted exclusively in cases of events similar to a pogrom...What is decisive is that the persecutory blows that affect the members of a group occur so densely and closely that by an objective assessment it is well-founded for each member of the group, thus for the asylum seeker to [fear that he] himself [may well] become a victim of such persecutory measures...A persecutory density of such a nature may, accordingly, be in place also if the attacks are committed in great numbers, deliberately and continuously by small groups, for example bands or radical commandos'¹⁵¹. The Bundesverwaltungsgericht was eager to distinguish the above cases of 'high density' regional group persecution from persecution of a lower degree which would not be, per se, in a position to back an individual refugee status claim: 'A 'hostile climate' existing in such an area, including possible discriminations or disadvantages suffered by the minority population, [emanating] from the relevant majority or even the gradual assimilation of ethnic or religious minorities as consequences of a long-term adaptation process, does not automatically constitute an indirect, state group persecution, thus it is not in itself already relevant to the asylum

¹⁵¹Judgment of 24 September 1992, BVerwG 9 B 130/92, 12 NVwZ (1993) 192, at 193.

claim'¹⁵². In consequence, the Federal Administrative Court has pointed out in its jurisprudence that territorial asylum is a status which may not be acquired in cases of minority discrimination in general, which, on their own, could not constitute a sound basis for an individual refugee status claim but only an indication of asylum-related persecution. Otherwise, '[t]he fundamental right of asylum...would...really take on the character of a general fundamental right for the protection of minorities'¹⁵³.

The German Supreme Courts have expressly recognised and pinpointed the extreme difficulty that any group persecution may present in the process of assessment of a claim of individual persecution. The Federal Constitutional Court has characteristically stated that 'the direct dismay of the individual, based on persecutory measures directed straight at him, as well as the group-directed persecution present only marginal points ['Eckpunkte'] of an appearance of political persecution characterised by fluid transitions. Reference to group membership in cases of persecution is not always clearly discernible. It usually emerges in the foreground only as a more or less clear fact which has also an effect upon the [examination of a particular] plight of persecution, [and] which [fact]...still does not justify in itself the

¹⁵²Judgment of 24 July 1990, BVerwG 9 C 78.89, 12 InfAuslR (1990) 337, at 339; see also judgment of 15 May 1990, BVerwG 9 C 17.89, 12 InfAuslR (1990) 312, at 314.

¹⁵³Judgment of 23 July 1991, BVerwG 9 C 154.90, 13 InfAuslR (1991) 363, at 366-7.

presumption of political persecution of every individual group member, but of specific group members who find themselves in a comparable situation. Such cases as well that are in crossing-points between occasional individual persecution and collective persecution directed against groups, are to be taken into account in order for the phenomenon of political persecution to be properly covered; situations of danger that are of significance to the right of asylum and actually exist should not be ignored in a way that reduces the content of the fundamental right [of asylum]¹⁵⁴. The Federal Constitutional Court has discerned the potential existence of transitory situations of a nature that rests between individual and group persecution. This may happen when although there have been persecutory measures against some group members, this does not, 'as yet, justify the presumption of a type of persecution directed against a group'. In such cases, however, individual persecution claims may also be successful. Case elements which should then be considered would be 'whether comparable persecutory facts have already occurred more often in the past, whether group members are obliged to live in a climate of a general moral, religious or social contempt that even if it does not completely justify the persecutory actions...of the persecutor, it favours them [the persecutory actions], and also whether they [the group members] are exposed in general to repression and to pursuits which may not, as yet, be of such a severity on which it may be founded the presumption of

¹⁵⁴83 BVerfGE 216, at 233; see also judgment of 6 June 1991, 2 BvR 748/89, 13 InfAuslR (1991) 283, at 284-5.

political persecution'. The Federal Constitutional Court has subsequently made more than explicit its view that any notion of individual persecution dependant on persecution of a collective nature should be applied in asylum adjudication in a 'heuristic manner that takes into account the diversified reality of political persecution'¹⁵⁵.

The difficulty of assessment arising in cases of claims that involve grounds for group-based persecution is indeed highlighted by the fact that the refugee status question, on the basis of the refugee treaty of 1951/1967 or of the German Basic Law, is, in the final analysis, founded upon the fundamental notion of individual persecution. Accordingly, substantiated group persecution, in the majority of cases, may not eo ipso provide the basis for the granting of individual

¹⁵⁵83 BVerfGE 216, at 233-4, emphasis added. These various forms that a persecution may take on are to be assessed by the competent courts. The Federal Constitutional Court has prescribed that for that reason the courts, in the framework of their margin of appreciation, should decide whether 'persecutory measures against members of a group have already shown such a density that it is justified the subsequent presumption of group persecution that includes each member of the group, or whether a danger of persecution is well-founded not for all, but for the majority or for specific group members, or whether the measures lack in this respect any character of circumstantial evidence.' The same Supreme Court went on to emphasise that the lower courts should not exaggerate any demand regarding the existence of a persecution and its evidence which should also always be adequately assessed in the context of the given general endangering situation relating to the case under consideration, see ibid. at 234; see also judgment of 4 November 1986, BVerwG 9 B 200.86 (transcript copy) at 4: '[The question] whether under civil war circumstances specific groups of the population would be affected because of their race (or other characteristics of importance to the granting of asylum), may not be answered on the basis of legal principles, but only through assessment of the actual conditions provided in each specific case.'

refugee status. Even though general group persecution may offer crucial and substantial corroborative evidence in favour of the individual refugee applicant, the refugee has, still, the onerous, as a rule, obligation to produce evidence substantiating a concrete derivative individual case of (well-founded fear of) persecution¹⁵⁶.

CONCLUSION

From the above case law analysis it is clear that the basic and fundamental nature of refugee persecution recognised by all three European jurisdictions has been of an individualist nature, since it has been generally accepted that persecution constitutes a serious injurious action directed at the person of the individual refugee. Nonetheless, the particularisation of persecution becomes relative once persecution has not been actually suffered, but is reasonably feared of, as in cases where small or big societal groups, of which an individual refugee is a member, become targets of persecutory measures in

¹⁵⁶See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 359-360; see also judgment of Federal Administrative Court, 2 August 1983, 9 C 599.81, 67 BVerwGE 314, at 315; see also judgment of 30 October 1990, BVerwG 9 C 72.89 (transcript copy) at 11: '...[I]t is the asylum seeker's obligation to report consistent facts with reference to his personal conditions and experience, on his own initiative providing exact details...'. See also judgment of 5 November 1991, BVerwG 9 C 118.90, 107 DVB1 (1992) 828, at 829-830: 'The notion of group persecution has been developed on the basis of pogroms that were directed against a religious minority, consequently against a great number of persons interconnected by characteristics specific to a group, who just because of their common characteristics are altogether persecuted...[T]he notion of group persecution is...simply an aid to the conclusion regarding an individual plight of persecution of the asylum seeker through measures that are directed against the group as such...'

the state of origin. Under which circumstances may then such a contextual persecution provide a sound basis for an individual territorial asylum application?

All three national jurisprudential sets examined herein seem to have been agreed on the legitimacy of any individual refugee status claim based on collective persecution. The difference among the above national case law sets, however, lies in the nature of the actual conditions set for the assessment of any such claims. The British and the French jurisprudence has opted for a general contextual examination of each individual case, without laying down any particular rules able to regulate such an assessing procedure. By contrast, German jurisprudence has established one substantive and substantial rule which it is submitted to be legitimate and reasonable in the asylum law context and, consequently, in a position to be usefully transplanted into the other two European case law contexts. The German rule we refer to is the one regarding the 'Verfolgungsdichte' ('density of persecution'). This is a notion actually related to the indispensable high degree that the persecutory collective violence is to reach before it may reasonably be viewed as able to form a basis for an individual persecution. It is a notion dependant not merely on an individual quantitative examination of the regional (or not) state (or quasi-state) measures of group persecution but, moreover, and par excellence, on a qualitative, objective assessment of this kind of persecution. Accordingly, any individual refugee

status claim must be in a position to prove that the collective form a persecution may take on is of such gravity that is consequently able to constitute a real context of endangerment of the individual refugee, on the basis of the established aetiological framework of persecution. However, German jurisprudence has rightly shown itself distanced from any illusion regarding the actual practicality of this kind of persecution assessment. Thus, despite the general character and applicability of the 'Verfolgungsdichte' rule, the German Supreme Courts have been vigilant enough to point out that any employment of the above rule is to occur in a heuristic manner. Given the actual 'diversified reality of persecution' the above guideline/condition of construction is indeed the only proper safety valve of interpretation, applicable to all forms that refugee persecution may take on in the various and complex socio-political contexts of the countries of refugee origin.

SECTION 3. PROSECUTION AS A POTENTIAL FORM OF REFUGEE PERSECUTION

Persecution of refugees may take on a particularly complicated form in cases where actual criminal proceedings have been initiated against a particular refugee applicant in the country of origin. Refugee status may be granted in such cases, on condition that the actual criminal prosecution has an inherent, overwhelming political, lato sensu, nature. In this vein, Article 14 of the 1948 Universal Declaration of Human Rights has recognised the right of everyone to seek and

enjoy asylum in such circumstances, except for 'the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'¹⁵⁷.

The crux of the matter in such cases is the question of discerning the predominant political element that would have a neutralising effect over the criminal part of the initiated formal state proceedings against a refugee applicant. This is a question which requires not only the assessment of the genuine political motives of the individual prosecuted but, moreover, the striking of a balance between the alleged offence and the actual nature and form of punishment¹⁵⁸. UNHCR has provided three exemplary prosecution cases where persecution may be discerned: firstly, cases where the impending

¹⁵⁷Article 14, of the Universal Declaration of Human Rights, 10 December 1948, UN GA Resol. 217 A (III), UN Doc. A/810, at 71 (1948); see also Kjaerum, M., 'Article 14', in Eide, A. et al. (eds.), The Universal Declaration of Human Rights: A Commentary, Oslo, Scandinavian University Press, 1992, at 217 infra. See also exclusion clauses of Article 1 F. (b) and (c) of the 1951/1967 Refugee Convention which refer to cases where the individual refugee applicant 'has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee', and/or 'he has been guilty of acts contrary to the purposes and principles of the United Nations' respectively; see also Grahl-Madsen, A., op. cit. supra n. 1 at 192 and 270 et seq., Goodwin-Gill, G.S., op. cit. supra n. 1 at 58-65, Hathaway, J.C., op. cit. supra n. 1 at 214 et seq., Köfner, G., Nicolaus, P., op. cit. supra n. 8, Band 1, at 318-332.

¹⁵⁸See UNHCR, Handbook, at 36-37. See also UN Doc. A/CONF.2/SR.24, 27 November 1951, at 4 et seq., in Travaux at 429 et seq., where the Plenipotentiaries to the 1951 Geneva Conference stressed their anxiety to differentiate between common law offenders and 'bona fide refugees'; see also Kälin, W., 'Refugees and civil wars: Only a matter of interpretation?', 3 IJRL (1991) 435, at 440-1.

punishment may actually be deemed to be excessive, that is, not proportional to the alleged crime; secondly, cases in which penal prosecution is based on (one of) the grounds provided for in the international (UN) refugee definition; thirdly, cases where besides a fear of prosecution or punishment on a common criminal ground, there exists also a 'well-founded fear of persecution' on the part of the refugee applicant¹⁵⁹. UNHCR has gone further to provide also three basic clues regarding the assessment of the genuineness of any criminal prosecution against a potential refugee. The asylum-adjudicating organs should have regard, firstly, to the laws of the prosecuting/persecuting country of origin and especially their application, secondly, to the 'national legislation' of the country of refuge itself and thirdly, to 'the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights'¹⁶⁰.

In British refugee case law, persecution under the cloak of prosecution used to be a common claim in cases of refugee applicants originating in former 'east block countries', who alleged to be liable to punishment by their state, in effect, for fleeing from it on the ground of their political opinions. In Tamas Vince v. The Secretary of State for the Home

¹⁵⁹See UNHCR, Handbook, at 15-16.

¹⁶⁰UNHCR, Handbook, at 16, paras. 59, 60.

Department¹⁶¹ a Hungarian refugee applicant who had refused to join the Hungarian communist party claimed that he would be persecuted if forced to return to his home country, by virtue of a penal law provision that provided for the punishment (imprisonment for a maximum of three years) of anyone who remained abroad violating the 'rules of foreign travel' or impairing 'significant interests' of the state. The Tribunal dismissed the appeal due to evidential lack of force but accepted, nonetheless, that political persecution in the guise of prosecution may very well occur and, moreover, found a territorial asylum claim¹⁶². The High Court affirmed this stance in R. v. Secretary of State for the Home Department ex parte Stephen Kojo Nelson and Gladys Ofori, stating expressis verbis that 'there may well be cases where a regime conceals political persecution in the guise of some trumped up prosecution'¹⁶³. The small-scaled political activity, nonetheless, of the main appellant in this case, and his ill-treatment while interrogated in the country of origin were not considered to constitute evidence strong enough to substantiate the genuine political nature of prosecution, that would be able to outweigh the criminal character of the offence with

¹⁶¹Immigration Appeal Tribunal, Appeal No. TH/75711/81 (2364), 11 June 1982 (transcript copy).

¹⁶²See also Nesro Abdo Ahmed v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/15379/86 (5673), 26 January 1988 (transcript copy).

¹⁶³Queen's Bench Division, CO/1604/87, 15 February 1989 (transcript copy) at 7. Accord, Yosief Habtu v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/15427/86 (5321), 15 July 1987 (transcript copy), at 7.

which he was charged¹⁶⁴.

But while the above cases have raised the question of the actual 'politicisation' of a specific criminal offence and/or of the subsequent proceedings, another set of cases in the UK have tackled the issue of the type and degree of punishment that would enable an asylum seeker to claim legitimately refugee status. In R. v. Secretary of State for the Home Department ex parte Ahmad and others¹⁶⁵ the High Court did not

¹⁶⁴See also Joe Appianing v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/817/85 (4404), 7 January 1986 (transcript copy). See also Gunay Karamuk v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/21904/ 92 (10039), 14 May 1993 (transcript copy), at 6: 'The issue... is rather whether the prosecution, the offence or the potential punishment was so politically inspired as to amount to persecution.' See also A.K. Tilmatine v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. HX/70370/93 (10947), 3 May 1994 (transcript copy), a case concerning an Algerian asylum seeker, active member of FIS, a violent fundamentalist group in Algeria. The Tribunal dismissed the appeal, pointing out that 'to characterise indiscriminate bombings [carried out by FIS, and in which the appellant had participated] which lead to the deaths of innocent people as political crimes so as to remove them from the exclusion clause would be against common sense and right reason. It cannot have been the intention of the Convention to accord protection to those who engage in such activities, and we would not so conclude unless bound by high authority.', ibid. at 9. Affirmed by the Court of Appeal in T v. Secretary of State for the Home Department, 3 November 1994, reported in The Independent, Law Report: 4 November 1994, at 11 (per Glidewell LJ): 'Before any crime could be said to have a political purpose, it must in some coherent sense be calculated to promote that purpose. That would simply not be so if the crime were wholly disproportionate to the purpose to be served. The more atrocious it was, the more gratuitous violence it involved, the more likely it was to be disproportionate, and the harder it would be to establish that close and direct causal link that must exist between the crime and the suggested political object.'

¹⁶⁵Queen's Bench Division, CO/681/85, 9 March 1988 (transcript copy).

consider as unreasonable the punishment for a term of three years or more, in conjunction with imposition of fines, that the four asylum seekers (members of the Ahmadiya community that belonged to a Muslim evangelical sect in the above country) risked if they returned to their country of origin. According to a Government Ordinance, Ahmadis who expressed openly their religious faith were liable to the above-mentioned punishment. The court noted that those measures were 'unfamiliar and unpleasant to Western eyes', but added that there were 'many Ordinances or laws in other countries which would be impossible to imagine as acceptable here'. Nonetheless, what the judgment emphasised was that no such legislation may 'automatically establish' liability to persecution. According to the High Court, the crux of the matter was 'the true nature of any persecution that may be feared rather than...the measure of suppression of active religious practices set out' in a national legislation. Accordingly, the court would have arguably reached a positive, for the refugee applicants, decision if the looming penalty were actually much more severe than imprisonment of three years, and reached, e.g. the harshness of the death penalty, as showed in Abdul Salam Ali v. The Secretary of State for the Home Department¹⁶⁶. In this case, the Immigration Appeal Tribunal examined an appeal of an Iraqi citizen, a Shi'a and member of the communist party, who objected to participating as a soldier in the army of his state during the war against

¹⁶⁶Immigration Appeal Tribunal, Appeal No. TH/38339/87 (6565), 10 May 1989 (transcript copy).

Iran. His failure to appear before the national military authorities after his call-up carried the capital punishment. This punishment was considered in that case to be an especially weighty factor in favour of the refugee applicant whose appeal was consequently allowed. British case law has emphasised, however, that domestic legislation of a refugee's country of origin should never be taken at its face value. Thus, in Kazmi¹⁶⁷, a case concerning a Pakistani former Muslim refugee status applicant who had converted to Christianity and claimed fear of punishment by death as an apostate, the High Court endorsed the reasonableness of the Home Office which had rejected the asylum application, having regard to expert evidence concerning the actual application of Pakistani law concerning apostates by the Pakistani authorities. The evidence demonstrated, inter alia, that the relevant legislation had not been 'rigorously or generally enforced and Christians [were] in general free to practice their religion without harassment from the authorities or other groups in Pakistan.'¹⁶⁸

Proportionality between the alleged offence and the actual impending punishment has been also the main preoccupation in relevant French case law¹⁶⁹. Accordingly, the death penalty

¹⁶⁷R. v. Secretary of State for the Home Department ex parte Syed Majid Kazmi, Queen's Bench Division, 27 September 1993, [1994] Imm AR 94.

¹⁶⁸Ibid. at 95; see also ibid. at 98, and at 101.

¹⁶⁹In Mac Nair, No. 13.914, Assemblée, 18 April 1980, Recueil des Décisions du Conseil d'Etat, 1980, 189, the Conseil d'Etat rejected the appeal of a US citizen, involved

which could be imposed on a political opposition activist has been regarded by the Commission des Recours des Réfugiés as a sound basis of a well-founded fear of persecution¹⁷⁰. Apart from the death penalty, however, imprisonment has also been regarded as a punishment potentially out of proportions. In Mèlle Wiesner¹⁷¹ the Commission des Recours, pointing out that 'the application of reasonable sanctions, in the framework of application of general rules, cannot be viewed as persecution in the sense of the Convention', found in favour of the refugee applicant having regarded as 'manifestly disproportionate' her sentence of imprisonment for one year and eight months, following her refusal to return to her

in hijacking, against his deportation, since this, in the absence of any sign of Convention refugee persecution, was not considered to place him in any other risk than that resulting from the instituting of criminal proceedings against him; see also relevant Conclusions of M. Bacquet, commissaire du gouvernement, in Actualité juridique-Droit administratif, 20 novembre 1980, at 609 *infra*. See also M. Osei Owusu, CE No. 57.948, 3 July 1985, M. Lutune Diakanua, CE No. 55.066, 21 June 1985, M. Mbuli Liambi, CE No. 55.041, 27 February 1985. See also M. Sila Usumane, CRR No. 32.103, 15 April 1985, M. Antoine, CRR No. 33.046, 15 April 1985, M. Huynh, CRR No. 23.729, 9 May 1985, M. Diallo, CRR No. 31.160, 12 July 1985, M. Monteiro, CRR No. 27.693, 13 January 1986, M. Novotny, CRR No. 36.582, 21 March 1986, M. Mbambi Bitona Nkosi, CRR No. 62.942, 9 July 1986, M. Nioka Masamba, CRR No. 27.092, 18 April 1986, M. Inthaphone, CRR No. 29.074, 27 June 1986, M. Saravanamuttu, CRR No. 20.082, 9 January 1987, M. Biyella, CRR No. 66.565, 18 January 1987, M. Ye, CRR No. 69.491, 26 January 1988, M. Yildiz, CRR No. 79.559, 26 October 1989, M. Louis, CRR No. 59.053, 7 November 1989, M. Panchenko, CRR No. 107.793, 12 April 1990, M. Luka, CRR No. 93.896, 12 March 1990, M. Aktas, CRR No. 144.882, 13 December 1990, M. Ballester Baya, CRR No. 83.746, 15 February 1991 (transcript copies).

¹⁷⁰See M. Kimu Seke, CRR No. 42.803, 11 December 1986 (transcript copy).

¹⁷¹CRR No. 9.129, 24 November 1977, 74 ILR (1987) 403.

country of origin¹⁷².

Cases concerning draft evaders have constituted a special category of prosecution in France as well, especially when inter-state or civil wars have been involved. The Commission des Recours has accepted in principle the possibility of persecution in such cases if the impending sanctions may be regarded as disproportionate¹⁷³. Accordingly, in M. Dabetic¹⁷⁴, a case concerning a Yugoslavian of Montenegro origin who was born in Croatia, the Commission des Recours accepted as valid the ground for fear of persecution put forward by the applicant. He refused to join the Croatian army 'for reasons of conscience', since that would place him in a fighting position, especially against the people of Montenegro. The heavy sanctions that that substantiated conscientious refusal would have as a consequence led the Commission des Recours to reach a decision in favour of the appellant¹⁷⁵.

¹⁷²See also M. Isaias, CRR No. 144.868, 7 December 1990, M. Sintonh, CRR No. 210.496, 25 February 1992 (transcript copies).

¹⁷³See M. Adourian, CRR No. 31.616, 18 April 1986, M. Razavi, CRR No. 25.788, 12 July 1985 (transcript copies).

¹⁷⁴CRR No. 229.956, 29 January 1993 (transcript copy).

¹⁷⁵See also M. Lozancic, CRR No. 232.258, 12 February 1993, M. Kurtic, CRR No. 227.353, 5 April 1993; see also the following cases of draft evasion on political conviction-related grounds: M. Hessabi, CRR No. 21.662, 10 July 1987, M. Bakhci, CE No. 83.344, 28 July 1989; see also the following army desertion-related cases: M. Mallouhie, CRR No. 54.665, 2 October 1989, M. Sebaibi, CRR No. 32.157, 12 July 1985 (transcript copies).

In Germany, the Federal Constitutional Court has established that the right to asylum is undoubtedly to be granted in cases of 'political offenders', as defined by German law¹⁷⁶. This right, however, is not to be limited to these cases only. Non-political offenders may also be granted refugee status, according to the same Court, when "they, in case they are extradited to their native country, would be exposed for political reasons to measures of persecution that would constitute a danger to life and limb or would restrict their personal freedom"¹⁷⁷. The Bundesverfassungsgericht has alluded to a general safeguard against persecution, that may be provided by 'a free democratic legal system...[with] settled domestic [political] conditions' in cases of extradition¹⁷⁸. The Federal Constitutional Court in its early post-World War II jurisprudence had indeed emphasised the importance of the general political situation of the country of origin, when it referred to a 'number of states where the politicization of large areas of life, and the use of the substantive criminal law for the safeguarding and accomplishment of social and

¹⁷⁶Judgment of 4 February 1959, 1 BvR 193/57, 9 BVerfGE 174, at 180; see also judgment of 14 November 1979, 1 BvR 654/79, 52 BVerfGE 391, judgment of 26 November 1986, 2 BvR 1058/85, 74 BVerfGE 51, at 58-60. See also note, 'Politische Straftäter genießen Asylrecht', 5 InfAuslR (1983) 119.

¹⁷⁷9 BVerfGE 174, at 180-1. This is a citation from the Bundesgerichtshof 4. Strafsenat judgment of 21 January 1953, 4 ARs 2/53, 3 Entscheidungen des Bundesgerichtshofes in Strafsachen 392, at 395. Accord, judgment of 9 January 1963, 1 BvR 85/62, 15 BVerfGE 249, at 251, judgment of 13 April 1983, 1 BvR 866,890/82, 64 BVerfGE 46, at 62-63; see also judgment of Federal Administrative Court, 17 May 1983, 9 C 36.83, 67 BVerwGE 184, at 190-2.

¹⁷⁸See judgment of 4 May 1982, 1 BvR 1457/81, 60 BVerfGE 348, at 358.

political revolutions have blurred the boundaries between "criminal" and "political" offences'¹⁷⁹. In a similar category of 'legally insecure states' have been placed by the above Supreme Court states that suffer an internal turmoil, such as an internal armed conflict which has as a consequence the impairment of the country's security, as well as of the administration of justice¹⁸⁰. For that reason, the Federal Constitutional Court has prescribed in cases of extradition the necessity of examination by the courts of any possibility of persecution that may be suffered by the individual subject to such a measure. The above Court, having directly liaised the 'meaning and effect' of the right to asylum with extradition proceedings, has categorically declared the necessity of the above kind of examination and subsequent exclusion, in every extradition case, of 'adequate reasons for which it may exist an assumption that the appellant fears... political persecution'¹⁸¹.

¹⁷⁹Judgment of 4 February 1959, 1 BvR 193/57, 9 BVerfGE 174, at 181; see also judgment of 9 January 1963, 1 BvR 85/62, 15 BVerfGE 249, at 255, judgment of 19 February 1975, 1 BvR 449/74, 38 BVerfGE 398, at 402-4. See also judgment of 9 February 1988, BVerwG 9 C 256.86 (transcript copy) at 13 where the Federal Administrative Court stated that 'for the ascertainment of the possibility of existence of an inherent persecutory motivation in the criminal provisions [it is] required an examination of the general conditions in the country of origin of the asylum seeker, including the question whether that state has a totalitarian character and pursues its aims disregarding the [asylum seeker's] personal characteristics which are related to asylum...'

¹⁸⁰60 BVerfGE 348, at 358-9.

¹⁸¹Judgment of 4 May 1982, 1 BvR 1457/81, 60 BVerfGE 348, at 357-9.

However, apart from extradition cases, it has been established in German refugee jurisprudence that criminal law regulations themselves and/or their application may also constitute a ground for persecution, and lead to the granting of refugee status, on condition that the asylum prerequisites are fulfilled¹⁸². Even though German jurisprudence has emphasised the right of a state to protect its integrity and order from attacks, through the medium and application of its criminal/penal law, the range of this right stops before the integrity of the individual's characteristics relevant to the granting of asylum, as in cases where the actual state persecutory action may be proven to have as a (potential) effect solely the severe repression, or even extinction, of these characte-

¹⁸²Judgment of Federal Constitutional Court, 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 161. See also judgment of Federal Administrative Court, 17 January 1957, I CC 166.56, 4 BVerwGE 238, at 242, judgment of 17 May 1983, 9 C 36.83, 67 BVerwGE 184, at 189, judgment of 17 May 1983, 9 C 874.82, 67 BVerwGE 195, at 198, judgment of 22 January 1985, BVerwG 9 C 1113.82 (transcript copy) at 10. See also judgment of 21 October 1986, BVerwG 9 C 28.85, 75 BVerwGE 99, at 106: 'It is not enough for the asylum request that the action for which the applicant is called to account in Yugoslavia demonstrates a "political issue" ["Politikum"], i.e. that the home state has not only a criminal but also a political interest in the criminal prosecution...The applicant may claim protection through asylum only when the state, through the struggle against the political opponent, affects his race, religion or political opinion, that is, an inalienable area which is above the state'. See also judgment of 11 May 1993, 2 BvR 2245/92, 109 DVB1 (1994) 38, at 39: 'The state prosecution of acts -like separatist activities- that themselves show an implementation of political convictions, may basically constitute political persecution. This is valid also when the state thereby protects the lawful interest of its own existence or its political identity. There is a need of a special ground, nonetheless, in order to let it [the state action] be excluded from the area of political persecution'.

ristics¹⁸³. Accordingly, the Federal Administrative Court has found in favour of an Iranian homosexual whose life was threatened by death penalty upon return to his home country because of his 'fateful sexual orientation'. The death penalty, according to the Court, 'is not only particularly severe by standards still acceptable by the legal order of the Federal Republic, but obviously intolerably hard...and from every conceivable viewpoint simply improper for the punishment of a violation of public morals that occurs on the border between the private and social areas'¹⁸⁴. The lack of proportionality may take on graver forms in cases where there are indications of functional impropriety of the general justice system in the country of origin¹⁸⁵. Thus, the Federal

¹⁸³See judgment of 1 October 1985, BVerwG 9 C 19.85 (transcript copy) at 7, judgment of 12 June 1990, BVerwG 9 C 3.90 (transcript copy) at 7; see also judgment of 6 December 1988, BVerwG 9 C 22.88, 81 BVerwGE 41, at 44-45: '...state measures because of withdrawal from military service may be of significance to asylum if they aim not only to punish a violation of a general duty of the citizens, but, in addition, they affect the bearer of the service duty by reason of characteristics of importance to asylum, especially because of a real or suspected undesirable political opinion'.

¹⁸⁴Judgment of 15 March 1988, BVerwG 9 C 278.86, 79 BVerwGE 143, at 153-4. See also judgment of 17 October 1989, BVerwG 9 C 25.89 (transcript copy) at 8-9, where the Court reaffirmed that 'the irreversible homosexuality shows a characteristic of the personality which the persecutory measures of the purpose and gravity feared of by the applicant in view of the current special political conditions must affect just as little as for example the characteristics of race, nationality, religion or political opinion named in Article 1 A Nr. 2 of the Geneva Convention.'

¹⁸⁵See judgment of 25 June 1991, BVerwG 9 C 131/90, 11 NVwZ (1992) 274, at 275: 'The exceptional severity of an impending penalty -especially the death penalty which is imposed and carried out in practice- provides an asylum-related cause, to be sure, especially when in a totalitarian state there lacks a settled and predictable judicial procedure and the penalties -also and particularly during a war- are

Administrative Court, in its judgment of 13 May 1993¹⁸⁶, upheld the appeal of a Pakistani Ahmadi refugee applicant who had been convicted to many years' imprisonment in Pakistan, on the basis of the country's Criminal Code, by reason of using in public the Muslim call of prayer.

The Federal Administrative Court has formulated a special notion able to constitute a gauging facilitator in cases where prosecution is involved. This notion has been the 'persecution bias' ('Verfolgungstendenz') that a general legislative measure or regulation may well possess along with its general legislative character. Such a bias may exist 'when at the same time the purpose would be a political discipline and intimidation of political opponents...a reeducation of dissidents or a forced assimilation of minorities'. Such purposes may be discerned through 'the particular form of the regulations...their implementation in practice, but also...their function in the general political system of the organisation...The totalitarian character of an organisation or a state form, the radicalism of their aims, the status in which they put the individual and his interests as well as the degree of the demanded or accomplished subjugation are important gauges of a persecution bias in regulations where a

imposed arbitrarily, because such an evident lack of principles of a state founded on the rule of law may be an indication of a persecution, lying behind the penal provision, [directed against] a characteristic of significance to asylum'; see also judgment of 24 November 1992, BVerwG 9 C 70.91, 15 InfAuslR (1993) 154, at 155.

¹⁸⁶BVerwG 9 C 49.92, 92 BVerwGE 278.

deliberate discrimination is not to be easily discerned'¹⁸⁷.

German case law has categorically ruled out of the asylum protective ambit any individuals who have been involved in terrorist activities, in their home country or in the country of refuge. The Bundesverwaltungsgericht has emphasised that in such cases 'there lacks an asylum-related significance in a penalty which concerns not only these persons who themselves use violence or appeal for that, but also those who agree on the use of violence by like-minded persons, while they put themselves to their service...Such an asylum seeker does not actually seek...peace and protection from political persecution, but a secured place to be protected for his further participation in a political struggle, in which [place] he would advance...his effort to prepare along with others the ground for the terrorism of the sides supported by him'¹⁸⁸. Accordingly, German case law has pointed out that

¹⁸⁷See judgment of 31 March 1981, 9 C 6.80, 62 BVerwGE 123 at 125, where it is also emphasised the excessively harsh penalty as an additional indicator of an intention to persecute; see also judgment of 26 June 1984, 9 C 185.83, 69 BVerwGE 320, at 323.

¹⁸⁸Judgment of 13 September 1990, BVerwG 9 B 97.90, 12 InfAuslR (1990) 345, at 345-6; see also judgment of 20 March 1990, BVerwG 9 C 6.90, 12 InfAuslR (1990) 205, at 206 where the Court pointed out that even in cases where there has been substantiated a refugee's participation in violent activities, the competent courts are to examine, using the objective method of persecution assessment, whether the state reaction against the refugee affects actually, in the framework of asylum law, the, actual or attributed, political opinion of the individual in question; see also judgment of 20 November 1990, BVerwG 9 C 73.90, 13 InfAuslR (1991) 181, at 183. See also Dawin, M., 'Asylrecht und gewalttätiger politischer Kampf', 10 NVwZ (1991) 349 *infra*, Schütz, G., 'Kein Asyl für den gewalttätigen Separatisten?', 3 ZAR (1983) 24 *infra*, Rumpf, Ch., 'Das türkische Gesetz zur Bekämpfung des Terrors

prosecution may be initiated by a state, drawing upon its right to self-defence, particularly relevant in cases of terrorism, or separatist/revolutionary activities, and be directed against the expression of political convictions, without establishing, in principle, a case of persecution if the above political expression violates legally protected interests of the state's citizens. No persecution may be substantiated, so far as the state punishment is directed against the criminal components of the criminalised action and not against the political conviction that gave rise to the activity, and the concomitant treatment does not surpass the usual degree of comparable dangerousness in the state of persecution¹⁸⁹.

One of the critical points to be examined in cases where violence has been utilised as expression of a political stance has been the time, as well as the manner in which this force may prevent a state reaction to take on its potential persecutory character. As indicated by the Federal Administrative Court, the graver the violent action the more likely is that the state reaction aims at the criminal and not

(Antiterrorgesetz)', 13 InfAuslR (1991) 285 infra.

¹⁸⁹Judgment of 20 December 1989, 2 BvR 958/86, 9 NVwZ (1990) 453, at 453-4; see also judgment of 9 October 1990, 2 BvR 1446/85, 13 InfAuslR (1991) 97, at 99. It is worth noting that the Federal Constitutional Court has added to the notion of the 'citizens' lawful interests' the notion of the 'political lawful interest' ('politisches Rechtsgut') referring to a state's foreign political relations which may be legitimately taken into account in asylum adjudication, in favour of that state's action, judgment of 26 June 1991, 2 BvR 427/91, 13 InfAuslR (1991) 360, at 362, judgment of 28 January 1993, 2 BvR 1803/92, 15 InfAuslR (1993) 142, at 145.

solely at the political content of the preceding violent political activity¹⁹⁰. Additionally, state measures should never be stretched beyond the circle of individuals who express their political conviction through terrorism, and, thus, affect also individuals who may speak in defence of the separatist or other political purposes, but do not support terrorist activities or are forced to do so¹⁹¹.

In the context of the margin of appreciation recognised as a right of the competent courts in asylum adjudication, the Federal Constitutional Court has also acknowledged that these organs may evaluate, assess, whether the 'content and scope' of a state penal norm falls into the asylum sphere and may, thus, provide a basis of persecution. The Court has accordingly provided a guideline of evaluation, according to which any such assessment should be carried out 'on the basis of the wording [of the legal norm] founded upon the authentic text'. In case the text may not be clearly outlined and defined by itself, or there are grounds to believe that the norm is actually interpreted and applied in a narrower or wider manner, compared to its wording, then it would be necessary that the determination take place through the

¹⁹⁰Judgment of 1 October 1985, BVerwG 9 C 19.85 (transcript copy) at 16; see also judgment of 16 April 1985, BVerwG 9 C 111.84 (transcript copy) at 6-7, judgment of 16 April 1985, BVerwG 9 C 115.84 (transcript copy) at 6-7, judgment of 16 April 1985, BVerwG 9 C 110.84 (transcript copy) at 6-7. For similar British case law see supra n. 164.

¹⁹¹See judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 339. See also judgment of 17 May 1983, 9 C 36.83, 67 BVerwGE 184, at 189-190.

foreign legal interpretation and application¹⁹². As a consequence, German case law has given priority, in the course of any such interpretation of a state's potentially persecutory legislation, to the 'objective meaning' of that legislation, on the basis of which it should be inferred whether or not there exists a discrimination that 'reaches a degree of significance to the granting of asylum'. The importance of this right, objective vein of interpretation lies in the actual relegation of a state's nominal legislative motivation which has been usually utilised for a justification of prosecutory measures grounded in the state's own 'self-defence'¹⁹³.

¹⁹²Judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 161; see also judgment of 9 November 1988, 2 BvR 288,388/88 (transcript copy) at 4-5. See also judgment of 26 October 1971, I C 30.68, 39 BVerwGE 27, at 28-9: 'The question whether a punishment on the ground of Republikflucht has a criminal or a political character may not have a generally applied answer, but it [this political character] is to be gathered in each case from the purpose and extent of the penalty as well as from the circumstances of the "commitment of the offence"'. Accord, judgment of 26 March 1985, BVerwG 9 B 37.84 (transcript copy) at 2; see also judgment of 26 July 1988, BVerwG 9 C 51.87 (transcript copy) at 11-12, judgment of 6 December 1988, BVerwG 9 C 22.88, 81 BVerwGE 41, at 46-7, judgment of 15 August 1988, BVerwG 9 C 3.88 (transcript copy) at 11; see also judgment of 30 June 1992, BVerwG 9 C 51.91 (transcript copy) at 13-16 where the Court examined the actual judicial interpretation of the legislation of Pakistan restricting religious expression.

¹⁹³See judgment of 9 November 1988, 2 BvR 288,388/88 (transcript copy) at 5-6, and 76 BVerfGE 143, at 166, judgment of 14 January 1992, 2 BvR 1300/89 etc., 38 Bayerische Verwaltungsblätter (1992) 369, at 369-370, judgment of 12 March 1992, 2 BvR 1353/89 etc., 107 DVB1 (1992) 821, at 822.

CONCLUSION

Prosecution as a sui generis form of persecution has provided a sound ground in all three national case law sets examined here, for the development of a rather common interpretational standpoint regarding the assessment of the above phenomenological issue of persecution. All three national jurisdictions have been eager to apply an objective method in the course of examining the potential political, lato sensu, nature of prosecution, thus laying particular emphasis not only upon the legislative text on which a prosecution may be based but, moreover, on the actual application of legislation in each particular case.

The first fundamental parameter of any such objective evaluation, commonly pointed out by both British and German case law, is the actual political situation in the country of origin, along with the concomitant degree of security of justice that such a situation may offer. It is submitted that the importance of this criterion should not be restricted to a narrow view of political regimes (predominant in asylum adjudication in 'western states' in the course of the 'cold war period') and of the management of refugee flows originating in countries of the former 'east block'. Nowadays, par excellence, a politico-legal examination in the context of a refugee status application should transcend any such narrow political polarisation, opting, instead, for an objective examination of the socio-political framework of persecution in the country of origin, no matter which country this may be.

The second parameter of examination in persecutory prosecution cases agreed upon by all three national jurisdictions is the notion of proportionality/reasonableness of punishment feared by the individual refugee in the country of origin. Given the connection, in each case, of the impending punishment with some of the established grounds for persecution, the severity of the penalty and the concomitant comparison with the alleged offence have constituted the common method of all three European jurisdictions of assessing the validity of a persecution claim in the framework of the legal notion of refugeehood. Accordingly, the death penalty has been in all cases recognised as a punishment whose severe and radical nature may satisfy the severity required from a persecutory measure in the context of refugee law.

However, a common problem encountered in all three European jurisdictions examined above has been the actual lack of any reference to international legal standards and principles, like the ones provided by international human rights instruments, which should constitute, due to their international character, a fundamental gauge of prosecuting measures in the asylum context. International instruments relating to the protection of human rights, in particular the 1966 International Covenants of Human Rights, may indeed represent the most valuable standards relating to persecution evaluation. These are international instruments based on the same fundamental principles of international law as the international Refugee Convention. Their value in the judicial

interpretation of refugeehood lies in the fact that their ambit exceeds the potentially parochial standard-setting prisms of both the country of refugee origin and of refuge, both of which have been de facto and de iure rejected by the examined national case law sets as legal prototypes in asylum adjudication procedures. Moreover, they have the real potential to constitute an up-to-date legal vehicle for the substantive, consistent and principled harmonisation of European asylum law. Given their internationally established legal character, it is submitted that the above two Covenants may and should legitimately play a most significant and productive role in refugee status case law, if they are appropriately employed by learned domestic competent courts and tribunals in the course of their interpretation task.



JUDICIAL INTERPRETATION OF REFUGEEHOOD:

A CRITICAL COMPARATIVE ANALYSIS WITH SPECIAL REFERENCE TO
CONTEMPORARY BRITISH, FRENCH AND GERMAN JURISPRUDENCE

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CHAPTER VI

THE EXTENT AND LIMITS OF THE POLYMORPHOUS NATURE OF THE AGENTS OF PERSECUTION IN JUDICIAL INTERPRETATION

SECTION 1. THE QUESTION OF THE AGENTS OF PERSECUTION IN REFUGEE LAW WITH SPECIAL REFERENCE TO THE QUESTION OF STATE RESPONSIBILITY

The question of the agent of persecution has been as controversial as persecution itself throughout the history of modern refugee law. The controversial nature of the above question originates in the actual lack of any definition of the 'agent of persecution' in international refugee law¹. The 1951/1967 Refugee Convention has not provided any clue to the issue. The Convention refugee definition does refer expressis verbis to the inability or unwillingness of the refugee to avail her/himself of the protection of the country of nationality or of former habitual residence. However, the identification of the organ that should (be able to) perpe-

¹See Grahl-Madsen, A., The Status of Refugees in International Law, vol. I, Leyden, A.W. Sijthof, 1966, at 189-192, Grahl-Madsen, A., 'International refugee law today and tomorrow', 20 Archiv des Völkerrechts (1982) 411, at 423, Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 125 et seq., Köfner, G., Nicolaus, P., Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Mainz, München, Grünewald/Kaiser, 1986, Band 2, at 433 infra, Brill, W.L., The 1951 Convention Definition of Refugee Status and the Issue of Agents of Persecution: A Comparative and Human Rights Based Analysis, Mémoire (Diplôme d'études supérieures), Université de Genève, Institut Universitaire de Hautes Etudes Internationales, 1992, at 1-19. See also van der Veen, J., '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', 11 NYIL (1980) 167, at 170-2, Kaul, Ch., 'Bemerkungen zum Flüchtlingsbegriff der Genfer Flüchtlingskonvention', in Geistlinger, M. et al. (Hrsg.), Flucht-Asyl-Migration, Regensburg, Transfer-Verlag, 1991, 23, at 38.

trate persecution rests in a nebulous condition in the UN Refugee Convention, a fact that has provided domestic courts with a substantial margin of appreciation in the course of interpretation of the legal concept of refugeehood.

The UNHCR Handbook² has attempted to provide some clarification to the issue. There, it has been recognised that the 'normal' agent of persecution would be the 'authorities of a country'. Apart from the country's authorities, however, it has been established in the UNHCR Handbook that as agents of persecution, in the context of territorial asylum, may also act 'sections of the population that do not respect the standards established by the laws of the country concerned', on condition that the persecutory acts 'are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection'³. The above definition is clearly based on the premise that the epicentre of any persecution in the context of asylum would be the state through its various organs. Any expansion of such a conception to individuals or groups of individuals with a potential persecutory function equivalent to that of a state⁴ but with

²UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979 (hereinafter UNHCR, Handbook).

³UNHCR, Handbook, at 17, para. 65.

⁴See Petersen, W., 'A general typology of migration', in Jansen, C.J. (ed.), Readings in the Sociology of Migration, Oxford, London etc., Pergamon Press, 1970, 49, at 58: 'If in primitive migrations the activating agent is ecological pressure, in forced migrations it is the state or some functionally equivalent social institution.'

no actual relation to the state power, would be legitimate only on condition that it may be assumed and be imputed a relevant state responsibility vis-à-vis persecution. This responsibility should be based on the state's obligation to protect the legitimate interests of, at least, its nationals on its sovereign territory.

This is undoubtedly a useful definition applicable to refugee case law, given the internationally recognised status of the recommendations included in the UNHCR Handbook. However, it is to be noted that the first section of the above definition, if interpreted restrictively, may unreasonably limit the ambit of territorial asylum to persecutory activism that contravenes solely the legislation of the country of refugee origin. The unreasonable character of any such interpretation lies in the fact that persecution, as shown in the previous chapter on persecutory prosecution, emanates in many cases from the legislation itself and its application in the country of refugee origin. Such oppressive domestic legal frameworks should not, therefore, constitute the boundaries of a persecution assessment, but they should be transcended. The only legitimately alternative legal standards should be the internationally accepted and established human rights norms, especially as enshrined in the two 1966 UN Covenants on civil and political, and economic, social and cultural rights.

Indeed, the framework of the contemporary international human rights law may provide the most appropriate standard-setting

for the reinforcement of the refugee law thesis according to which a state of refugee origin is to be held responsible not only when its own organs and agents perpetrate serious human rights violations that force its nationals to flee persecution⁵. Such state responsibility for human rights violations has been a truism in international human rights law, which corresponds to the well-established rules of state responsibility of customary international law⁶. Responsibility may also be imputed to a state when it may be demonstrated that it has shown negligence to prevent or to stem human rights

⁵See Executive Committee of the UNHCR's Programme, Note on Certain Aspects of Sexual Violence Against Refugee Women, UN Doc. A/AC.96/822, 12 October 1993, at 12, para. 31: 'The international system for the protection of refugees and the international system for the protection of human rights both rely first and foremost on States to discharge their responsibility to persons in need of protection.' See also Hausammann, Ch., Les Femmes Victimes de Persécutions et la Notion de Réfugié, Berne, Bureau fédéral de l'égalité entre femmes et hommes, avril 1992, at 20.

⁶See Draft Articles of State Responsibility in Yearbook of the International Law Commission, 1980, vol. II, Part Two, at 30 et seq. See also, inter alia, Brownlie, I., System of the Law of Nations State Responsibility Part I, Oxford, Clarendon Press, 1983, at 132-158, Brownlie, I., Principles of Public International Law, Oxford, Clarendon Press, 1990, Fourth Edition, at 446 et seq., Harris, D.J., Cases and Materials on International Law, London, Sweet & Maxwell, 1991, Fourth Edition, at 475 et seq. With reference to human rights violations, state responsibility has been recognised also for 'acts of State organs abroad', see European Commission of Human Rights, Decision of 4 March 1991, Applications Nos. 15299/89, 15300/89, 15318/89-Chrysostomos et al. v. Turkey, 12 Human Rights Law Journal (1991) 113, at 121-2. See also Lee, L.T., 'The right to compensation: Refugees and countries of asylum', 80 AJIL (1986) 532, at 538 infra. See also Olimpia Lazo-Majano v. INS, US Court of Appeals, Ninth Cir., April 2, 1987, 813 F.2d 1432, at 1433-6 where the court upheld the appeal of the Salvadoran appellant to whom anti-governmental political opinions were imputed and who had been subjected on many occasions to rape by a sergeant of the Salvadoran military; see also Desir v. N. Ilchert, US Court of Appeals, Ninth Cir., May 26, 1988, 840 F.2d 723 at 727 et seq.

violations perpetrated by individual nationals (or even non-nationals) on the territory under the state's jurisdiction⁷. Such a state responsibility deriving from an horizontal structure of human rights violations, that is, violations perpetrated by individuals, and not by the state, against other individuals, may be grounded in two fundamental international human rights instruments. First, the 1948 Universal Declaration of Human Rights⁸, which has emphasised in its post-Preamble text the obligation of 'every individual and every organ of society...by progressive measures, national and international, to secure [the] universal and effective recognition and observance [of the rights and freedoms enshrined in the Declaration], both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'.

Second, in the same vein, responsibility may also be imputed to a state member to implement the 1966 International Covenant on Civil and Political Rights (ICCPR), given that it is prescribed by the above Covenant not only the state's respect

⁷See Hofmann, R., 'Refugee-generating policies and the law of state responsibility', 45 ZaöRV (1985) 694, at 701-2. On state responsibility for actions of individuals in customary international law see Brownlie, I., ibid., at 159 infra, Wolf, J., 'Zurechnungsfragen bei Handlungen von Privatpersonen', 45 ZaöRV (1985) 232, at 237 infra. See also Krishnaswami, A., Study of Discrimination in the Matter of Religious Rights and Practices, New York, United Nations, 1960, at 22, where the author stresses the duty of public authorities to protect individuals and groups against 'restraints upon freedom of thought, conscience and religion -and even denials of that freedom- [which] stem not from any governmental action but from pressures within the society in which they occur.'

⁸UN GA Resol. 217 A (III), UN Doc. A/810, at 71 (1948).

for the human rights included therein, but moreover state action 'to ensure' these rights 'to all individuals within its territory and subject to its jurisdiction'⁹. The fact that ICCPR has attempted to protect the therein enshrined human rights not only vertically, but moreover horizontally has been reaffirmed by its Article 5 1. which has proscribed any interpretation of the Covenant, so as to imply 'for any State, group or person any right to engage in an activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the...Covenant'¹⁰.

The responsibility of state parties to the ICCPR vis-à-vis violations of therein enshrined human rights by governmental or not agents has been firmly established by the UN Human Rights Committee in Herrera Rubio v. Colombia¹¹. Even though the case concerned serious human rights violations perpetrated by members of governmental armed forces, the wording of the decision of the UN Human Rights Committee has been structured in such a manner that makes clear that state responsibility stretches further than illegal actions of governmental agents.

⁹Article 2 of the Covenant; see text of the Covenant in 999 UNTS 171.

¹⁰See also similar Article 17 of the 1950 European Convention on Human Rights, 213 UNTS 221, and Article 29 (a) of the 1969 American Convention on Human Rights, 1144 UNTS 123.

¹¹Communication No. 161/1983, 2 November 1987, in Report of the Human Rights Committee, General Assembly, Official Records: 43rd Session, Supplement No. 40 (A/43/40), New York, United Nations, 1988, at 190.

The Committee emphasised in its decision its 'general comment No. 6 (16) concerning article 6 of the Covenant, which provides, inter alia, that States parties should take specific and effective measures' for the protection of the human right to life enshrined in the above Article¹². Accordingly, the UN Human Rights Committee concluded that the respondent state had violated, inter alia, Article 6 of ICCPR, on the ground that 'the State party failed to take appropriate measures to prevent the disappearance and subsequent killings [of the communication author's parents] and to investigate effectively the responsibility for their murders'¹³. The UN Human Rights Committee affirmed Herrera Rubio in W. Delgado Páez v. Colombia¹⁴. The case concerned a Colombian national who had been actually granted territorial asylum in France. The UN Human Rights Committee found that Colombia had violated, inter alia, Article 9.1 of the ICCPR (right to liberty and security of person), having laid emphasis on the fact that state parties 'have undertaken to guarantee the rights enshrined in the Covenant' and, consequently, these states 'are under an obligation to take reasonable and appropriate measures to protect [persons under their jurisdiction]'¹⁵. The fact that the persecutory measures to which the above applicant had been

¹²Ibid., at 197, para. 10.3.

¹³Ibid. at 198, para. 11.

¹⁴Communication No. 195/1985, 12 July 1990, Report of the Human Rights Committee, vol. II, General Assembly, Official Records: 45th Session, Supplement No. 40 (A/45/40), New York, United Nations, 1990, at 43.

¹⁵Ibid. at 47, para. 5.5.

subjected in his country of origin originated, in fact, not only in governmental agents but also in anonymous death threats, as well as the structure of the above decision of the UN Human Rights Committee which expressly favoured an effective interpretation of Article 9.1, clearly indicate the firm establishment in contemporary international law of state responsibility for human rights violations perpetrated not only by state agents, but also by private law persons.

Finally, a third basic international human rights instrument, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination¹⁶, has reinforced the above view of indirect state responsibility in contemporary international human rights law. Article 2 1. (d) of the above Convention has expressly laid down the obligation of every state party to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization'¹⁷.

The imputability to the state of human rights violations perpetrated by public or private law persons seems to have established itself in the practice of regional human rights law as well, as demonstrated by relevant jurisprudence of the European Court and Commission of Human Rights, as well as of the Inter-American Court of Human Rights. In Young, James and

¹⁶660 UNTS 195.

¹⁷Emphasis added.

Webster¹⁸ the European Court in Strasbourg acknowledged the respondent state's responsibility based on the latter's domestic legislation that made possible the violation by a legal person under state control of the applicants' rights of peaceful assembly and freedom of association, including the right to form and to join trade unions¹⁹. This basic thesis, now with express regard to human rights-violating actions of private law persons, was reaffirmed by the same Court, for the sake of 'an effective respect' of the human rights enshrined in the European Convention on Human Rights, in X. and Y. v. The Netherlands²⁰. Here it was stressed and established by the European Court of Human Rights that the state's responsibility deriving from its 'positive obligations', on the basis of the above European Convention, is to prevent or protect persons on its territory from acts of individuals that have the potential to constitute violations of a person's private or family life²¹. This is a thesis that expressly endorses the indirect

¹⁸Publications of the European Court of Human Rights, Series A, vol. 44, CASE OF YOUNG, JAMES AND WEBSTER v. UK, judgment of 13 August 1981.

¹⁹Ibid., at 20, para. 49: 'Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis.'; see also ibid. at 21-23, paras. 52-55.

²⁰European Court of Human Rights, judgment of 26 March 1985, Series A, no. 91.

²¹Ibid. at 11, para. 23: 'The Court recalls that although the object of article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities...there may be positive obligations inherent in an effective respect for private or family life...These

effect of the above Convention's human rights on relations between private parties (indirect Drittwirkung). It is to be noted that the European Commission of Human Rights has clearly accepted the same thesis in cases concerning expulsion of individuals from a state party to the European Convention on Human Rights. In Altun v. Federal Republic of Germany²² the Commission emphasised that in cases of expulsion it 'has taken account...of a danger not arising out of the authorities of the State receiving the person concerned...'²³. The same

obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.' This thesis was reiterated by the Court in Plattform, Eur. Court H.R., Plattform "Ärzte für das Leben", judgment of 21 June 1988, Series A no. 139, at 12, para. 32.

²²Application No. 10308/83, Decision of 3 May 1983, 26 Yearbook of the European Convention on Human Rights (1983) 163.

²³Ibid. at 164, para. 5. See also Application No. 7216/75, X. v. Federal Republic of Germany, Decision of 20 May 1976, European Commission of Human Rights, Decisions and Reports 5, 137, at 143. On this 'indirect Drittwirkung' of rights enshrined in the European Convention on Human Rights see also Van Dijk, P., Van Hoof, G.J.H., Theory and Practice of the European Convention on Human Rights, Second Edition, Deventer, Kluwer, 1990, at 15-20. On the limited, as yet, but significant role of the European Convention on Human Rights (ECHR) in refugee protection see Einarsen, T., 'The European Convention on Human Rights and the notion of an implied right to de facto asylum', 2 IJRL (1990) 360 infra, Alleweldt, R., 'Protection against expulsion under Article 3 of the European Convention on Human Rights', 4 European Journal of International Law (1993) 360 infra; see also Frowein, J.A., Zimmermann, A., Der völkerrechtliche Rahmen für die Reform des deutschen Asylrechts, Köln, Bundesanzeiger, 1993, at 29-31. See also the following case law of the Strasbourg Human Rights Court concerning expulsion of asylum seekers, and involving the application of, inter alia, Article 3 of the ECHR ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'): Case of Cruz Varas and others v. Sweden, Judgment of 20 March 1991, Series A, vol. 201, esp. at para. 68 et seq., Vilvarajah and others, Judgment of 30 October 1991, Series A no. 215, at para 101 et seq., Case of Vijayanathan and Pusparajah v. France, Judgment of 27 August

stance has been adopted by the Inter-American Court of Human Rights, as shown in Velásquez Rodríguez v. Honduras²⁴. The Court emphasised in this judgment that the obligation of the contracting states, in the context of the American Human Rights Convention, to 'ensure' the 'free and full exercise of the [Convention] rights' by the individuals subject to their jurisdiction 'implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'²⁵. However, what was additionally pointed out by the same Court, and herein lies most of the judgment's importance for our case, is that responsibility for violations of human rights enshrined in the American Convention on Human Rights may be imputed to a state not only by reason of an act carried out by a 'public authority or by

1992, Series A no. 241-B, and the Opinion of the European Commission of Human Rights, ibid. at 89 infra; see also Dutch Supreme Court decision and opinion of the Advocaat-Generaal in The Netherlands v. Short, January 26, March 30, 1990, 29 ILM (1990) 1375 infra.

²⁴ VELASQUEZ RODRIGUEZ CASE, judgment of July 29, 1988, Inter-American Court of Human Rights, Series C: Decisions and Judgments, No. 4. US refugee case law has also established the legitimacy of fear of persecution in cases where persecution emanates from non-governmental groups, like extreme political organisations (see McMullen v. INS, US Court of Appeals, Ninth Cir., October 13, 1981, 658 F.2d 1312 at 1315 n.2) and guerrilla groups (see Arteaga v. INS, US Court of Appeals, Ninth Cir., April 6, 1988, 836 F.2d 1227, at 1231, Rodriguez-Rivera v. US Department of Immigration and Naturalization, US Court of Appeals, Ninth Cir., August 12, 1988, 848 F.2d 998, at 1006, Estrada-Posadas v. US INS, US Court of Appeals, Ninth Cir., April 24, 1991, 924 F.2d 916, at 919) with an actual ability to persecute, and which the government is unwilling or unable to control.

²⁵VELASQUEZ RODRIGUEZ CASE, ibid. at 152, para. 166.

persons who use their position of authority'; such an illegal act by a private person may also generate international state responsibility, in the words of the Court, 'not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [1969 American] Convention [on Human Rights]'²⁶.

²⁶Ibid. at 154, para. 172. On the establishment in contemporary case law and doctrine of state responsibility for human rights violations perpetrated by individuals see Clapham, A., Human Rights in the Private Sphere, Oxford, Clarendon Press, 1993, at 89-133, Meron, Th., Human Rights and Humanitarian Norms as Customary Law, Oxford, Clarendon Press, 1989, at 155-171, Drzemczewski, A.Z., European Human Rights Convention in Domestic Law, Oxford, Clarendon Press, 1985, at 199-228, Sperduti, G., 'Responsibility of states for activities of private law persons', Encyclopedia of Public International Law, vol. 10, 1987, 373, at 374-5. See also Forde, M., 'Non-governmental interferences with human rights', 56 BYIL (1985) 253, at 270 infra, Eissen, M.-A., 'The European Convention on Human Rights and the duties of the individual', 32 NTIR (1962) 230, at 242 et seq., Khol, A., 'The protection of human rights in relationships between private individuals: The Austrian situation', in International Institute of Human Rights (ed.), René Cassin Amicorum Discipulorumque Liber III, Paris, Pedone, 1971, 195, Kiss, A.-C., 'La protection des droits de l'homme dans les rapports entre personnes privées en droit international public', ibid. at 215 et seq.. See also American Law Institute, Restatement of the Law Third The Foreign Relations Law of the United States, vol. 2, St. Paul, Minn., American Law Institute Publishers, 1987, at 161, Section 702 'Customary International Law of Human Rights' which reads: 'A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.'. The Comment that follows the above text, ibid. at 162, takes a more restrictive view than that of the European and of the Inter-American Courts of Human Rights, adopted in the context of the relevant regional human rights conventions, stating that 'A state is not ordinarily responsible under this section for violations of human rights by individuals, such as individual acts of torture or of racial discrimination. A state would be responsible if, as a matter of state policy, it required, encouraged, or condoned such private violations of human rights, but mere failure to enact laws prohibiting private violations

State responsibility for acts of private persons who violate internationally established human rights is to be regarded as existent also in cases of 'public emergency' which may be in place in time of an armed conflict or of 'public danger' that 'threatens the independence or security' of a state²⁷. Provided that it is in a position, not only de iure but also de facto, to protect its nationals²⁸, the state is to be regarded as responsible in the above context not only in cases of violations of non-derogable human rights (like the right to life, and freedom from torture and from cruel, inhuman or

of human rights would not ordinarily constitute encouragement or condonation.'. The theoretical harbinger of this nature of state responsibility has been the German legal theory of the 'third party effect' ('Drittwirkung') of fundamental (human) rights, developed in Germany, especially after the following judgment of the Bundesverfassungsgericht that established this theory: judgment of 15 January 1958, 1 BvR 400/51, 7 BVerfGE 198, see esp. 203-212; on the Drittwirkung theory and extended bibliography see also, inter alia, Drzemczewski, A.Z., idem, Iliopoulos-Strangas, J., The "Third Party Effect" of the Civil and Social Rights of the Constitution of 1975, Athens, Komotini, Sakkoula, 1990 (in Greek), at 3-71.

²⁷See the derogation clause of 1969 American Convention on Human Rights, 1144 UNTS 123, Article 27 1.; see also the derogation clauses of 1950 European Convention on Human Rights, Article 15.1, 1966 International Covenant on Civil and Political Rights, Article 4.1. On refugee production in the context of third world conflicts see Hakovirta, H., Third World Conflicts and Refugeeism, Helsinki, Finnish Society of Sciences and Letters, 1986, at 63 infra.

²⁸See Hofmann, R., loc. cit. supra n. 7 at 702. See also Evans, G., 'Agents of persecution: A question of protection', Discussion Paper #3, Refugee Law Research Unit, Osgoode Hall Law School, York University, 1991, at 7; see also Blum, C.P., 'Political assumptions in asylum decision-making: The example of refugees from armed conflict', in Adelman, H. (ed.), Refugee Policy Canada and the United States, Toronto, York Lanes Press, 1991, 282, at 283-5. See also Canada (Attorney General) v. Ward, Supreme Court of Canada, June 30, 1993, 153 National Reporter 321, at 359: 'Absent a situation of complete breakdown of state apparatus...it should be assumed that the state is capable of protecting a claimant.'

degrading treatment or punishment) but also when derogable human rights have been violated, if the state in question has not actually followed the derogation procedure and/or the substantive requirements established by the human rights instruments by which it is legally bound²⁹. In any event, in cases where the customary international law rules of 'state of necessity'³⁰ may not be applicable, then, as noted by Theodor Meron, 'the burden of establishing both the state of necessity and the justification for derogation from a given norm' should lie entirely with the state³¹.

Of particular interest to refugee law are persecution claims originating in internal armed conflicts. In such cases of emergency, states are bound, in addition to international

²⁹See Max van der Stoep, Special Rapporteur of the Commission on Human Rights, Report on the situation of human rights in Iraq, UN Doc. E/CN.4/1992/31, 18 February 1992 at 11, para. 38: 'From the clear wording of article 4 of [ICCPR], as read in the light of the whole Covenant and in the spirit of international human rights law in general, it is apparent that derogations are to be strictly limited and can never be implied. For if the procedure of notification and justification were not to be respected, then it would not be possible to determine the substance or legitimacy of derogations, and potentially arbitrary and abusive measures could undermine respect for human rights in general.'

³⁰See Yearbook of the International Law Commission, 1980, vol. II, Part Two, at 34 infra; see also Brownlie, I., op. cit. supra n. 6 at 167-179.

³¹See Meron, Th., op. cit. supra n. 26, at 217-8, and at 215-222. See also Sieghart, P., The International Law of Human Rights, Oxford, Clarendon Press, 1983, at 110-118, Oraá, J., Human Rights and States of Emergency in International Law, Oxford, Clarendon Press, 1992, at 34 et seq., Higgins, R., 'Derogations under human rights treaties', 48 BYIL (1976-77) 281, at 289 et seq., Schreuer, Ch., 'Derogation of human rights in situations of public emergency: The experience of the European Convention on Human Rights', 9 The Yale Journal of World Public Order (1982) 113 infra.

human rights law, by international humanitarian law standards some of which are of a customary international law nature. Of great importance are indeed the fundamental, customary law principles enshrined in common Article 3 of the 1949 Geneva Conventions. This provision has laid down, in cases relating to an 'armed conflict not of an international character', some legal principles binding upon states 'at any time and in any place'. These principles refer to treatment of, among others, 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms'. With respect to such persons, Article 3 has established four sets of prohibited, under any circumstances, acts: '(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'³² This significant, fundamental provision was further developed by Article 4 of the 1977 Second Geneva Protocol Additional to the 1949 Geneva

³²Text in Roberts, A., Guelff, R. (eds.), Documents on the Laws of War, Oxford, Clarendon Press, 1989, Second Edition, at 172. 'In view of the large number of states parties to the 1949 Geneva Conventions and the status which the Conventions have acquired in the international community, it is reasonable to assume that the Conventions are (at least in large part) declaratory of customary international law. This is particularly the case in respect of the general principles contained therein.', ibid. at 170; see also De Lupis, I.D., The Law of War, Cambridge etc., Cambridge University Press, 1987, at 167-9.

Conventions, explicitly applicable to armed conflicts between the armed forces of a state and `dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'³³. Article 4 has added to the 1949 common Article 3 the following prohibited acts: `(a) violence to the...health and physical or mental well-being of persons, in particular...cruel treatment such as torture, mutilation [already in common Article 3] or any form of corporal punishment; (b) collective punishments;...(d) acts of terrorism; (e)...rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any of the foregoing acts.'³⁴ In view of the prohibitive, customary law character of the vast majority of the above acts, states do bear responsibility for these acts in the context of internal armed conflicts, a significant point in relevant asylum cases where the agent of persecution is at issue³⁵. It is finally to be noted that responsibility

³³Article 1 1. of the 1977 Geneva Protocol II, text in Roberts, A., Guelff, R. (eds.), ibid. at 449-50; see also De Lupis, I.D., ibid. at 170-4.

³⁴Ibid. at 450-1.

³⁵See also Meron, Th., Human Rights in Internal Strife: Their International Protection, Cambridge, Grotius, 1987, at 29-70, Plattner, D., `The protection of displaced persons in non-international armed conflicts', 32 International Review of the Red Cross (1992) 567, at 570 et seq., von Sternberg, M.R., `Political asylum and the law of internal armed conflict: Refugee status, human rights and humanitarian law concerns', 5 IJRL (1993) 153, at 171-6, Butcher, P., `Assessing fear of persecution in a war zone', 5 Georgetown Immigration Law

for acts of 'insurrectional movements' established in the territory of a state may not be imputed, in principle, to this state, according to customary international law³⁶. However, such an attribution of responsibility may be possible if the insurrectional movement 'becomes the new government' of the state in question³⁷.

The foregoing considerations are of significance not only from a theoretical but also from a practical standpoint in the context of refugee status case law regarding the question of the agents of persecution. As demonstrated below, domestic courts of the European countries that have been targeted by the present research have shown so far a complete lack of interest in (or ignorance of) the constructive role that international and, especially, international human rights/humanitarian law may play in the examination and

Journal (1991) 435, at 468-9. It is also to be noted that the above provisions of the 1949 Geneva Conventions and of the 1977 Geneva Protocols constitute 'provisions relating to the protection of the human person' whose legal force, according to Article 60. 5 of the 1969 Vienna Convention on Treaties (1155 UNTS 331), may not be affected by termination or suspension invoked by one party, in case of a 'material breach' by another party to the treaties; see Schwelb, E., 'The law of treaties and human rights', in Reisman, W.M., Weston, B.H. (eds.), Toward World Order and Human Dignity, New York, The Free Press, 1976, 262, at 272 et seq.

³⁶See Yearbook of the International Law Commission, 1980, vol. II, Part Two, at 31, Draft Article 14 'Conduct of organs of an insurrectional movement'. On the question of national liberation movements' authority to use force in international law see Wilson, H.A., International Law and the Use of Force by National Liberation Movements, Oxford, Clarendon Press, 1988, at 91 infra.

³⁷Yearbook of the International Law Commission, 1980, vol. II, Part Two, at 31, Article 15. See also Meron, Th., op. cit. supra n. 26, at 162.

establishment of state responsibility for acts of persecution in the asylum context.

However, it is submitted that this situation may and should be reversed. Employment of the contemporary international human rights and humanitarian law rules concerning state responsibility for human rights violations may act beneficially not only on an individual domestic refugee case law basis aiding the creation of coherent and up-to-date judicial decisions. Moreover, it has the real potential to act as the main catalyst for the development of a homogeneous and consistent European set of refugee status jurisprudence so much required, as already mentioned, in the current and future framework of European asylum law harmonisation.

SECTION 2. THE ISSUE OF THE AGENTS OF PERSECUTION IN THE BRITISH, FRENCH AND GERMAN JURISPRUDENCE

In British case law persecution originating in the authorities of the country of refugee origin has been accepted as the regular pattern that persecution may take on. The British administration has liaised governmental persecutory measures with 'systematic or organised or authorised persecution', in contradistinction to 'unsystematic or random or unauthorised persecution' which may emanate from individuals without any kind of official state authorisation. Both the above patterns were recognised as possible in the context of refugee persecution by the High Court in R. v. Secretary of State for

the Home Department ex parte Rose Solomy Alupo³⁸. The examination and assessment of both potential typologies by the administration have been therefore acknowledged by the court to be legitimate. In Alupo, which concerned a Ugandan refugee applicant, member of the Iteso tribe, the potential non-governmental persecutors examined by the Secretary of State were 'individual soldiers' who subjected the refugee applicant to harassment³⁹. This stance, however, had been earlier established by the Queen's Bench Division in R. v. The Secretary of State for the Home Department ex parte Jeyakumaran⁴⁰ where Taylor J, using as a reasoning basis the aforementioned UNHCR Handbook recommendation, had expressly accepted that persecution may also be substantiated in cases where persecutory action is taken not by the government of a state, but by 'soldiers out of control'⁴¹.

Choudhury⁴² concerned a Bangladeshi refugee applicant who alleged that he had suffered persecution by 'government supporters' whose activities 'the authorities cannot or do not wish to control'. The Secretary of State had accepted the

³⁸Queen's Bench Division, 29 May 1991, [1991] Imm AR 538, at 541-2.

³⁹Ibid. at 541.

⁴⁰Queen's Bench Division, 28 June 1985, [1994] Imm AR 45.

⁴¹Ibid. at 48: '...I ask what solace is it to the victim to know he is being persecuted by soldiers out of control rather than by the Government, if that be the case.'

⁴²R. v. Secretary of State for the Home Department ex parte Choudhury, Court of Appeal (Civil Division), 19 September 1991 (transcript copy).

legitimacy of such a claim on condition that the applicant could 'show that [the above individuals'] activities were knowingly tolerated by the authorities or that the authorities refused or were unable to offer effective protection'. The Court of Appeal regrettably did not elaborate on this issue but accepted, indirectly, the legitimate character of the above reasoning of the Home Secretary⁴³.

Persecution of individual members of a minority religious group by another stronger religious group, with governmental acquiescence, has been also indirectly accepted by the High Court as possible in R. v. Secretary of State for the Home Department ex parte Tanak⁴⁴. Persecution by 'Islamic fundamentalists' directed against a refugee applicant whose academic work was considered to be offensive by such individuals has been also regarded by the Immigration Appeal Tribunal as valid for a refugee status claim, in case the applicant returned to his country of origin⁴⁵.

⁴³Accord, R. v. Secretary of State for the Home Department ex parte Dondu, Court of Appeal (Civil Division), 25 May 1990 (transcript copy).

⁴⁴Queen's Bench Division, CO/666/90, 26 November 1990 (transcript copy). The case concerned a Turkish Alevi Kurd who claimed to have suffered persecution by Sunnis, and to have been provided with no protection by the authorities in Turkey.

⁴⁵See Mahmood Tariq v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/1596/85 (4569), 13 May, 1986 (transcript copy), at 5 where the Tribunal concluded saying that 'We have had additional evidence [to that of the adjudicator] which at least suggests that [the appellant's] work has provoked considerable active hostility and perhaps, has encouraged those ill-disposed towards him to acquire damaging evidence, which in the circumstances obtaining in Pakistan at the date of decision could have led to his being persecuted as that term is to be

Of a particularly complicated nature have been cases where no actual state authority is in place, de facto, in a specific country which has been in disarray by reason of, e.g., a civil war. Suffering of individuals in general civil war situations has not been regarded, per se, as a legitimate ground for a refugee status application in British case law. British courts have demanded in such contexts evidence of individual persecution showing a special plight, distinguished from the general situation to which the population of a specific country has been subjected in the course of a civil war. The High Court pointed out in R. v. Secretary of State for the Home Department ex parte Kandiah Navaratnam and others⁴⁶, a case concerning Sri Lankan Tamil asylum seekers, that 'If one lives in an area where there is civil war, or rebellion, or civil disturbance, or terrorism, call it what one will, there will be unpleasant experiences and one may get hurt. But that is not the same as saying that there is persecution on the grounds of race.' Accordingly, in R. v. The Secretary of State for the Home Department ex parte Coomaraswamy and another⁴⁷ the High Court upheld the appeal partially, having found that the Home Secretary had not paid particular attention to the plight of the second Tamil refugee applicant from Sri Lanka

understood in the context of the rules.'

⁴⁶Queen's Bench Divisional Court, CO/1522/87, CO/1525/87, CO/1467/87, CO/1469/87, CO/1470/87, 25 September 1987 (transcript copy). Accord, R. v. Secretary of State for the Home Department ex parte Ganeshanathan, Court of Appeal (Civil Division), 27 July 1988 (transcript copy).

⁴⁷Queen's Bench Division, CO/331/84, 28 June 1985 (transcript copy).

who 'had been threatened on several occasions and...once... escaped death by the mob only by hiding in a loft.' This interpretational stance was followed by the Immigration Appeal Tribunal in Khodr Ali Boutari v. Secretary of State for the Home Department⁴⁸. In this case, the appellant, a Sunni Lebanese, claimed that he was persecuted in his country of origin, in an area controlled by Shi-ites. The persecution carried out by the latter religious faction was considered, on the basis of the case's evidence, to constitute an adequate ground of refugee status. The Tribunal emphasised that 'If it be right that persecution by a faction is within the Convention when a government is unable or unwilling to control that faction it would be curious if persecution by a faction fell outside the convention because there was no government at all. It would either be within the Convention because of the faction exercising governmental powers or (as appears to be the case in the Lebanon) the government is simply unable to exercise central authority and therefore to control the various factions.'⁴⁹

⁴⁸Appeal No. TH/7065/89 (7349), 14 August 1990 (transcript copy).

⁴⁹Ibid. at 12. See, however, Mohamed Ibrahim Hamieh v. Secretary of State for the Home Department, Court of Appeal, 4 August 1992, [1993] Imm AR 323, at 326-7, where the court - in a case concerning a Lebanese asylum seeker who was not politically active but was threatened by Hezbollah because he resisted to join their forces- accepted as reasonable the following conclusion of the Home Office, without, however, dealing substantively with the question of persecution in the above framework: "...if [the applicant's] brother has been killed this would not change the Secretary of State's view that [the applicant] would not be of specific interest to either Hezbollah or any other faction were he to be returned to the Lebanon, and maintains his refusal of asylum on the grounds that [his] reluctance to join any military group, and

In France the Conseil d'Etat has adopted a stance similar to that of the British case law vis-à-vis indirect state persecution, that is, persecution carried out by third individual parties, for which responsibility may, in principle, ultimately be placed upon the state of refugee origin. The French locus classicus has been Dankha⁵⁰, a case concerning a Christian Iraqi national, member of the Assyro-Chaldean minority in his country of origin. Dankha had encountered difficulties in his profession as a teacher of the Assyrian language, religion and culture: he was under police surveillance, his library and church had been destroyed, and he himself was arrested on multiple occasions and threatened by reason of his refusal to integrate into the majority Arab population in Iraq. The main point in that case was that while the appellant was not in a position to prove his ill-treatment by state authorities, he was able to substantiate persecution-

fear of pressure in the future to join such a group, does not amount to fear of persecution for any reason recognised under the Refugee Convention."'; see also R. v. Secretary of State for the Home Department ex p. Ibrahim Zib, [1993] Imm AR 350, at 351. See also Ali Sobhi Kaseem Hammoud v. Immigration Officer-Heathrow, Immigration Appeal Tribunal, Appeal No. TH/114625/83 (3678) (3415R), 8 January 1985 (transcript copy); see also Genet Woldu v. The Secretary of state for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/93591/82 (2705), 26 April 1983 (transcript copy). See also the inter-state war case Mezban Batti Hassan v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/127614/84 (3943), 1 May 185 (transcript copy), at 4: 'It is accepted the War between Iraq and Iran has created general tension and danger to the population of Iraq but the appellant would be subject to the same conditions as everyone else living there.'

⁵⁰CE No. 42.074, 27 May 1983, Recueil des Décisions du Conseil d'Etat, 1983, 220. See also the Conclusions of the commissaire du gouvernement M. Bruno Genevois, in Actualité juridique-Droit administratif, 20 septembre 1983, 481; see also Julien-Laferrrière, F., Note, 111 JDI (1984) 120.

related claims with regard to individuals, evidence that had been discarded by the Commission des Recours des Réfugiés. The French Supreme Administrative Court established in Dankha in a very clear manner, on the basis of a textual interpretation of the definition of refugeehood contained in the 1951/1967 Refugee Convention, that apart from state authorities there are also other forces, such as individual members of the society in which a refugee lives, that have the ability to initiate and carry out persecutory measures. The Conseil d'Etat pointed out that 'it may not be concluded from the text [of the above Convention] that the persecutions suffered are to emanate directly from public authorities;...persecutions carried out by individuals, organised or not, may be taken into account and lead to the conclusion that, since they are in fact encouraged or intentionally tolerated by public authorities, the applicant is not actually able to claim the protection of these authorities'⁵¹.

⁵¹The reasoning of the judgment corresponds to the one propounded in the Conclusions of the commissaire du gouvernement M. Bruno Genevois who, in his detailed analysis of the refugee definition of the 1951/1967 Refugee Convention, had stressed that 'the requirement that persecutions be the action of the government of the country of which the individual is a national would constitute an addition to the text of the Convention. What is required by the Convention is persecutions or risks of persecution in the country [of origin]..., but not persecutions emanating from the authorities of the country under consideration...The passivity of these authorities, their inability to control a situation in which a racial, religious, social or political minority finds itself persecuted or threatened by persecution, is sufficient to lead to [refugee] status.', in Actualité juridique-Droit administratif, 20 septembre 1983, 481, at 483; see also M. Avakian, CE No. 54.090, 27 September 1985, M. Masilamany, CE No. 55.130, 5 June 1985, M. Mouqamadou, CE No. 56.677, 24 April 1985, M. Jayasinghe, CE No. 70.776, 13 May 1987, Mme Raad, CE Nos. 95.166, 95.167, 17 February 1992, M. Davoudian, CE No. 94.693, 31 July 1992 (transcript copies).

The above precedent has been consistently followed by the Commission des Recours des Réfugiés in a series of cases. Accordingly, in M. El Bahi⁵² the Commission upheld the appeal of the above Bahai Moroccan national persecuted by the state authorities due to his religious beliefs. By contrast, the Commission rejected the appeal of M. Gasmi⁵³, an Algerian refugee applicant who had been subjected to multiple aggressions by the Islamic community for not following certain religious practices. The rejection was based on the fact that these aggressions were not tolerated or encouraged by the authorities⁵⁴. The question whether a state actually supports or tolerates a persecutory action carried out by individuals not related to the state machinery, has always been complicated in judicial practice. This was particularly evident in Mlle Diop⁵⁵, a case concerning a female Malian

⁵²CRR No. 214.512, 2 April 1992 (transcript copy).

⁵³CRR No. 211.787, 26 May 1992 (transcript copy).

⁵⁴See also M. Rahman, CRR No. 30.534, 5 March 1985, M. Sari, CRR No. 29.001, 21 March 1986, M. Cobanoğlu, CRR No. 39.575, 19 November 1987, M. Bayrakcioglu, CRR No. 32.970, 10 July 1987, M. Bermema, CRR No. 140.228, 22 October 1990, M. Zagbi, CRR No. 098.960, 10 December 1990, M. Chandrakani Ramanlal Parmar, CRR No. 139.309, 26 November 1990, M. Belquebli, CRR No. 219.988, 15 May 1992, M. Rezkallam, CRR No. 210.151, 1 June 1992, M. Adeya, CRR No. 215.050, 23 March 1992. See also M. Misquita, CRR No. 26.289, 31 August 1984, M. Rebello, CRR No. 19.382, 20 May 1985, M. Surti, CRR No. 154.088, 6 February 1991, Mlle Yousif, CRR No. 148.628, 15 January 1991, M. Teldjoune, CRR No. 173.117, 28 November 1991, M. Taqi, CRR No. 183.801, 4 October 1991, M. Farayibi, CRR No. 209.339, 27 February 1992, M. Taher, CRR No. 214.012, 6 April 1992, M. Bouziani, CRR No. 237.628, 5 January 1993 (transcript copies).

⁵⁵CRR No. 164.078, 18 September 1991 (transcript copy). See also 'Mémoire de l'OFPRA devant la Commission des Recours', in Documentation-Réfugiés, Supplément au No 187, 20/29 Juin 1992, at 2-5. See also supra Chapter V, Section 1

refugee applicant claiming persecution on the ground of her forced subjection to the ritual of female circumcision. Although it was accepted that the Malian authorities were in favour of campaigns for the eradication of the above practice, the Commission des Recours did not consider this to constitute enough protection, since the state had not actually 'repressed [the practice] by any specific penal provision', and female circumcision was carried out in state hospitals. These facts were consequently regarded by the Commission as demonstrating that forced genital mutilation was in fact 'deliberately tolerated' by the authorities in Mali, and should thus be regarded as persecution⁵⁶.

The same logic has been adopted by the Commission des Recours in cases where persecution was claimed to have been suffered by a refugee applicant due to activities of political organisations uncontrollable by state authorities, as in Mlle Rodriguez Ramirez⁵⁷. There, the Commission rejected the refugee status claim based on fear of persecution emanating from the

infra.

⁵⁶CRR idem. Accord, Mlle Nadia El Kebir, CRR No. 237.939, 22 July 1994, reported (in French) in 13 Refugee Survey Quarterly (1994) 198. El Kebir concerned a case of an Algerian female refugee applicant who had been brought up in France, and was subjected to violence by 'Islamic elements' in her country of origin, because of her life style and her profession [secretary in a company] which were targeted by 'Islamic elements'. The Commission upheld the appeal, having concluded, inter alia, that these violent events against the appellant should be considered to be 'intentionally tolerated' by reason of the 'deliberate abstention from any intervention' of the local authorities which 'were aware of the actions of which the appellant was victim'.

⁵⁷CRR No. 189.349, 21 April 1992 (transcript copy).

communist party of Peru, since any such persecutory activities were not encouraged or deliberately tolerated by the Peruvian public authorities⁵⁸.

Of a special nature have been recent successful cases where persecution concerned racist activities of individuals in European states who had not been actually organised in political legal or illegal well-structured bodies, as in the case of M. Gabor⁵⁹, concerning a Roma refugee applicant who had been subjected to continuous verbal and physical attacks by skin heads and extreme right militants in Czechoslovakia, and had been provided with no state protection. Of a similar nature has been M. Zoui⁶⁰, a successful case concerning a Byelorussian national of Jewish origin who had been subjected to continuous physical attacks and threats by antisemitic groups in the country of origin with no state protective

⁵⁸See also M. Oughli, CRR No. 30.199, 23 October 1984, Mme Sathtanatan, CRR No. 45.385, 15 January 1987, M. Kabaleeswaran, CRR No. 096.331, 29 October 1990, M. Ines Torres, CRR No. 43.021, 24 July 1990, M. Rajeswaran, CRR No. 142.557, 19 December 1990, M. Ines Torres, 24 July 1990, M. Guevara Sanchez, CRR No. 097.573, 17 January 1991, Mme Ontanilla Galan, CRR No. 058.484, 7 January 1991, M. Jayalath Hettiarachchige, CRR No. 180.311, 9 September 1991, Mle Leon, CRR No. 190.009, 21 November 1991, M. Mohammad Ouais, CRR No. 160.720, 11 September 1991, M. Rabezanahary, CRR No. 158.934, 13 June 1991, M. Erdei, CRR No. 174.872, 16 October 1991, M. Prokhorov, CRR No. 185.199, 10 December 1992, Mme Grigorian, CRR No. 185.200, 10 December 1992, M. Bromley Lazo, CRR No. 194.102-193.908, 20 January 1992, M. Balachandran, CRR No. 202.262, 31 January 1992 (transcript copies).

⁵⁹CRR No. 227.596, 3 September 1992; see also Mme Gaborova, CRR No. 227.597, 3 September 1992, Mme Ondriez, CRR No. 227.595, 3 September 1992, M. Constantin Tirnoveanu, CRR No. 75.009, 25 May 1989 (transcript copies).

⁶⁰CRR No. 233.897, 18 January 1993 (transcript copy).

reaction⁶¹.

Persecution has been established in French case law also in cases of civil war situations, as that of Sri Lanka, carried out by state authorities or military opponents to the state forces, on condition that the persecution has been particularised in the course of the armed conflict⁶². French jurisprudence has placed in a sui generis category cases of persecution claimed to have happened in the course of the internal armed conflict in Lebanon, and to have been carried out by political or military forces not subject to a particular state authority. In M. Avedikian⁶³ the Commission des Recours des Réfugiés had before it an appeal of a Lebanese national who, having refused to serve in the irregular army, was imprisoned and tortured by them. The appeal was, paradoxically, rejected on the ground that that treatment `did not emanate directly from the public authorities or [was] not exercised by individuals with the encouragement or the

⁶¹See also Mme Grigorian, CRR No. 185.200, 10 December 1992, M. Prokhorov, CRR No. 185.199, 10 December 1992 (transcript copies), cases relating to ethnic minorities (Armenians) subjected to death threats and/or physical attacks by nationalists of the ethnic majority in Azerbaijan.

⁶²See, inter alia, Mle Yaotha, CRR No. 56.307, 22 May 1990, Mle Thuriappah, CRR No. 072.794, 19 June 1991, M. Thisokumar, CRR No. 072.928, 8 January 1991, M. Joy Sutharsan, CRR No. 120.373, 5 July 1990, M. Sathtanatan, CRR No. 45.385, 15 January 1987, M. Thisaveerasingh, CRR No. 124.803, 26 July 1990, Mme Arunasalam, CRR No. 127.771, 7 January 1991 (transcript copies). See also Tiberghien, F., 'La guerre civile et la reconnaissance de la qualité de réfugié', Documentation-Réfugiés, Supplément au No. 7, 15/24 juillet 1987, at 1.

⁶³CRR No. 105.028, 7 September 1990 (transcript copy).

intentional tolerance of these authorities'. The paradoxical element of the above decision lies in the fact that the Commission rejected the appeal on the ground that the alleged persecution did not emanate from the Lebanese government, nor from individuals tolerated or encouraged by Lebanese authorities. However, the effectiveness, if not nominal existence, of protection by Lebanese state authorities should, realistically, at least in the chronological context of the above case, be more than doubted. In this vein, in a series of cases concerning Lebanese nationals persecuted, in the context of asylum law, by political groups in their country of origin, the Commission des Recours has refused to recognise the validity of refugee status claims, on the ground that such persecutions are 'the consequence of the civil war that has torn Lebanon apart for many years' and not activities with the potential to be liaised with any state responsibility⁶⁴. The same sweeping civil-war-consequence 'reasoning'- without any detailed examination of the actual capacity of the Lebanese state to provide protection to its nationals (nor of state responsibility arising from international human rights/humanitarian law)- has also been applied by the Commission in cases concerning Lebanese nationals fearing persecution by the Syrian army occupying Lebanon, due to

⁶⁴See also M. Daoud, CRR No. 43.669, 22 January 1987, M. Sinno, CRR No. 48.304, 2 March 1987, M. Dbouk, CRR No. 47.054, 13 March 1987, M. Tarraf, CRR No. 98.719, 17 November 1989, M. Nohra, CRR No. 88.793, 20 October 1989, Mle Ammoun, CRR No. 104.047, 5 June 1990, (transcript copies).

refugee applicants' anti-occupation activism⁶⁵. By contrast, persecution feared by Syrian Christian nationals who had fought against the Syrian occupation forces in Lebanon has been accepted as legitimate by the Commission des Recours⁶⁶.

The fallacy of the reasoning in the above Lebanese national cases has lain in the fact, as already mentioned, that the Commission has not really examined whether effective protection by the Lebanese state was available. However, the decision taken in Mme Hammoud⁶⁷ has rectified this stance of the Commission. In this case, the Commission des Recours recognised the refugee status of a refugee applicant who had been persecuted by the Hezbollah group while in Lebanon. The early erroneous reasoning did not reappear in later cases concerning refugee applicants claiming persecution in the course of the armed conflict in the former Yugoslavia. Thus, in M. Kurtic⁶⁸, a case concerning a Muslim Bosnian from Sarajevo who had refused to join the federal army and was subject to threats by Serbs in Sarajevo, the Commission upheld the appeal, acknowledging that it was not possible for the

⁶⁵See M. Tarraf, CRR No. 98.719, 17 November 1989, and also M. Nohra, CRR No. 88.793, 20 October 1989. Contra: M. Khoury, CRR No. 184.991, 21 October 1991 (transcript copies).

⁶⁶See M. Tawil, CRR No. 130.321, 3 December 1990, M. Nassar, CRR No. 70.557, 13 March 1989, M. Atiah, CRR No. 67.920, 15 September 1988 (transcript copies).

⁶⁷CRR, No. 109.304, 12 April 1990; see also Tiberghien, F., note, Documentation-Réfugiés, No. 145, 28 avril/7 mai 1991, (Supplément Législation et Jurisprudence), at 1.

⁶⁸CRR No. 227.353, 27 November 1992, reported in Documentation-Réfugiés, Supplément au No 223, 17/30 Août 1993, at 7.

appellant to 'claim usefully protection from the Bosnian authorities' given the state of war in Bosnia. The same reasoning was applied in M. Dujic⁶⁹, a case concerning a Catholic Croatian from Vukovar persecuted by the Serbian forces, and unable to be provided with protection by the state of Croatia, due to the devastating for the state apparatus armed conflict in that country. However, in all such cases the persecution feared by the refugee applicant is to emanate from a political/military force which may be regarded as a de facto authority able to exercise power, and thus persecute. This was clarified by the Commission des Recours des Réfugiés in Ahmed Abdullahi⁷⁰, a case concerning a Somali who claimed to be subject to persecution in his country by a Somali military faction participating in the civil war there. The reason for his persecution, propounded by the appellant, was his refusal to provide his mechanical expertise to that faction. The Commission des Recours rejected the refugee status claim, having regarded the above military faction, on the basis of the available evidence, as one of those in Somalia which 'strive to create or expand zones of influence inside the national territory without, however, being in a position to exercise in these zones an organised power that would permit, in any case, to regard them as de facto authorities

⁶⁹CRR No. 230.571, 12 February 1993 reported ibid. at 8. Accord, M. Lozancic, CRR No. 232.259, 12 February 1993, idem, Dzebric, CRR No. 216.617, 12 February 1993, ibid. at 9, Karaica, CRR No. 125.776, 7 April 1993, ibid. at 10, Mlle Stankovic, CRR No. 125.777, 7 April 1993, reported idem.

⁷⁰CRR No. 229.619, 26 November 1993, reported in Documentation-Réfugiés, Supplément au No 237, 1er/14 Mars 1994, at 1.

[`autorités de fait']⁷¹.

Non-state agents of persecution may provide a ground for the creation of refugeehood when they act not only inside but also out of the territory of the refugee's country of origin. Thus, the Commission des Recours upheld the appeal in M. Beida⁷², a case concerning an Iranian national of Jewish origin who was persecuted in Lebanon by Iranian politico-religious groups, without being able to be protected by his own state. The extraterritorial action of agents had been, nonetheless, laid down earlier by the Conseil d'Etat in M. Urtiaga Martinez⁷³. The French Supreme Administrative Court had accepted the well-founded nature of fear of persecution of the Spanish Basque appellant whose life had been threatened while in France by Spanish terrorist organisations acting on French territory. In that case, there was evidence able to substantiate the claim that the above-mentioned organisations were tolerated or encouraged by Spanish authorities⁷⁴.

⁷¹Idem. See also Tiberghien, F., 'Observations', idem.

⁷²CRR No. 59.304, 9 May 1988 (transcript copy).

⁷³CE No. 61.376, 4 December 1987 (transcript copy), reported in Actualité juridique-Droit administratif, 20 février 1988, at 164.

⁷⁴See also M. Lecertua Urrutibeascoa, CE No. 83.514, 16 November 1988, M. Astorquiza Icazuriaga, CE No. 95.205, 31 October 1990 (transcript copies), M. Lopez de Abechuco Liquiniano, CE No. 79.082, 4 December 1987, reported in Actualité juridique-Droit administratif, 20 février 1988, at 165; see also note, ibid. at 155-6. See also Tiberghien, F., 'Le lieu d'exercice des persécutions', Documentation-Réfuégiés, Supplément au No. 67, 6/15 mars 1989, at 1-3.

Also in Germany, as in the UK and France, refugee status jurisprudence has established the refugee's state of origin as the primary agent of persecution. The Federal Constitutional Court has laid down this principle on the basis of an interpretation it has given to the notion 'political persecution' of the German constitutional asylum provision. The Constitutional Court has interpreted the above notion as one that does not express an 'objectively demarcated area of politics, but characterises a property or quality that may be taken on by measures in every sphere under certain circumstances at any time'. In consequence, actions/measures may be invested with a persecutive nature, and be of interest in the asylum context, in case the persecution 'is connected with a dispute over the formation and particular nature of the general order of the life of a community of men and of groups of people', and, as a consequence, it 'has a public reference, and emanates from a superior agent, as a rule a sovereign power, to whom the persecuted individual is subject'⁷⁵. The Bundesverfassungsgericht, taking as a starting point for its

⁷⁵See judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 333-4. See also judgment of 24 November 1992, BVerwG 9 C 70.91, 15 InfAuslR (1993) 154, a case concerning alleged persecution by the state of origin through a third state while the refugee applicant has been in this third state: 'The pressures exerted on the applicant by the Iraqi authorities abroad during his residence in the former Yugoslavia do not emanate from the territorial power of the home state. In so far as the former Yugoslavia co-operated in these pressures, this conduct is not equal to a conduct of the home-state. The Court has assumed such an equality in a state that becomes active against its citizens through its political and ideological supremacy over a subordinate satellite state; it has accepted this situation in the relation of the former Soviet Union with Ethiopia, when this country was under communist rule...Between the former Yugoslavia and Iraq, nonetheless, there was never such a relation.'

reasoning the political institution of the state from a sociological perspective, has stressed that states consist of 'units at peace...that relativize all the interior differences, conflicts and disputes through a predominant order, so that they remain under the level of violence and do not challenge the individual's potential to exist, and they, consequently, do not abolish the order of peace'. That is exactly the service rendered by the state power whose 'power to protect', in the words of the same Court, 'incorporates the power to persecute', persecution from the dangers of which asylum aims to protect⁷⁶. The Court went on to provide a general definition of persecution, operational in the context of the institution of asylum, according to which a persecutory act may be of relevance to asylum 'if it deliberately, [and] in relation to characteristics important to the grant of asylum, violates an individual's rights, [and] which by reason of its intensity exceeds the predominant peaceful order of the state unity'⁷⁷.

⁷⁶80 BVerfGE 315, at 334, emphasis added. Accord, Federal Administrative Court, judgment of 18 January 1994, 9C 48.92, 47 Die Öffentliche Verwaltung (1994) 479, at 480. See also Marx, R., Asylrecht, Band 2, Baden-Baden, Nomos Verl.-Ges., 1991, 5. Auflage, at 433-4: 'The state monopoly of power constitutes the sociological prerequisite for the modern notion of statehood and therefore for the reference to protective norms of international law in favour of the individual (general protection of human rights and asylum law).'

⁷⁷80 BVerfGE 315, at 334-5. The intensity required in cases of violations of rights has excluded from consideration 'occasional excessive acts' of state authorities, judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 352; see also judgment of 24 June 1992, 2 BvR 176/92 etc. (transcript copy) at 14, judgment of 4 March 1993, 2 BvR 1440,1559, 1782/92 (transcript copy) at 15. The above intensity therefore presupposes that any aggressive action against a refugee should be able to substantiate, in principle, an, as it were,

The Federal Administrative Court reconfirmed the above principal thesis of German asylum law, in its judgment of 18 January 1994⁷⁸. It laid down the existence of state persecution as a fundamental principle in all cases of refugee persecution. In the words of the above Court, 'Political persecution is in principle state persecution'. However, the Court went on to add that 'Equal to this is persecution carried out by an organisation with power to exercise authority similar to that of the state. [Persecution] consists of violation of lawful interests, perpetrated either directly by the state by virtue of its territorial authority, or indirectly by the state [in cases where] actually [the above violation has been carried out] by third persons [whose action] has not been prevented by the state despite the fact that it still has the territorial authority. As a consequence, the characteristic "on political grounds" [of the German asylum provision] identifies persecution as a conduct of an organised ruling authority ['Verhalten einer organisierten Herrschaftsmacht'], primarily of a state, to which the applicant is subjected'⁷⁹. The Federal Court claimed that this interpretation should be given to the refugee concept contained in the 1951/1967 Refugee Convention as well. The method employed by the above Court in order to justify this state-centred view of the agents of persecution was based,

policy of the 'centre' of the state's executive.

⁷⁸BVerwG 9C 48.92, 47 Die Öffentliche Verwaltung (1994) 479. Affirmed by judgment of 22 March 1994, BVerwG 9 C 443.93, ibid. at 740.

⁷⁹Ibid. at 480.

firstly, on a narrow interpretation of the 1951/1967 Convention refugee concept in the context of the history of this treaty. The Court stressed that the 'fundamental characteristic of the refugee in the sense of the traditional understanding' at the time of the Convention's creation was that the 'bond between [the refugee] and his state had been broken, that on the part of the individual faith was replaced by fear and loyalty by hatred, while the state authorities, instead of protecting and supporting, sought to oppress the individual, to intimidate or -in the best case- to ignore him and his fate'⁸⁰. The Federal Administrative Court considered this interpretation as one corresponding to the typical form that refugee persecution may take on, and which was recognised as valid by Germany when signing the above Refugee Convention. The second interpretational tool employed by the above German Supreme Court in this case was Article 31.1 of the Vienna Convention on Treaties⁸¹. The Court, in an over-restrictive, and thus erroneous, interpretational vein, utilising the above provision, stressed that the preceding interpretation of the agent of persecution corresponded to the ordinary meaning of the terms of the Refugee Convention, as well as to the object and purpose of the above Convention in 1951, according to which this treaty should be understood as meaning that 'the refugee concept was characterised by a feared persecution

⁸⁰ Idem.

⁸¹ 1155 UNTS 331. According to Article 31 1. of the Vienna Convention 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

originating in the state'⁸².

However, while it has been established and always taken for granted that the primary agent of refugee persecution would be the state, as personified by its various, mainly executive, organs⁸³, the question of persecution perpetrated by individuals not directly related to state authority has raised serious controversies in German jurisprudence, as shown below. The Federal Constitutional Court, like its administrative counterpart, has accepted in principle that persecution may well emanate from persons not vested with state authority. The state's violence may be substituted for 'private acts' which, in turn, potentially constitute persecution in the context of the law of refugee status⁸⁴. According to the Federal Constitutional Court, this is the case when the state 'provokes individuals or groups to take persecutory measures or supports, approves or idly puts up with acts of that nature, and so it denies to the person affected the necessary protection because of lack of willingness or capability [to

⁸²47 Die Öffentliche Verwaltung (1994) at 480. The above interpretation was actually employed by the Federal Administrative Court to found its view according to which no refugee status claim may arise from a civil war situation where the state authority has been dissolved, ibid. at 481. See also infra.

⁸³See judgment of 27 February 1990, 2 BvR 186/89, 12 InfAuslR (1990) 199, at 202.

⁸⁴See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 358; see also judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 158, and 169. See also judgment of 3 December 1985, BVerwG 9 C 33.85 etc., 5 NVwZ (1986) 307, at 308, judgment of 15 October 1985, BVerwG 9 C 30/85, 5 NVwZ (1986) 759.

offer protection]'⁸⁵.

Persecution emanating from 'third parties', that is, political forces or individuals not connected with the political power of the state, may, nonetheless, constitute refugee status-related persecution on condition that it may be attributed to the state, that depending on whether the state provides actual protection to the asylum seeker by means available to it. In such a case, state responsibility, and subsequent persecution, may arise if the state is neither ready nor in a position to use adequately means available to it in a specific case towards persecutory measures of a third party⁸⁶. Basic means that should be used by the state in order to prevent or to protect from indirect state persecution are, according to the Federal Administrative Court, its own legislation and its

⁸⁵54 BVerfGE 341, at 358; see also judgment of 18 March 1986, BVerwG 9 C 207.85 (transcript copy) at 9, judgment of 26 April 1988, BVerwG 9 C 4.88 (transcript copy) at 4-7, judgment of 12 June 1990, BVerwG 9 C 37.89 (transcript copy) at 15, judgment of 24 July 1990, BVerwG 9 C 46.89 (transcript copy) at 11.

⁸⁶See judgment of German Federal Constitutional Court, 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 335-6; on this judgment see Selk, M., 'Zum Tamilenbeschuß des BVerfG', 9 NVwZ (1990) 331. See also judgment of 23 January 1991, 2 BvR 902/85, and 515,1827/89, 83 BVerfGE 216, at 232-3. See also Federal Administrative Court judgment of 31 March 1981, 9 C 6.80, 62 BVerwGE 123, judgment of 22 January 1985, BVerwG 9 C 1113.82 (transcript copy) at 8, judgment of 16 October 1986, BVerwG 9 C 320.85 (transcript copy) at 6-7, judgment of 2 August 1990, BVerwG 9 C 102.89 (transcript copy) at 10, judgment of 2 August 1990, BVerwG 9 C 47.89 (transcript copy) at 9, judgment of 30 June 1992, BVerwG 9 C 24.91 (transcript copy) at 11 where it is reaffirmed by the Court that no indirect state persecution may be supposed to exist if 'the endeavours of the basically ready to protect state in order to end attacks of third parties of significance to asylum have a variable effectiveness'.

executive branch⁸⁷.

German case law has thus emphasised the obligation of the state to protect its nationals from such an indirect persecution. Accordingly, it has been pointed out that the intensity of any such state protective measures should 'correspond to the degree of distress' caused by the persecutory measures. However, any such state readiness, or willingness, to protect should never be assessed on the basis of the existing constitutional or general legal protection framework of the country of origin. The German Constitutional Court has, instead, opted for an objective test of the state protective ability which should be, accordingly, 'verifiable in a concrete manner', that is, on the basis of facts that have explicitly shown the protective action of the state authorities⁸⁸. This pragmatic approach represents the prism through which the whole apparatus of the refugee's state of origin should be viewed in the context of refugee status law. Any situation which requires a specific state to take measures

⁸⁷See judgment of Federal Administrative Court, 16 August 1993, BVerwG 9 C 7.93, 109 DVB1 (1994) 58, at 59: 'The means the use of which is necessary are -according to their nature- the instruments of criminal law, police and the law of public order'.

⁸⁸See judgment of 23 January 1991, 2 BvR 902/85, and 515,1827/89, 83 BVerfGE 216, at 235; see also judgment of 14 June 1991, 2 BvR 219,264,291,331/91 (transcript copy), at 6-7, judgment of 7 June 1991, 2 BvR 989,1195,1403/89, and 1367/90 (transcript copy) at 6-7. See also judgment of 4 November 1988, BVerwG 9 C 8.88 (transcript copy) at 8-9; see also judgment of 16 March 1990, BVerwG 9 C 97.89, 12 InfAuslR (1990) 206, at 207 where the Court stated that in a civil war situation the existence of political persecution should be judged through 'an assessment of the given actual conditions in the particular concrete case'.

that exceed its protective capacity may not, as a consequence, lead to its responsibility. The basic parameter of such responsibility is, according to German case law, not a state's mere claim to 'legitimate monopoly of power', but, in principle, its realisation. Consequently, German jurisprudence has stressed that no state responsibility may be claimed, and protection be called for from 'consequences of anarchic circumstances or of the dissolution of the state power'⁸⁹. The Federal Constitutional Court has emphatically stated, similarly to its administrative counterpart, that the existence of the state's 'effective sovereign authority' over its territory is, in principle, a conditio sine qua non for the attribution of responsibility for a specific persecution to the state⁹⁰.

⁸⁹See 80 BVerfGE 315, at 336. See also judgment of 2 August 1990, BVerwG 9 C 48.89 (transcript copy) at 10: 'What is more important is whether the state provides on the whole protection [in this case, to Christians fearing attacks from Moslems] with the means available to it'; see also judgment of 12 June 1990, BVerwG 9 C 37.89 (transcript copy) at 16-19, judgment of 30 October 1990, BVerwG 9 C 72.89 (transcript copy) at 36, judgment of 23 July 1991, BVerwG 9 C 154.90, 13 InfAuslR (1991) 363, at 364-5: 'If the grant of protection ...exceeds the power of the concrete state, in other words the grant of protection lies beyond the means available to the state, then its [the state's] responsibility ends, according to asylum law. The attribution of measures of persecution carried out by third persons finds its basis therefore not really in the mere claim of the state over the legitimate power mono-poly, but first of all -in principle- in its realization...'; see also infra for cases in a civil war context.

⁹⁰See judgment of 9 October 1990, 2 BvR 1863, 1864, 1865, 1866/89 (transcript copy) at 9; see also judgment of 7 November 1990, 2 BvR 1566 etc./87, 13 InfAuslR (1991) 48. Accord, Federal Administrative Court, judgment of 18 January 1994, 9C 48.92, 47 Die Öffentliche Verwaltung (1994) 479, at 480-1. See also judgment of 2 July 1986, BVerwG 9 C 2.85 (transcript copy) at 5: 'Attacks are also to be attributed to a state when the state which is willing to protect is unable in principle and for a certain period to prevent persecutory measures [of third parties], because it has lost the authority to other

In cases where persecution has been allegedly carried out by third persons, or by organised politico-military forces not related to the official state power, the German Federal Administrative Court has moreover pointed out that it is always to be granted to the state a specific period of time in order to be able to fight back and provide its nationals with the necessary protection. A delay of state reaction has been accepted as natural, especially in cases of spontaneous and grave acts of violence, if that reaction is to be effective and to eliminate the non-state violence⁹¹. Such an 'interval

forces and is unable any more to accomplish its security and other performances'.

⁹¹See judgment of 30 October 1984, BVerwG 9 C 24.84, 70 BVerwGE 232, at 236-7: '...in cases of indirect state persecution where the intensity and gravity of the persecution are defined not by the state but by third parties, the extent [of the intensity and gravity] through the judgment of the time-characteristic "certain duration" ["gewisse Dauer"] may not be decisive'. The Court emphasised that the state may not always be able to react immediately to attacks of third individual parties, even if the persecution has reached a certain extent, like pogroms, since such attacks may take place spontaneously and suddenly. It went on to add that 'the efficiency of state protection does not increase but decreases in case there exists a growing, in quantity, extent of attacks, which may not have as a consequence the denial of the protection ability in principle or during a certain period of time'; see also judgment of 18 March 1986, BVerwG 9 C 207.85 (transcript copy) at 10-12, judgment of 18 February 1986, BVerwG 9 C 104.85, 74 BVerwGE 41, at 43, judgment of 2 July 1986, BVerwG 9 C 2.85 (transcript copy) at 5, judgment of 16 October 1986, BVerwG 9 C 320.85 (transcript copy) at 9, judgment of 6 March 1990, BVerwG 9 C 14/89, 9 NVwZ (1990) 1179, at 1181, judgment of 24 July 1990, BVerwG 9 C 38.89 etc. (transcript copy) at 12. Contra: judgment of 2 August 1983, BVerwG 9 C 818.81, 67 BVerwGE 317, at 320-2 where the Court added that attacks by non-state forces may constitute persecution 'if the state is basically and certainly during a certain period of time ['auf gewisse Dauer'] unable to prevent such attacks, because it - either in all the state territory or in specific regions- has lost the authority to other forces and is, in this respect, unable to carry out its security[-related] and other performances'.

of protection' has been justified by the above Court especially in cases of massive and sudden persecutory activism where a particular state should objectively require a period of time in order to organise its protective apparatus properly⁹². This jurisprudential stance has been actually in complete tune with the general conviction of both the above-mentioned German Supreme Courts, according to which an 'indirect state persecution on the ground of refusal to protect may not be really assumed in cases where the state is not able to provide a gapless protection from politically motivated attacks of non-state forces or individuals'. Any presupposition of an ability of the state to protect with no gaps has therefore been considered to be beyond any realistic assessment of the efficiency of a state's protection mechanism⁹³.

A special case examined by the Bundesverwaltungsgericht has been that where a political group (PLO in that case) has acquired de facto and exercised power and force upon individuals in a particular state territory (Lebanon in that case), to such an extent that none of that group's actions may

⁹²See judgment of 23 February 1988, BVerwG 9 C 85.87 (transcript copy) at 7-8 where the Federal Administrative Court assessed as over-burdening any complaint regarding the one month inaction of the state of Pakistan towards the massive acts of violence of the population majority against the Ahmadis from May until September 1974.

⁹³See judgment of 3 December 1985, BVerwG 9 C 33/85 etc., 5 NVwZ (1986) 307, at 308-9, judgment of 8 February 1989, BVerwG 9 C 33.87 (transcript copy) at 12, judgment of 24 July 1990, BVerwG 9 C 46.89 (transcript copy) at 17-18, judgment of 2 August 1990, BVerwG 9 C 48.89 (transcript copy) at 12.

be, consequently, connected with an 'indirect state political persecution'. Any state-attributed persecution has been accordingly excluded, since that group had 'achieved an independent structure of power on the territory [of the above-mentioned state] and [managed to] exercise sovereign power similar to that of a state'. The 'quasi-occupied' state's territorial authority is to be considered in such a case as being displaced by that political/military organised force whose operation has actually taken on a quasi-state form. This, however, does not mean that persecution is even then completely ruled out. The Court accepted that persecution emanating from such a quasi-state power which has substituted a state may also, exceptionally, affect individuals who may, in turn, substantiate a relevant refugee status claim⁹⁴.

An extraordinary, nonetheless, example of indirect state persecution has been presented by cases where there has been an 'actual unity' of the state and the state party, or of the state and the state religion. Within such politico-social frameworks, German refugee case law has viewed as justified the attribution to the state of such persecutory measures as those taken by members of the official state party, or by followers of the state religion against individuals of different political convictions or of a different faith, even

⁹⁴See judgment of 3 December 1985, BVerwG 9 C 22/85, 5 NVwZ (1986) 760; see also judgment of 14 January 1987, BVerwG 9 B 264.86 (transcript copy) at 4-5 where the Court reconfirmed that persecution may emanate from non-state organisations to which the state has lost its authority, and which are actually vested with an active quasi-state political character and power.

though there has not been a direct and obvious involvement of a state authority. Here a direct involvement of state authorities would not constitute the decisive factor in establishing a case of persecution. The Bundesverfassungsgericht has thus established that a prima facie case of persecution may always exist under circumstances such as these described above⁹⁵.

Civil war situations in countries where no effective, predominant order-keeping state power is in place have also been recognised (in a restrictive interpretational vein if compared to British and French case law) by the above two German Supreme Courts' jurisprudence as constituting sui generis cases. The Bundesverwaltungsgericht, in its aforementioned judgment of 18 January 1994⁹⁶, on the narrow basis of an historical prism of viewing refugeehood as established on the international plane by the UN Refugee Convention, as well as of Article 33 1. of the Vienna Convention on Treaties, opined in the clearest possible manner that no refugee status claim may be accepted as valid, either in the constitutional asylum context or in the context of the definitional article of the 1951/1967 Refugee Convention, if it originates in a situation where the `state power has been dissolved as a consequence of

⁹⁵See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 314, at 358; see also judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 336.

⁹⁶See supra n. 78 and accompanying text.

a civil war'⁹⁷. The Court rejected, as non-binding, the different jurisprudence of foreign domestic courts, where it was not `required the complicity of the state in [the acts of] the persecuting third person, but it was considered as sufficient the fact that the state is actually unable in general to prevent the persecutory measures of the third person'⁹⁸.

However, the Bundesverfassungsgericht has established in German case law two basic categories of civil war, being of significance to the law of asylum. The first category has been named `open war' and refers to an internal armed conflict in `a contested area [of the state where] in fact the state adopts the role of a military active party to the civil war'⁹⁹. As a consequence, there may be no reasonable claim of state persecution, according to the German Federal Constitutional Court, so long as measures taken by the state in a contested area `demonstrate a typical military character and serve the reconquest of an area that belongs indeed (still) de iure to its own...territory over which, however, the state has

⁹⁷Ibid. at 481. Affirmed by judgment of 22 March 1994, BVerwG 9 C 443.93, 47 Die Öffentliche Verwaltung (1994) at 740, where also the Federal Administrative Court, in a sweeping statement, categorically pointed out that `it is beyond any doubt... that there is no general legally binding rule accepted by the overwhelming majority of states, which prescribes the expulsion of civil war refugees.'

⁹⁸Ibid. at 481-2. The Court said that in such cases asylum seekers may be protected by German asylum law basically through the non-refoulement provision of § 51 Abs. 1 of the Law on Aliens.

⁹⁹80 BVerfGE 315, at 340.

lost de facto the authority to its [civil war] opponents'¹⁰⁰. The second civil war category has been that of a 'guerrilla civil war' the characteristic of which is the 'assymetry, so long as the rebels, in order to protect themselves, remain hidden but progressively undermine the state monopoly of power'. Thus, this persistent challenge of state power leads to a hybrid situation where even though the 'state capability to protect and persecute exists still partially, it nonetheless competes with those stronger or superior opposing powers'. The state mechanism in such situations is unable to use its legal repressive means of protection in favour of itself or of its own population, and is, consequently, obliged to use military means similar to those of its opponents. The state has accordingly lost de facto its power to keep order and peace on its territory and no claim of asylum may be put forward, if based on sufferings by such state activities in the above-described context¹⁰¹.

¹⁰⁰ Idem; see also judgment of 3 January 1990, 2 BvR 591,951,1102/87 (transcript copy) at 2, judgment of 6 March 1990, 2 BvR 937,1289 etc./89 (transcript copy) at 4-5; see also judgment of 17 October 1989, BVerwG 9 C 58.88 (transcript copy) at 15, judgment of 16 March 1990, BVerwG 9 C 97.89, 12 InfAuslR (1990) 206, at 207, judgment of 8 September 1992, BVerwG 9 C 62/91, 12 NVwZ (1993) 191, at 192. See also judgment of 3 December 1985, BVerwG 9 C 33/85 etc., 5 NVwZ (1986) 307, at 309-310 where overreactions-atrocities by Sri Lankan state security forces against civilian population that provided aid to Tamil separatist groups were not regarded by the Court, on their own, as able to provide a sound refugee persecution ground.

¹⁰¹ 80 BVerfGE 315, at 341; see also judgment of 9 October 1990, 2 BvR 1863,1864,1865,1866/89 (transcript copy) at 9. Accord, judgment of 20 November 1990, BVerwG 9 C 75.90 (transcript copy) at 10. See also judgment of 17 October 1989, BVerwG 9 C 58.88 (transcript copy) at 15 where the Court considered, in itself, of no importance to the asylum application the claim of state force attacks against the civil

However, a general exception applicable to both the above types of civil war has been emphatically recognised in German case law. The exception refers to ultimate and extreme cases where the state forces lead the, open or guerrilla-type, civil war in such a manner that 'it is directed towards the physical extermination of the actual opponents, or of those who are regarded as such, and who possess asylum-related characteristics, even though these persons do not wish or are not able to exercise any more resistance, or are not or no more involved in military activities, especially when the actions of the state forces change into a deliberate physical extermination or destruction of the ethnic, cultural or religious identity of the whole rebellious part of the population'¹⁰². Only in cases where persecutory measures take

population in the course of civil war clashes: 'Because it is characteristic...of the "guerrilla"...type of fighting... that...the commandos [of the anti-state forces group] operate to a great extent underground and with the support of varying aides, informers etc. from the ranks of the civil population - if necessary made to comply through intimidations- and they are consequently, as a rule, connected with the fighting in a way which is not to be examined more closely by the civil war opponent'; see also Oeter, S., 'Flüchtlinge aus Bürgerkriegssituationen-ein ungelöstes Problem des Asylrechts', 47 ZaÖRV (1987) 559, at 565 infra.

¹⁰²See judgment of 9 October 1990, 2 BvR 1863-1866/89, 13 InfAuslR (1991) 22, at 24; see also judgment of 13 February 1990, 2 BvR 1088,1157,1342/86, 400,1159/87 (transcript copy) at 3-4, judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 340. Accord, judgment of 18 January 1994, BVerwG 9C 48.92, see supra n. 78, at 481, judgment of 18 March 1986, BVerwG 9 C 207.85 (transcript copy) at 15-16, judgment of 11 July 1986, BVerwG 9 C 27.86 (transcript copy) at 10-11, judgment of 20 November 1990, BVerwG 9 C 75.90 (transcript copy) at 9, judgment of 16 March 1990, BVerwG 9 C 97.89, 12 InfAuslR (1990) 206, at 207, judgment of 14 May 1990, BVerwG 9 C 125.86 (transcript copy) at 5-6, judgment of 9 April 1991, BVerwG 9 C 91/90 etc., 11 NVwZ (1992) 270, at 271, judgment of 8 September 1992, BVerwG 9 C 62/91, 12 NVwZ (1993) 191, at 191-2, judgment of 14 July 1992, BVerwG 9 B 183.91 (transcript

on such a grave (genocidal, in effect) character (well-founded fear of) persecution claims may well be accepted as justified in the relevant restrictive context of the German refugee status case law¹⁰³.

CONCLUSION

From the foregoing analysis of European case law two basic conclusions regarding all three jurisprudential sets may be safely reached: firstly, in all three European states courts have recognised and established that persecution may take on complex and polymorphous forms in either normal, peaceful, or in abnormal, war-related socio-political contexts; secondly, in all three states examined during our research the state, through its various agents or organs, has been recognised by the relevant case law as the epicentre of persecution-related agents. Even though all the above three national judicial contexts have acknowledged the possibility of persecution perpetrated by non-state agents, the circumstances surrounding the persecution-related events should always make possible, ultimately, the imputability of the persecutory activities of such agents to the state (or a de facto state) authority. This state responsibility should emanate, in principle, from a

copy) at 2-3.

¹⁰³See also International Law Association, Declaration of Principles of International Law on Compensation to Refugees, ILA 65th Conference, Cairo April 1992, Principle 3: 'The act of generating refugees in some situations should be considered genocide if it is committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such...', text reproduced in 6 Journal of Refugee Studies (1993) 69, at 70.

negligent stance on the part of state. It is actually based on the state's internationally recognised obligation, well established in international human rights law, to protect effectively its nationals from events with the potential to harm their lives and/or freedom, or other essential derivative human rights. Once the state has shown itself unwilling or in any way de facto unable to provide such protection to its nationals, then the state-nationals societal bond should be considered as seriously broken entailing again, in principle, the former's responsibility for the harm suffered by the latter.

The issue on which the three national case law sets seem to be split is that concerning cases where the state apparatus has been in disarray, as in internal armed conflicts, with no actual potential to provide the nationals with the effective protection from serious human rights violations, owed to them in the asylum framework as well. The case law of the UK and of France has adopted a common view with regard to the above issue. Both British and French courts have recognised the refugee status of individuals fleeing their countries scourged by internal strifes, with a well-founded fear of persecution by state or non-state (with effective power comparable to that of the state) agents, on condition that the fundamental prerequisites of refugee persecution, analysed in the previous chapters, are met. Neither the British nor the French courts and tribunals have actually deliberated, with the aid of a well-structured legal reasoning referring to state

responsibility, on the above issue. They have, nonetheless, allowed the extraction of the conclusion that even in cases where the state apparatus is, as it were, clinically dead, refugees should be granted, on the above conditions, the protection of territorial asylum.

By contrast, German jurisprudence has rejected, in principle, any potential to grant refugee status to individuals fleeing states where political power is no more 'monopolised' by them, but is violently shared by more forces. The theoretical foundation of the German case law has been, as stressed in the last section, of a pragmatic, in effect, nature. German courts have refused to acknowledge state responsibility for persecutory measures taken by non-state agents if the protection which would be required from the state exceeds its actual potentials. In refugee cases arising from civil wars, they have adopted a much more restrictive interpretational stance. There, according to German case law, the state may not, in principle, be held responsible for persecution, either because it leads an 'open war' as an active military party, or, in cases of 'guerrilla civil wars', because it has lost its actual power to control its territory. The only exceptions to the above rule recognised by German jurisprudence have been cases where the struggle led by state forces has acquired a grave, genocidal nature.

It is submitted that the above German jurisprudential theses have been legally erroneous. Firstly, the German courts

themselves, with the exception of the Federal Administrative Court in its judgment of 18 January 1994, have not actually founded their thoughts on a legal, stricto sensu, reasoning. The nature of their reasoning has been, as already mentioned, either sociological or derived from political science, recognising a large margin of action in favour of the state and its right to maintain its 'legitimate monopoly of power'. Secondly, as shown in the first section, state responsibility for harm suffered by state nationals may always exist, from a legal standpoint, in cases of civil wars or other state emergencies, on the basis of international human rights and/or humanitarian law norms. The Federal Administrative Court in the above-mentioned judgment did not accept (actually did not refer at all to) any such state responsibility, grounding its reasoning, as already seen, firstly, in a restrictive historical interpretation of the refugee concept as established in international law and, secondly, in this concept's 'ordinary meaning', along with -according to the above Court, following a contradictory teleological reasoning- its 'object and purpose' as viewed by the contracting states in 1951. The contradiction and fallacy of the Court's interpretation, based on the Vienna Convention on Treaties, lies in the fact that no teleological interpretation may be able to keep a treaty in such a chronological stalemate. Unless the judicial interpreter has decided a priori the opposite, the teleological method constitutes a liberal interpretational tool that provides, in fact, a treaty with a force and character of its own, according to its object and

purpose, detached, to a significant extent, from its chronology¹⁰⁴. Moreover, the above manner of interpretation of the Federal Administrative Court does not accord with a humanitarian and human rights, lato sensu, instrument like the UN Refugee Convention. As already mentioned, treaties of such a nature may never be interpreted in an airtight and anti-development way which inextricably ties them to their chronological boundaries. These are international instruments conceived for the effective protection of vulnerable individuals with no protection from a persecutory state or quasi-state power. For this reason, they should be interpreted in a pro-development and dynamic manner that surpasses parochial chronological limitations¹⁰⁵. Apart from that, state responsibility should also be, in principle, accepted in cases of civil war situations, at least in cases where internationally accepted and binding human rights, as well as humanitarian law standards may not cease to be applicable. These are indeed international legal principles which have been wrongly ignored by domestic courts in general. As to the genocidal degree of harm which has been accepted by German courts as the sole basis of state responsibility in civil war cases is to be rejected as legally groundless and unreasonable. It is in clear contrast to and in contravention of the substantive nature of refugee persecution which has never been required, not even by the basic German case law, to be of a degree equivalent to genocide. British and French case

¹⁰⁴See analysis supra Chapter II Section 2 infra.

¹⁰⁵See analysis supra Chapter II Section 2 infra.

law has demonstrated that civil war situations should not lead asylum jurisprudence to a legal, or even logical, cul-de-sac, leaving persecuted individuals in limbo. It is submitted that, on condition that the rest of the refugeehood prerequisites are met by the individual refugee applicant, territorial asylum rules should be interpreted in such cases-dilemmas in a bona fide manner able to provide effective protection to individuals in need of such protection (effective interpretation)¹⁰⁶. A different narrow legal, or even political science, view should be excluded not only as unreasonable but, moreover, as contravening the very substantial humanitarian nature of the territorial asylum institution.

¹⁰⁶See Kälin, W., 'Refugees and civil wars: Only a matter of interpretation?', 3 IJRL (1991) 435, at 445: '...the main purpose of the Refugee Convention requires an interpretation favouring refugee protection. Otherwise the Convention risks losing its 'effet utile'.'; see also ibid. at 446-8.

CHAPTER VII

PROGNOSIS OF PERSECUTION IN REFUGEE CASE LAW; ITS NATURE AND PARAMETERS

SECTION 1. PROGNOSIS OF PERSECUTION IN THE CONTEXT OF INTERNATIONAL LAW

Granting of refugee status to an individual is essentially a humanitarian preventive act on the part of a state of refuge. The aim of territorial asylum is indeed to prevent the occurrence (or repetition) of persecutory measures against the individual refugee applicant if (s)he finds her/himself on the territory of the country of origin. This is a question that in refugee status proceedings, like in many other areas of public law, is to be dealt with on the basis of facts or events relating to the past, the present, and especially the future. The human inability to provide a wholly verifiable prognosis of future events, especially when they are attached to a foreign territory, with the potential to endanger, inter alia, a refugee's life and/or liberty, constitutes the main burden which is to be overcome in judicial asylum proceedings, given the principle of non liquet¹.

¹See Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 22: 'A decision on the well-foundedness or not of a fear of persecution is essentially an essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin.' See also Dürig, J., Beweismaß und Beweislast im Asylrecht, München, Beck'sche Verlagsbuchhandlung, 1990, at 3-9, and at 69-80, Kokott, J., Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten, Berlin etc., Springer-Verlag, 1993, at 24-40, and at 317-68; see also Kälin, W., 'Well-founded fear of persecution: A European perspective', in Bhabha, J., Coll, G. (eds.), Asylum Law and Practice in Europe and North America: A Comparative Analysis, Washington, DC, Federal Publications Inc., 1992, at 21 infra.

The duty of the, in the first place administrative, state organs to make a future-related evaluation of persecution in the course of examination of an asylum request is emphasised in Article 1 A. (2) of the 1951/1967 Refugee Convention where it is required that there should be on the part of the refugee a 'well-founded fear of being persecuted'. The above wording of the Refugee Convention, apart from establishing the necessity of a persecution prognosis in the course of assessment of an asylum request, has moreover triggered a debate, both in the course of the preparation of the Convention and in refugee law doctrine, with regard to the actual meaning of the phrase 'well-founded fear' and, in particular, to the question whether this phrase should be viewed as one placing particular weight on subjective elements connected with the individual psychological situation of the refugee, or on objective elements liaised with the background situation in the country of origin.

Members of the UN Ad Hoc Committee on Statelessness and Related Problems which prepared the UN Refugee Convention were not initially agreed upon the above issue. The Israeli delegate, Mr Robinson, for example, seemed to place particular emphasis upon the subjective element of refugeehood, stressing that 'the reasons why some of the refugees did not return to their countries of origin were not objective but subjective'.

On the 'inherent element of insecurity' in the context of judicial decisions-prognoses in administrative law see Wabnitz, R.J., Politische Fragen, Rechtsfragen und Sachfragen, Frankfurt a.M. etc., Peter Lang, 1980, at 99-100.

Using as an example the case of refugees from Germany, he went on to say that 'persons who had left Germany, not of their own accord, but for reasons outside their own desires, could not refer to persecutions which no longer existed. It was their horrifying memories which made it impossible for them to consider returning. German-occupied countries offered other examples which justified the reluctance of some refugees to return to their countries of origin.' Accordingly, he concluded that 'if the text finally adopted did not include a subjective clause, it would be unsatisfactory. It was essential that the clause should appear somewhere; its absence would constitute a great omission.'² Other states' delegates, however, albeit recognising the role of such subjective elements in the creation of refugeehood, did not express the same zeal as the above delegate to emphasise the subjective elements³. The final view adopted by the UN Committee on Statelessness was one that favoured rather the objective

²See UN Doc. E/AC.32/SR.18, 8 February 1950, at 4-5, in Takkenberg, A., Tahbaz, C.C. (eds.), The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees, vol. I, Amsterdam, Dutch Refugee Council, 1990 (hereinafter Travaux), at 274-5.

³Mr Henkin (USA) pointed out that he 'felt that in the case of victims of the Spanish falangist regime, it was not sentimental considerations which prevented them from returning home', adding that 'the representative of France has declared...that there was no reason not to recognize the validity of sentimental reasons in all cases', UN Doc. E/AC.32/SR.18, 8 February 1950, at 5, in Travaux, at 275. See also the French Proposal for a Draft Convention Preamble, UN Doc. E/AC.32/L.3, 17 January 1950, at 1-2, in Travaux at 147, where it was mentioned that refugee status 'must be recognized to all persons who, having left their country of origin, refuse to return there owing to fear of persecution or are unable to do so because they have not obtained permission and for either of these reasons are unwilling or unable to claim the protection of that country...'.

stance towards the assessment of the well-founded fear, without, nonetheless, discarding the subjective standpoint. In its Report of 17 February 1950⁴ the Committee commented that 'The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.'

However, UNHCR has subsequently officially supported the subjective theory. In its Handbook⁵, UNHCR has recognised that the well-founded fear of a refugee towards persecution consists of a subjective and an objective element, and has commented that 'Determination of refugee status will... primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in the country of origin'⁶. Thus, based on a preference for the subjective theory, UNHCR has liaised the 'evaluation of the subjective element' of the Convention refugee definition with 'an assessment of the personality of the applicant'. Personal elements that should, as a consequence, be taken into account should be, according to the Handbook, 'the personal and family

⁴UN Doc. E/1618, 17 February 1950, Annex II, Chapter I, in Travaux, 405, at 415.

⁵UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979 (hereinafter UNHCR, Handbook).

⁶UNHCR, Handbook, at 11, para. 37, emphasis added. Accord, Cox, Th. N., 'Well-founded fear of being persecuted': The sources and application of a criterion of refugee status', 10 Brooklyn Journal of International Law (1984) 333, at 351-2.

background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences'⁷. The overtly subjective, refugee-favouring, standpoint of UNHCR has been made clearer in the Handbook, in the paragraph regarding the examination of the objective element ('well-founded') of the refugee's fear. While it has been conceded that the refugee applicants' statements 'must be viewed in the context of the relevant background situation', UNHCR has gone on to stress that 'In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.'⁸

However, the above stance of UNHCR has been out of harmony not only with the preparatory history of the 1951 Refugee Convention, but also with the accepted opinion in contemporary refugee law doctrine and refugee case law. Atle Grahl-Madsen has supported the objective theory, stressing that 'The adjective 'well-founded' suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugeehood, but that this claim should be measured with a

⁷Ibid., at 12, para. 41.

⁸Ibid., at 12-13, para. 42.

more objective yardstick'⁹. The same opinion has been adopted by another contemporary authority, J.C. Hathaway, who, based on the preparatory history of the 1951 Refugee Convention, has emphasised that 'the concept of well-founded fear is rather inherently objective, and was intended to restrict the scope of protection to persons who can demonstrate a present or prospective risk of persecution, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past.'¹⁰

It is submitted that international refugee status case law, when dealing with the issue of the requisite well-founded fear of a refugee and the concomitant prognosis regarding persecution, has actually subscribed to the objective school. This, however, does not mean that courts have placed an unreasonable onus on the refugee applicant. As demonstrated below, asylum-adjudicating courts have conditioned their objective theory-based opinion on a persecution risk-standard

⁹Grahl-Madsen, A., The Status of Refugees in International Law, vol. I, Leyden, A.W. Sijthoff, 1966, at 173.

¹⁰Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 65. Accord, Gilbert, G.S., 'Right of asylum: A change of direction', 32 ICLQ (1983) 633, at 644, Shimada, Y., 'The concept of the political refugee in international law', 19 JAIL (1975) 24, at 33-4, Tsamenyi, B.M., 'The "boat people": Are they refugees?', 5 HRQ (1983) 348, at 365, Kälin, W., loc. cit. supra n. 1, at 28-29. G.S. Goodwin-Gill, on the other hand, has adopted a neutral stance attaching rather the same weight to both the subjective and the objective element of the well-founded fear of a refugee, see Goodwin-Gill, G.S., op. cit. supra n.1, at 25. Accord, Hyndman, P., 'The 1951 Convention definition of refugee: An appraisal with particular reference to the case of Sri Lankan Tamil applicants', 9 HRQ (1987) 49, at 67-9.

of proof that is to be regarded not only as reasonable but moreover as concordant with the sui generis nature of a refugee's plight, and the concomitant humanitarian ratio that should characterise this phase of asylum adjudication. Thus, the emphasis by case law has not actually been placed upon the subjective and objective elements of a refugee's claim, but rather on the onerous duty of the courts to determine the standard of proof that should be applicable and required from the refugee applicant who actually bears the onus probandi¹¹ with regard to the existence or not of an actual danger of persecution in case of return to the country of origin.

The internationally leading judgment regarding this issue is the one rendered by the US Supreme Court in INS v. Cardoza-Fonseca¹². The above Court in its attempt to determine when there should be considered to exist a well-founded fear of persecution pointed out in Cardoza-Fonseca that 'There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening... As we pointed out in Stevic, a moderate interpretation of the "well-

¹¹See UNHCR, Handbook, at 12, para. 42, and at 47-8, paras. 195-202; see also Weis, P., 'The concept of the refugee in international law', 87 JDI (1960) 928, at 986, Jackman, B., 'Well-founded fear of persecution and other standards of decision-making: A North American perspective', in Bhabha, J., Coll, G. (eds.), op. cit. supra n. 1, 37, at 52 infra; see also Hyndman, P., 'The 1951 Convention and its implications for procedural questions', 6 IJRL (1994) 245, at 247.

¹²Judgment of March 9, 1987, 480 US 421, 94 L Ed 2d 434.

founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility".¹³ In the same vein, the Canadian Court of Appeal in Joseph Adjei v. Minister of Employment and Immigration¹⁴ accepted that the refugee's fear of persecution should be 'evaluated objectively [in order] to determine if there is a valid basis for that fear'¹⁵. The court, relying on Canadian precedents where the 'requisite test' had been established to be in terms of 'reasonable chance' or 'good grounds', concluded laying down the following fear of persecution-assessment reasoning: 'What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also

¹³94 L Ed 2d 434, at 453, emphasis added. INS v. Stevic, judgment of June 5, 1984, 467 US 407, 81 L Ed 2d 321, was a deportation (in effect non-refoulement) case and established in US refugee law the bifurcation of the standards of proof between withholding of deportation, when 'a clear-probability-of-persecution standard' should apply, and asylum proceedings proper, where 'the well-founded fear standard is more generous', ibid., 81 L Ed 2d 321, at 335. On the above two US cases see, inter alia, Anker, D., Blum, C.P., 'New trends in asylum jurisprudence: The aftermath of the US Supreme Court decision in INS v. Cardoza-Fonseca', 1 IJRL (1989) 67 infra, Gibney, M., 'A "well-founded fear" of persecution', 10 HRQ (1987) 109 infra, Sautman, B., 'The meaning of "well-founded fear of persecution" in United States asylum law and in international law', 9 Fordham International Law Journal (1986) 483 infra.

¹⁴Judgment of January 25 and 27, 1989, [1989] 2 Canada Federal Court Reports 680.

¹⁵Ibid. at 682.



be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.¹⁶ Finally, a similar thesis has been adopted by the High Court of Australia in Chan Yee Kin v. Minister for Immigration and Ethnic Affairs¹⁷. The court in this case commented, with reference to the well-founded fear of a refugee, that 'the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns'¹⁸. The objective theory was actually expressly supported in this case as well by Dawson J. who pointed out that 'the circumstances in which an applicant for recognition of refugee status fled his country of nationality will ordinarily be the starting point in ascertaining his present status'¹⁹.

The objective method of risk assessment has also been firmly established in European as well as international human rights case law concerning cases of a nature similar to that of refugee status applications. This has been demonstrated by the

¹⁶Ibid. at 683.

¹⁷6 April, 12 September 1989, 87 Australian Law Reports 412.

¹⁸Ibid. at 417. The Court has based its views to a great extent on the opinion of Atle Grahl-Madsen according to whom (op. cit. supra n. 9 at 181) 'the real test is the assessment of the applicant's becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded'.'

¹⁹Ibid. at 425.

European Court of Human Rights in the context of deportation or extradition cases raising the issue of 'a real risk of treatment contrary to Article 3 [of the European Convention on Human Rights]'²⁰. The above Court dealt with this issue in Vilvarajah and others²¹, a case concerning the deportation of Sri Lankan Tamil asylum seekers from the UK to their country of origin. The Court pointed out in Vilvarajah that the duty it had to discharge in such cases, in order to determine whether 'substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3', consisted of an examination -on the basis 'of all the material placed before it or, if necessary, material obtained proprio motu'- of the 'foreseeable consequences of the removal of the applicants [to their country of origin]'²². The European Court of Human Rights in a number of such cases has accordingly provided ample evidence regarding its actual reliance on an objective assessment of the risk that the individual applicants might run if they forcibly found themselves (following an expulsion or an extradition) back in their country of origin, without discarding, however, the factual background presented by each applicant's case. This was made explicit by the Court in Cruz Varas and others²³, a case

²⁰Article 3 of the European Convention on Human Rights (213 UNTS 221) reads as follows: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

²¹European Court of Human Rights, judgment of 30 October 1991, Series A no. 215.

²²Ibid. at 36, paras. 107-8.

²³Case of Cruz Varas and others v. Sweden, judgment of 20 March 1991, Series A, vol. 201.

concerning the expulsion of a Chilean asylum seeker from Sweden to Chile. Here the European Court of Human Rights emphasised that `...that ill-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, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim...'²⁴.

The objective method for assessing the risk of being subjected to torture in the country of origin, following an expulsion to that country, has also been endorsed, and was employed by the UN Committee against Torture (UN-CAT) in Mutombo v. Switzerland²⁵. This case concerned a Zairean unsuccessful asylum seeker subject to expulsion in Switzerland. The main question

²⁴Ibid. at para. 83. See also Soering Case, (a case concerning the extradition of an US citizen, subject to death penalty, from the UK to the USA), judgment of 7 July 1989, Series A, vol. 161, at para. 111: `...in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.' See also Vilvarajah and others, supra n. 21, at paras. 109-116; see also Alleweldt, R., 'Protection against expulsion under Article 3 of the European Convention on Human Rights', 4 European Journal of International Law (1993) 360, at 365-70, Einarsen, T., 'The European Convention on Human Rights and the notion of an implied right to de facto asylum', 2 IJRL (1990) 361, at 369-73.

²⁵Communication No. 13/1993, Decision of 27 April 1994, reported in 15 Human Rights Law Journal (1994) 164.

before UN-CAT was whether the above state party to the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment would violate the Convention's non-refoulement provision of Article 3²⁶, if she expelled the communication author to his country of origin. What the above Committee had to consider, in effect, was whether there were `substantial grounds for believing that Mr. Mutombo would be in danger of being subject to torture [in Zaire].'²⁷ UN-CAT answered in the affirmative to that key-question, having regard to objective elements of the case. That is, to facts relating, firstly, to the author's `ethnic background, alleged political affiliation and detention history as well as the fact...that he appears to have deserted from the army and to have left Zaire in a clandestine manner and, when formulating an application for asylum, to have adduced arguments which may be considered defamatory towards Zaire.'²⁸ The second significant objective element conjunctively taken into serious consideration (in accordance with Article 3.2 of the above-mentioned UN Convention) and which led UN-CAT to the conclusion that detention and torture of the above applicant would constitute a `foreseeable and

²⁶Article 3 reads as follows: `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.'

²⁷15 Human Rights Law Journal (1994), at 167, para. 9.3.

²⁸Ibid. at 167, para. 9.4.

necessary consequence' of his return, was the human rights situation in the country of origin. More specifically, UN-CAT had regard to the available, substantial evidence relating to the existence of 'a consistent pattern of gross, flagrant or mass violations [of human rights]'²⁹ in the author's country of origin.

SECTION 2. THE THESES OF EUROPEAN REFUGEE JURISPRUDENCE

British refugee status case law has expressed two basic theories with regard to the persecution risk-standard of proof which should be discharged by the refugee applicant. The first theory, found in cases of the late 1970s and early 1980s, may be characterised as over-restrictive, and consequently inappropriate, while the second one is to be recognised as a reasonable, correct standard, concordant with the humanitarian exigencies of an asylum seeker's plight.

In 1977 the Immigration Appeal Tribunal in Habtu Kahsai Hailu

²⁹Ibid. at 167-8, paras. 9.4, 9.5. The objective method for assessing the existence of risk for a person subject to extradition to be subjected to cruel, inhuman or degrading treatment or punishment in the requesting state, was also endorsed by the UN Human Rights Committee (UN-HRCee) in Ng v. Canada, Communication No. 469/1991, Decision of 5 November 1993, 15 Human Rights Law Journal (1994) 149. This case concerned an individual subject to extradition, from Canada, and to death penalty by cyanide gas asphyxiation in the USA. UN-HRCee found in favour of the communication author, having recognised that the above method of death penalty constitutes cruel and inhuman treatment in violation of article 7 of the 1966 International Covenant on Civil and Political Rights. The Committee, in order to reach this conclusion, expressly had regard 'to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent.', ibid. at 157, para. 16.1.

v. The Secretary of State for the Home Department³⁰ rejected the submission that the onus of proof of the refugee appellant was one of a lesser degree than in other immigration cases, and that, consequently, it would be 'sufficient for the Tribunal to be satisfied that there is "a reasonable chance" or a "serious possibility" of persecution to consider the fear well-founded'³¹. The precedent on which the above appellant's contention had been based was Fernandez v. Government of Singapore and others³². The case concerned a fugitive offender and the main provision at issue there was section 4 paragraph 1 (b) and especially (c) of the Fugitive Offenders Act 1967 which proscribed any person's return if 'it appears...to the court of committal or to the High Court...on an application for habeas corpus...(b) that the request for his return (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or (c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his...political opinions.' The House of Lords established in Fernandez that the risk described in section 4 para. 1 (c) of the above Act should not be proved on the civil litigation test of 'balance of probabilities' which had been applied earlier by the High

³⁰Appeal No. TH/3936/76, TH/3926/76 (923), 8 March 1977 (transcript copy).

³¹Ibid. at 9.

³²[1971] 2 All ER (HL) 691.

Court³³. According to the former Court, while that was a 'convenient' test in delimiting the 'degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences', it was 'inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future.' Lord Diplock went on to say that 'There is no general rule of English law that when a court is required...to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on it happening are fractionally less than evens...in determining whether or not to grant a quia timet injunction on the ground that irreparable harm may be caused unless a particular kind of conduct is restrained, the court is not required by law to shut its eyes to the risk of irreparable harm unless it is satisfied that it is fractionally more than 50 per cent. The degree of risk should be an important factor in the court's decision, whether it is more or less than 50 per cent.'³⁴ Accordingly, the conclusion reached by the House of Lords was that the 'degree of [the court's] confidence that the events specified in paragraph [c] will occur...should depend on the gravity of the consequences contemplated by the section on the

³³R. v. Governor of Pentoville Prison, ex parte Fernandez, [1971] 1 Weekly Law Reports 459, at 466 et seq.

³⁴per Lord Diplock, supra n. 32, at 696-7.

one hand of permitting, and on the other of refusing, the return of the fugitive...'. In that case, 'detention or restriction in [the appellant's] personal liberty' was, according to the Court, 'grave indeed to the individual fugitive concerned'. In consequence, the House of Lords stressed that the test of applicability of paragraph (c) was not whether '...the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is...sufficient'. Thus, the Court suggested that the phrases '[a] reasonable chance', 'substantial grounds for thinking', 'a serious possibility', constituted all appropriate 'ways [with no significant difference between them] of describing the degree of likelihood of the detention or restriction of the fugitive on his return', which would permit them to give effect to the aforementioned Act³⁵.

The Immigration Appeal Tribunal in Hailu rejected the application of the above test in a refugee status context. They reasoned their judgment differentiating, on the basis of a textual-semantic interpretation, between the words 'might' (of the Fugitive Offenders Act) and 'well-founded' (of the 1951/1967 Refugee Convention). They found that the above two sets of words were of a different nature, and opting for 'a common-sense approach, devoid of legal nicety' they concluded that there should be applied an 'objective test in deciding whether the fear...the appellant [had] of returning to the

³⁵Ibid. at 697.

Sudan [first country of asylum] for the reasons stated by him [was] well-founded'³⁶.

However, in 1984 the Immigration Appeal Tribunal in Nagat Baghat Asad Al Kazie v. Secretary of State for the Home Department³⁷ accomplished a jurisprudential u-turn, propounding that Lord Diplock's test applied in Fernandez offered a 'most valuable guidance' and, consequently, it should be applied in refugee status cases, on the ground that a 'person's freedom of movement is at stake in each kind of case and the wording of the comparative provisions is so similar'³⁸. Kazie has been thereafter followed by the Tribunal in a series of cases. In Crosby Kofi Enningful v. Secretary of State for the Home Department³⁹ it was accepted that 'a person facing a "less than evens" chance of perse-cution could...be properly found to have a well-founded fear of that eventuality'⁴⁰. What has consequently been established as a

³⁶Supra n. 30, at 11. This thesis was reiterated by the same Tribunal in Poitr Zbigniew Kus v. The Secretary of State for the Home Department, Appeal No. TH/31628/78 (1470), 20 March 1979, and in Victor Dub v. The Secretary of State for the Home Department, Appeal No. TH/99793/82 (2798), 27 June 1983 (transcript copies).

³⁷[1984] Imm AR 10.

³⁸Ibid. at 14.

³⁹Immigration Appeal Tribunal, Appeal No. TH/119683/84 (3423), 30 August 1984 (transcript copy).

⁴⁰See also the following Immigration Appeal Tribunal cases: Peteira Mandro Bamunoba Makuro v. Secretary of State for the Home Department, Appeal No. TH/121655/84 (3618), 5 December 1984, Ritha Hameed Mohammad and others v. Secretary of State for the Home Department, Appeal No. TH/110277/83 (3232), 16 April 1984, Kwaku Duodu and others v. The Secretary of State for the Home Department, Appeal No. TH/134346/84

standard of proof in asylum cases is a lower one⁴¹, or a 'moderate onus of proof'⁴², or 'a standard of proof somewhat lower than the balance of probability'⁴³, or a 'somewhat reduced degree of probability'⁴⁴. The High Court dealt with the same issue in R. v. Immigration Appeal Tribunal ex parte Daniel Boahim Jonah⁴⁵. Although he did not approve openly the Fernandez and Kazie criterion, refusing to fall into 'the danger of creating purely semantic problems', Nolan J effectively accepted it, pointing out that the 'likelihood of persecution' in a refugee status case is 'something different from proof on the balance of probabilities that persecution

(4174), 24 September 1985 (transcript copies).

⁴¹See the following cases of the Immigration Appeal Tribunal: Patrick Nortey v. The Secretary of State for the Home Department, Appeal No. TH/1986/85 (4327), 21 November 1985, Nirmaladevi Salvadurai/Sellathurai v. The Secretary of State for the Home Department, Appeal No. TH/130924/84 (3993), 23 May 1985, Msolini Mguni and others v. The Secretary of State for the Home Department, Appeal No. TH/123009/84 (4056), 2 July 1985, Irina Cholodowskaja v. The Secretary of State for the Home Department, Appeal No. TH/133785/84 (4133), 12 August 1985, Jangbahadur Singh v. The Secretary of State for the Home Department, Appeal No. TH/19121/86 (6510), 26 April 1989 (transcript copies).

⁴²See Alo-Appiah Gyan v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/129398/84 (4026), 10 June 1985 (transcript copy).

⁴³See Antero Ajikua Amboritua v. Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/119144/84 (4046), 19 June 1985 (transcript copy).

⁴⁴See David Luritie Luri v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/978/85 (4138), 4 September 1985 (transcript copy).

⁴⁵Queen's Bench Division, 11 February 1985, [1985] Imm AR at 7.

will occur'⁴⁶.

The issue was finally settled in the UK by the House of Lords in R. v. Secretary of State for the Home Department ex parte Sivakumaran and conjoined appeals (UNHCR intervening)⁴⁷. In this case, the Lords' judgment drew upon three basic jurisprudential sources: the above-mentioned US Supreme Court cases of Cardoza-Fonseca and Stevic, as well as the aforementioned case of Fernandez and the therein reasoning of Lord Diplock's. Accordingly, the House of Lords, having aligned themselves with the objective theory regarding the well-foundedness of the refugee's fear of persecution⁴⁸, held that 'the requirement that an applicant's fear of persecution should be well founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for

⁴⁶Ibid. at 11-12; see also the following Immigration Appeal Tribunal cases: Edna Akainyah and others v. the Secretary of State for the Home Department, Appeal No. TH/7186/85 (4444), 6 March 1986, Mehdi Sonboli v. The Secretary of State for the Home Department, Appeal No. TH/132421/84 (4452), 20 February 1986, Veli Alier Mouharemov v. The Secretary of State for the Home Department, Appeal No. TH/776/85 (4167), 18 September 1985 (transcript copies); see also Celal Yurekli v. Secretary of State for the Home Department, Court of Appeal, [1991] Imm AR 153.

⁴⁷[1988] 1 All ER (HL) 193.

⁴⁸Per Lord Keith of Kinkel: '...the general purpose of the [1951/1967 Refugee] convention is surely to afford protection and fair treatment to those for whom neither is available in their own country and does not extend to the allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question.', ibid. at 196; see also ibid. at 198. Accord, Lord Goff of Chieveley, ibid. at 202. Accord, R. v. Secretary of State for the Home Department ex p. Karamjit Singh Chahal, Queen's Bench Division, 12 February 1993, [1993] Imm AR 362, at 371.

a convention reason if returned to his own country'⁴⁹.

It was consequently established in British case law the sui generis character of the asylum adjudication which differentiates it from general immigration or civil procedures that require a more stringent and harder to discharge standard of proof. The unique character of refugee status applications lies in the fact that a refugee applicant's fear of persecution may prove to be realistic in the future, in case (s)he returns to the country of origin. The vulnerability of the unprotected, de iure or de facto, refugee and the concomitant dangers that any kind of return may entail constitute parameters that should be seriously taken into account by the adjudicating organs⁵⁰. This, however, may detract nothing from the other evidential requirements an asylum seeker has to meet in order to qualify for refugee status. It is exactly the prognostic problem of foreseeing, and proving the potential future persecution that places upon

⁴⁹Per Lord Keith of Kinkel, [1988] 1 All ER (HL) 193, at 197-8; see also per Lord Goff of Chieveley, ibid. at 202.

⁵⁰It is to be noted that British courts have expressed a fear of using a 'lower standard of proof' in asylum cases. In R. v. Immigration Appeal Tribunal ex parte Barfour Adjei-Barwuah, Queen's Bench Division, CO/916/88, 8 December 1988 (transcript copy), the court stated that the words 'on the low standard of proof applicable' are 'capable of a number of meanings'. The Immigration Appeal Tribunal in Pornu Thurai Nackeeran v. The Secretary of State for the Home Department, Appeal No. TH/111280/83 (6419), 26 January 1989 (transcript copy), drawing on Adjei-Barwuah, went on to say that there are 'dangers which lie in the use of the phrase'. Nevertheless, the courts have strictly followed the guidelines of the House of Lords expressed in Sivukamaran, see R. v. Secretary of State for the Home Department ex parte Ayse Oran, Queen's Bench Division, [1991] Imm AR 290.

the latter a serious burden. This burden is actually exacerbated by the usual phenomenon of the courts' obligation to rely, to a great extent, on persecution-related evidence provided by the asylum applicant, along with the inevitable question of the latter's 'creditworthiness', or 'credibility'⁵¹.

As a consequence, persecution in British refugee case law has been characterised by limitations ratione temporis which are usually taken into account by courts in the course of formation of their opinion with regard to the risk of persecution. In R. v. Secretary of State for the Home

⁵¹See the following cases of the Immigration Appeal Tribunal: Emmanuel Amanfo and others v. The Secretary of State for the Home Department, Appeal No. TH/126706/84 (4055), 24 June 1985, Philip Aboagy Bonner v. The Secretary of State for the Home Department, Appeal No. TH/1884/85 (4866), 25 July 1986, Pavllus Zemariah Kinfu v. The Secretary of State for the Home Department, Appeal No. TH/135/88 (6241), 14 October 1988 (transcript copies); see also Marion Mamei Gaima v. Secretary of State for the Home Department, Court of Appeal, [1989] Imm AR 595, R. v. Secretary of State for the Home Department ex parte "K", Queen's Bench Division, [1990] Imm AR 393, R. v. Secretary of State for the Home Department ex parte H. Bolat, Queen's Bench Division, [1991] Imm AR 417, R. v. Secretary of State for the Home Department ex parte Gulabi Ozdemir, Queen's Bench Division, CO/397/90, 31 March 1992 (transcript copy). See also Anker, D., 'INS. v. Cardoza-Fonseca, one year later: Discretion, credibility and political opinion', in Tomasi, L.F. (ed.), In Defense of the Alien, vol. XI, New York, Center for Migration Studies, 1989, 120, at 122 et seq., Kälin, W., 'Troubled communication: Cross-cultural misunderstandings in the asylum-hearing', 20 IMR (1986) at 230 infra, Goodwin-Gill, G.S., 'The determination of refugee status: Problems of access to procedures and the standard of proof', International Institute of Humanitarian Law Yearbook 1985, 56, at 62, Ruppel, J., 'The need for a benefit of the doubt standard in credibility evaluation of asylum applicants', 23 Columbia Human Rights Law Review (1991-92) 1, at 6 et seq., Dignam, Q., 'The burden and the proof: Torture and testimony in the determination of refugee status in Australia', 4 IJRL (1992) 343, at 357-8.

Department ex parte Murat Akdogan⁵² the High Court examined the case of a Turkish Alevite Kurd asylum seeker who had been detained and tortured once in 1978 by the Turkish authorities by reason of his political activism, but no such persecution took place again thereafter, until 1989. The court accepted the conclusion of the Home Office that, on the basis of the case's evidence, the appellant could not successfully claim refugee status because of the persecution he had suffered almost ten years before⁵³. Thus, British courts used to adopt a rather restrictive view putting emphasis only on future persecution a refugee applicant would be liable to in the country of origin. In this vein, the Court of Appeal in Re D⁵⁴ rejected the submission that 'persecution at various stages in the past' could qualify the appellant as a refugee. The court stressed that 'the fear of persecution must be a fear of persecution in the future if he returns to Turkey, because of which he is unwilling to avail himself of the protection of that country.' The same interpretation was applied by the High Court in R. v. Secretary of State ex parte Erguzel⁵⁵. The court here, relying on the letter of the 1951/1967 Refugee Convention, although it accepted that 'if somebody has left their own country because they were persecuted, that is a

⁵²[1990] Imm AR 341.

⁵³See also R. v. Secretary of State for the Home Department ex parte Kosar, Queen's Bench Division, CO/623/90, 16 March 1992 (transcript copy).

⁵⁴Court of Appeal (Civil Division), 11 April 1990 (transcript copy).

⁵⁵Queen's Bench Division, CO/555/90, 23 May 1990 (transcript copy).

strong argument for saying they have a well-founded fear of being persecuted in the future', went on to add that 'it does not necessarily follow that because of an isolated occasion somebody has been persecuted they have a well-founded fear of being persecuted in the future. The convention is specific, not "who has been persecuted" but somebody "who has a well-founded fear of being persecuted"; that is to say what is going to happen hereafter'. The fact that the past persecution was torture, substantiated by medical evidence, which occurred only one year before was not considered as able to convince the court that the case before them was a meritorious one.

However, in later judgments British courts have moved away from their unreasonable insistence on the ability of the refugee to prove only future persecution, taking thus seriously into account past persecution suffered by the refugee applicant. In R. v. Secretary of State for the Home Department ex parte Parmak⁵⁶ the High Court decided a case of a Turkish Kurd, a victim of torture suffered in 1980, and of ill-treatment while in detention in 1986. The court opined that the 'essential ingredient' of persecution was the 'degree of persistence' and while 'One would not ordinarily categorise as persecution a single incident', it was accepted that there may exist cases where 'a single incident would amount to persecution'. The Queen's Bench Division held the Secretary of State's decision in that case to be erroneous and flawed,

⁵⁶Queen's Bench Division, CO/702/90, 23 January 1992 (transcript copy).

since he had failed to take into account the 'past suffered persecution at the hands of the Turkish authorities; and failed to relate those past events to their current interest in him'. The same court elaborated further on this point in R. v. Secretary of State for the Home Department ex parte Halil Direk⁵⁷, a case concerning a Turkish Kurd who had suffered persecution in 1980 and arrived in the UK in 1989. His asylum claim was rejected by the Home Office in 1990. The High Court emphasised in Direk that the Secretary of State 'has to look both at the past and the present, and the future'⁵⁸. Accordingly, the court pointed out that the administration should 'measure the seriousness of the whole picture'⁵⁹, while it would be unreasonable on their part to dismiss an asylum application on the logic that past persecution, even if it consisted only of ill-treatment, may on its own disqualify an asylum claim.

In France, even though it is well-established in refugee status jurisprudence that the refugee applicant bears the burden of proof regarding the claim of a well-founded fear of persecution⁶⁰, neither the Conseil d'Etat nor the Commission

⁵⁷Queen's Bench Division, 5 March 1992, [1992] Imm AR 330.

⁵⁸[1992] Imm AR 330, at 335. Accord, Immigration Appeal Tribunal, Luis Carlos Rojas Cortes v. The Secretary of State for the Home Department, Appeal No. TH/25618/86 (6088), 1 September 1988 (transcript copy).

⁵⁹[1992] Imm AR 330, at 335.

⁶⁰See M. Kabasele Makuenda, CE No. 66.322, 15 November 1985, M. Sundramoorthy, CE No. 55.927, 29 May 1985, M. Rajendram, CE No. 51.900, 20 March 1985, M. Geyik, CE No. 123.702, 27 January 1992, M. Subramaniam, CE No. 114.973, 13

des Recours des Réfugiés has ever elaborated on the very notion of 'well-founded fear of being persecuted'. In M. Nakarajah⁶¹ the Conseil d'Etat accepted the reasoning of the Commission des Recours which had rejected the refugee status application on the ground that the applicant did not 'provide any evidence which would allow to regard as established the facts that were invoked and the fear of persecution that he may reasonably have if he returned to [his country of origin]'⁶². From this judgment one may conclude that in French asylum adjudication what would be considered to be the point in every singular case concerning the question of the well-founded fear would be whether the competent tribunal is in a position, on the basis of the evidence produced by the refugee applicant, to conclude that the fear of persecution is reasonable. The standard of proof laid down by French jurisprudence has been associated with the notion of 'sufficient [evidentiary] presumptions'. Thus, in M. Pathmeswaran⁶³ the Conseil d'Etat found no defect in and affirmed the decision of the Commission des Recours, according to which what is in fact required in a refugee status application is the production of such evidence from which 'may result sufficient presumptions which permit to regard these facts as substantiated'. To this

November 1992 (transcript copies).

⁶¹CE No. 62.650, 2 July 1986 (transcript copy).

⁶²Emphasis added.

⁶³CE No. 50.723, 26 July 1985 (transcript copy).

end, the evidence should consist of 'sufficient details'⁶⁴, or 'precise [evidential] elements'⁶⁵, or 'sufficiently precise [evidential] elements'⁶⁶ regarding feared persecution. The above French rule of sufficient presumptions is undoubtedly not a strict one, since it does not impose on the refugee applicant any particularly demanding onus of proof. This lenient position, however, although it may act beneficially for a refugee applicant concurrently contains a serious drawback. The lack of elaboration of the above rule by the French courts or tribunals has provided them with a quite large margin of appreciation the boundaries of which are not at all easily definable in the French legal framework.

However, as in the case of British case law, French jurisprudence has linked the assessment of a claim of a well-founded fear of persecution with ratione temporis considerations, thus effectively endorsing the objective theory of persecution prognosis. Accordingly, the Commission des Recours pointed out in M. Costache⁶⁷ that the fear of persecution should be 'current and justified'. Persecution

⁶⁴See M. Kavoka N'sumbula, CE No. 57.185, 26 July 1985 (transcript copy).

⁶⁵See M. Monga Mallenge, CE No. 55.555, 29 May 1985 (transcript copy).

⁶⁶See M. Kanithesingam, CE No. 54.709, 10 May 1985; see also M. Castrillo Alcalde, CRR No. 18.690, 27 November 1984, M. Razouki, CRR No. 19.344, 30 July 1984, Mle Dorzema, CRR No. 25.290, 30 July 1984, M. Aboul, CRR No. 24.739, 31 August 1984, M. Zurutuza Oruna, CRR No. 27.260, 30 July 1984, M. Ramasamy, CRR No. 19.514, 13 June 1985, M. Somasundaram, CRR No. 32.984, 7 July 1986 (transcript copies).

⁶⁷CRR No. 153.760, 6 February 1991 (transcript copy).

suffered a long time (e.g. ten years) before the lodging of the refugee status application has not been accepted as sound evidence by the Commission des Recours des Réfugiés⁶⁸. Another temporal issue of significance has been changes of the political situation in the country of refugee origin. Consequently, general political liberalisation in a country following the flight of the refugee applicant⁶⁹, amnesty proclaimed for all political offences⁷⁰, or democratisation of the political system of the country of origin⁷¹, have all been taken into consideration and regarded as rebuttable evidence establishing prima facie a case against a claim of persecution. This prima facie conclusion may, nonetheless, be overturned if evidence is produced substantiating a still existing well-founded fear based either on recently suffered persecution⁷², or even persecution of a serious nature, suffered further in the past and the gravity of which may

⁶⁸See M. Kandasamy, CRR No. 24.729, 30 July 1984; see also M. Diallo Mamadou Ouri, CRR No. 25.451, 30 October 1984, M. Ambrosu-Kanknmlage, CRR No. 65.842, 14 February 1986 (transcript copies).

⁶⁹See Mle Camara, CRR No. 23.214, 30 July 1984 (transcript copy).

⁷⁰See Mle Sompere, CRR No. 139.226, 19 November 1990 (transcript copy).

⁷¹See M. Borso, CRR No. 192.982, 3 June 1992 (transcript copy). See also M. Pavaloaie, CRR No. 246.470, 10 December 1993, reported in Documentation-Réfugiés, Supplément au No 245, 21 Juin/4 Juillet 1994, at 1.

⁷²See M. Bereciartua Echarri, CRR No. 10.513, 30 July 1984 (transcript copy).

still be regarded as justifying the grant of refugee status⁷³.

The requisite prognosis of persecution for the establishment of the relevant well-founded fear has been recognised by German case law as referring to the 'foreseeable progress of some specific relations...[and] to the expected intensification or toning down' of persecutory measures in the refugee's country of origin. This prognosis has been expressly associated in Germany with a 'frame of judgment', or 'scope of assessment' ('Wertungsrahmen'/'Bewertungsspielraum', respectively) of the domestic courts in asylum adjudication⁷⁴. This is actually a margin of appreciation regarding the occurrence (or repetition) of persecution, that refers not only to the legal but also the factual assessment of claims attached to each asylum case. Any such assessments are subject to the judicial review of the German Constitutional Court which is entitled to judge whether the lower courts' assessments 'demonstrate a sufficient degree of reliability and whether they are sufficient, according to the scope [of assessment] relating to the special conditions [established] in the field

⁷³See M. Munoz Domange, CRR No. 119.696, 4 October 1990 (transcript copy): this has been a rather exceptional case of a Chilean tortured during the dictatorship in Chile, due to his political activism. The Commission des Recours found in favour of him, drawing heavily upon the gravity of the 'consequences that the torture suffered had produced on the physical and psychic equilibrium of the applicant'.

⁷⁴See judgments of the Bundesverfassungsgericht, 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 169; 6 March 1990, 2 BvR 937,1289,1405 etc./89 (transcript copy) at 4; 17 December 1991, 2 BvR 1041/91, 11 NVwZ (1992) 560, at 561.

of asylum [law]'⁷⁵. Accordingly, the Federal Administrative Court has stressed that this 'future-oriented statement should be more than a mere 'prophesy' or 'prediction', [and that] it must consequently possess to a certain extent rationality and plausibility'⁷⁶.

According to a general rule (similar to the one expressed in British case law) which has been established by the Federal Administrative Court, this kind of assessment should not be limited ratione temporis to the past or current events relating to the (fear of) persecution of the refugee applicant. As pointed out by the Bundesverwaltungsgericht, 'the prognosis which is to be set up at the time of the last judicial instance dealing with the facts, and which regards the danger of political persecution of the asylum seeker should not be limited to the situation in his home country as it may be established at a snapshot, and [should not] be

⁷⁵76 BVerfGE 143, at 161-2; see also judgment of 9 November 1988, 2 BvR 288, 388/88 (transcript copy) at 4. However, this frame of judicial assessment has been characterised as narrow, given the great dependence of the right to asylum on the judicial procedure, see judgment of 18 January 1990, 2 BvR 760/88, 12 InfAuslR (1990) 161, at 163-4.

⁷⁶Judgment of 20 November 1990, BVerwG 9 C 73.90, 13 InfAuslR (1991) 181, at 184; see also judgment of 6 March 1990, BVerwG 9 C 16.89, 12 InfAuslR (1990) 240, at 241, judgment of 6 March 1990, BVerwG 9 C 14/89, 9 NVwZ (1990) 1179, at 1180: 'The future prognosis has as its content the probability of future events in case of a hypothetical return of the asylum seeker to his home country'; see also judgment of 20 November 1990, BVerwG 9 C 73.90, 13 InfAuslR (1991) 181, at 184; see also judgment of 9 April 1991, BVerwG 9 C 91/90 etc., 11 NVwZ (1992) 270, at 272, judgment of 3 December 1991, BVerwG 9 C 15.91 etc. (transcript copy) at 10-11, judgment of 8 September 1992, BVerwG 9 C 62/91, 12 NVwZ (1993) 191, at 192.

solely based on what is presently seen or what can be identified as going to happen in the immediate future, but must be directed at the foreseeable future'⁷⁷.

However, what distinguishes German asylum jurisprudence from British and French case law is the creation of a bifurcated prognostic evaluation with regard to fear of persecution, on the basis of whether or not persecution has actually been suffered by the refugee applicant in the past, prior to the lodging of the asylum application. Accordingly, events of the past, which satisfy the prerequisites of persecution in the country of origin should always be taken into account in the course of asylum adjudication⁷⁸. What should be additionally taken into consideration in such cases is the 'nature and extent' of this past persecution. It is upon this factual evidence that any prognosis regarding a 'danger of repetition' ('Wiederholungsgefahr') should be carried out. As the German

⁷⁷See judgment of 4 November 1988, BVerwG 9 C 8.88 (transcript copy) at 11-12; see also judgment of 15 August 1988, BVerwG 9 C 3.88 (transcript copy) at 15, judgment of 23 June 1989, BVerwG 9 C 51.88 (transcript copy) at 10: 'The summarizing statement of the court below, according to which p r e s e n t l y there may not be assumed a ban of the Ahmadi, is not enough for the assessment of the application of No. 295 c PPC [Pakistani Penal Code] against the applicant in case she returns to her country. The same is valid so far as the court below reaches, on the basis of the facts, the conclusion that u n t i l n o w no case of an Ahmadi's conviction has been known. These expressions leave doubt as to whether the Appeal Court has taken into account the foreseeable future'; see also judgment of 30 October 1990, BVerwG 9 C 60.89, 106 DVB1 (1991) 535, at 538-9, judgment of 20 November 1990, BVerwG 9 C 74.90, 106 DVB1 (1991) 541, at 542.

⁷⁸See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 360.

Federal Constitutional Court has emphasised, 'to burden an asylum seeker who has already suffered persecution once with the risk of a repetition [of persecution] runs against the humanitarian character of asylum'⁷⁹. The Court has consequently prescribed that any return to the refugee's country of origin may be permissible only if 'a repetition of the persecutory measures is ruled out with sufficient probability'⁸⁰. The Federal Administrative Court, accepting the above reasoning of its constitutional counterpart, which is considered to be valid both for the actual place of persecution and for flight alternatives, has emphasised that in all cases of past persecution there must be 'high demands...[regarding] the probability of exclusion of repetition of persecution'⁸¹. What the above Supreme Court has actually stressed in such cases is the refugee's preferential, in effect, treatment which has been extrapolated from the constitutional asylum provision itself. Consequently, the refugee should not be required to prove a danger of repetition of persecution utilising the standard of '"considerable probability", according to the objective standard of the reasonable observer'. A lower standard of proof should, accordingly, be in place, in view of the 'mostly grave and permanent consequences -including [those of a] psychological [nature]- of the persecution already suffered once'. It would

⁷⁹Idem. See also Dürig, J., op. cit. supra n. 1 at 36-41.

⁸⁰54 BVerfGE 341, at 361-2; see also judgment of 10 January 1990, 2 BvR 1434/89, 12 InfAuslR (1990) 202, at 204-5.

⁸¹See judgment of 2 August 1983, 9 C 599.81, 67 BVerwGE 314, at 316.

suffice if 'there exist[ed] grounds that make once again the possibility of a threatening persecution to appear as not totally remote'. The asylum request should be rejected, as a consequence, only if relevant arguments may be refuted, or in cases where it may be excluded 'a repetition of persecution without serious doubts regarding the security of the asylum seeker in case of return to the home country'⁸². The Bundesverwaltungsgericht has attempted to provide some definitional guidance for assessing the 'considerable probability' of persecution (the standard of which is not applicable in cases where persecution has already occurred), stressing that such a probability 'for the occurrence of a future political persecution is given when, by an assessment of all the [refugee's] life-related facts submitted for consideration, the circumstances that speak for a persecution have a greater gravity and thus they surpass the opposing circumstances'⁸³. As for the 'remaining psychological consequences' regarding the individual refugee, following an already suffered persecution, the Federal Administrative

⁸²See judgment of 25 September 1984, BVerwG 9 C 17.84, 70 BVerwGE 169, at 170-1; see also the following judgments: 27 April 1982, 9 C 308.81, 65 BVerwGE 250, at 251-2, 22 January 1985, BVerwG 9 C 1113.82 (transcript copy) at 8-9, 26 March 1985, BVerwG 9 C 114.84 (transcript copy) at 10-11, 2 July 1985, BVerwG 9 C 58/84, 5 NVwZ (1986) 485, at 487, 3 December 1985, BVerwG 9 C 22/85, 5 NVwZ (1986) 760, at 760-1, 1 October 1985, BVerwG 9 C 20.85, 37 Die Öffentliche Verwaltung (1986) 612, at 612-3, 1 October 1985, BVerwG 9 C 21.85 (transcript copy) at 10-11, 9 February 1988, BVerwG 9 C 256.86 (transcript copy) at 11, 4 November 1988, BVerwG 9 C 8.88 (transcript copy) at 12, 14 July 1992, BVerwG 9 B 183.91 (transcript copy) at 3-4, 7 April 1992, BVerwG 9 C 58.91 (transcript copy) at 9.

⁸³See judgment of 9 April 1991, BVerwG 9 C 15.90 (transcript copy) at 21.

Court, like its constitutional counterpart, rejected them as a parameter of primary importance in the context of the lowered standard of proof applicable in such cases, supporting, instead, the use of an objective evaluation of the fear of persecution: `...the right of asylum presupposes basically a flight from an objectively hopeless situation...This does not mean...that it is to be regarded as a persecuted individual who fled only he who leaves his home state during a pogrom or an individual persecution. This can rather also be the case if he leaves after the end of a persecution. But then the departure must have happened under circumstances that by an objective assessment still provide the outer image of a flight taken place under the pressure of a suffered persecution. Only when a trauma caused by a suffered persecution corresponds to such an external context may it be regarded as considerable'⁸⁴. Accordingly, the alleviation of the onus probandi in these cases involving an already suffered persecution always presupposes that the fear of persecution is still connected with the conditions prevalent in the state of origin when persecution occurred, or that the refugee has fled her/his country of origin for reasons liaised with the actual persecutory conditions in the context of which (s)he has already suffered⁸⁵. The objecti-

⁸⁴See judgment of 7 April 1992, BVerwG 9 C 58.91 (transcript copy) at 10.

⁸⁵See judgment of 26 March 1985, BVerwG 9 C 107.84, 71 BVerwGE 175, at 178-9. The connection between already suffered persecution and the asylum request may not be considered as broken merely by the fact that the asylum seeker has remained in the country of origin for a certain period of time (in the above case for over one and a half years) following the

fication of the above evidential evaluation procedure has thus prevented the extreme lowering of the standard of proof. Accordingly, the Federal Administrative Court has clarified that in cases of past persecution 'any low possibility of renewed persecution does not suffice, [or] any -also remote-doubt about the future security of the persecuted person, but there should exist at least serious doubt about that...[I]n order [for an individual] to become a victim of [persecution], it is required...that objective grounds should demonstrate that [persecution] is not totally remote, and therefore constitutes a perfectly "real" possibility...' ⁸⁶. In case the repetition of persecution feared by the refugee application is founded upon grounds different from the ones on which the past persecution was based, then the lower standard of proof is not to be applied. In the words of the German Federal Administrative Court, 'if a political persecution suffered in the past aimed simply at an attitude of protest developed from a concrete situation and limited to that, then the danger that the ended persecution, grounded on causes of the past, may revive must be excluded with sufficient security, so that the decisive standard relating to the danger of repetition is not to be objected to on the basis of persecutory actions that are

persecution, in the hope of betterment of the situation. The Court has accepted this possibility as legitimate and reasonable, especially in cases of collective persecutions-pogroms, where phases of great unrest are followed by phases of peace that in turn prove to be phases of a 'latent endangerment', ibid. at 179.

⁸⁶See judgment of 8 September 1992, BVerwG 9 C 62/91, 12 NVwZ (1993) 191, at 192.

founded on totally different motives of persecution'⁸⁷.

By contrast, when no refugee persecution has occurred in the past in the country of origin (irrespective of whether it has actually taken place in a third country), then the question that should be examined is whether a danger of persecution 'is to be expected to a considerable for the right of asylum degree', employing for that assessment 'a prognosis...which is [actually] oriented towards the foreseeable future'⁸⁸. German jurisprudence has established that the burden of proof in this kind of asylum cases should be higher than in cases where persecution has already been suffered, that is to say, the standard of burden of proof should be the normal one which requires that the refugee be able to prove that there is a 'considerable probability' of danger of persecution in the home country⁸⁹. As pinpointed by the Federal Administrative

⁸⁷See judgment of 24 July 1990, BVerwG 9 C 78.89, 12 InfAuslR (1990) 337, at 338. Of a special nature has been a case where a member of a group, which has been subjected to collective persecution in the country of origin, has not been persecuted accidentally. The Bundesverwaltungsgericht has emphasised that the fact that a member of the persecuted group has not been affected by persecution in the past accidentally may not have as a consequence the exclusion of that refugee applicant from the application of the lowered burden of proof, see judgment of 23 February 1988, BVerwG 9 C 85.87 (transcript copy).

⁸⁸See judgment of 18 October 1983, 9 C 158.80, 68 BVerwGE 106, at 108-9; see also judgment of 17 October 1989, BVerwG 9 C 58.88 (transcript copy) at 8 and 10.

⁸⁹See judgment of 25 September 1984, BVerwG 9 C 17.84, 70 BVerwGE 169, at 171. See also judgment of 17 October 1989, BVerwG 9 C 29.89 (transcript copy) at 10 where the Court accepted the reasoning of the court below according to which there was not in that case a 'necessary prognosis of danger for the supposition of a considerable probability, leading to the conclusion that the grounds on which a persecution may be

Court, in cases where various grounds for persecution are presented by the refugee applicant, then these grounds are not to be examined separately, isolating one from the other. In every case there should exist 'a general assessing view of the particular facts of life including the political situation in the country of origin'⁹⁰. In this vein, the German Federal Constitutional Court has accepted the legitimacy of the fact that lower courts had taken into account the objective situation in the country of origin as well as any 'concrete grounds for a change of that situation in the foreseeable future' in order to judge whether or not there was a 'sufficient security from persecution'⁹¹. The Court, rephrasing its above-mentioned reasoning and employing the rule of considerable probability, has thus laid down that the

founded have a qualitatively greater importance than those which speak against such a persecution, so that according to such a qualitative assessment there can be accepted not only a mere possibility but already a considerable probability of political persecution.'; see also judgment of 27 June 1989, BVerwG 9 C 1.89, 82 BVerwGE 171, at 172-3.

⁹⁰See judgment of 12 July 1983, 9 B 10542.83, 5 InfAuslR (1983) 257, at 257-8; see also judgment of 30 October 1990, BVerwG 9 C 72.89 (transcript copy) at 33-4.

⁹¹See judgment of 5 March 1990, 2 BvR 938/89 and 1467/89, 12 InfAuslR (1990) 165, at 166, judgment of 14 January 1992, 2 BvR 1300/89 et al., 38 Bayerische Verwaltungsblätter (1992) 369. See also judgment of 6 March 1990, 2 BvR 937,1289 etc./89 (transcript copy) at 4-5. See also judgment of 29 November 1990, 2 BvR 1095/90, 13 InfAuslR (1991) 94, at 97 where the Court refers to the right of the asylum adjudicating organ to assess whether there is a 'certainty [that] the [persecutory] law would be anew operative [in the country of origin] according to the constitutional prescriptions' in case the refugee applicant returns there; see also judgment of 7 November 1990, 2 BvR 1566, 1581,1676,1740/87, 13 InfAuslR (1991) 100, at 103, judgment of 20 May 1992, 2 BvR 205/92, 11 NVwZ (1992) 1081, at 1083, judgment of 28 January 1993, 2 BvR 1803/92, 15 InfAuslR (1993) 142 at 146.

important assessment which should take place in such cases is whether a political persecution is impending in a foreseeable time with considerable, that is, overwhelming, probability, and respectively -when the refugee applicant has already suffered political persecution once- whether a repetition of the same or similar persecutory measures is excluded with adequate probability'⁹².

The objective standard of prognosis applicable in asylum adjudication has also been expressly endorsed in such cases by the Federal Administrative Court: 'In the course of an objective judgment, a well-founded fear of persecution on the part of the asylum seeker may...also be created by 'reference cases' of political persecution that have occurred or are taking place, as well as [by] a "climate of a general moral, religious or communal contempt", so that it is not reasonable for [the asylum seeker] to stay in his homestate or to return there'⁹³. The above Court has thus established in German jurisprudence that the prognosis referring to the risk of persecution should be based on a sensible assessment of all the circumstances available to courts through the evidence provided. Such a kind of prognosis, according to the same Federal Court, should not 'solely take into account what is

⁹²See judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 167. See also judgment of 18 January 1990, 2 BvR 760/88, 12 InfAuslR (1990) 161-2, judgment of 8 November 1990, 2 BvR 933/90, 13 InfAuslR (1991) 25, at 28.

⁹³See judgment of 23 July 1991, BVerwG 9 C 154.90, 13 InfAuslR (1991) 363 (also in 88 BVerwGE 367), at 367. See also similar reasoning of the UN Committee against Torture in Mutombo, supra notes 25-29 and accompanying text.

presently at the decisive time viewed, or what is identifiable as directly imminent...[but] a "qualifying" manner of viewing things is to be laid down, in the sense of weighing and appraising all the circumstances and their significance. It is decisive whether in consideration of these circumstances there may be elicited a fear of persecution to a sensibly thinking, prudent man in the situation of the asylum seeker. A well-founded fear of an event in this sense may therefore also be in place when because of a "quantitative" or statistical consideration there exists a less than 50% probability for it to occur'⁹⁴.

It is finally worth noting the emphasis placed by the Federal Administrative Court upon cases where persecution has taken on a collective form and has thus been directed against groups of individuals connected 'through common characteristics like

⁹⁴Judgment of 15 March 1988, BVerwG 9 C 278.86, 79 BVerwGE 143, at 150-1, emphasis added. The final wording of the Court is indeed similar to the wording of the US Supreme Court in Cardoza-Fonseca, see supra n. 12. See also judgment of 17 January 1989, BVerwG 9 C 62.87, 11 InfAuslR (1989) 163, at 163-4; see also judgment of 5 November 1991, BVerwG 9 C 118.90, 107 DVB1 (1992) 828, at 830: 'The reasonableness [of the refugee's return to or stay in the country of origin] constitutes the primary qualitative criterion which is to determine in the judgment whether the probability of a danger is "considerable"'; see also judgment of 29 June 1961, BVerwG I C 41.60, 78 DVB1 (1963) 146, judgment of 29 November 1977, BVerwG I C 33.71, 55 BVerwGE 82, at 83, judgment of 22 January 1985, BVerwG 9 C 1113.82 (transcript copy) at 7, judgment of 26 February 1987, BVerwG 9 B 168.86 (transcript copy) at 4-5. See also Cohen, J., 'Freedom of Proof', in Twining, W., Stein, A. (eds.), Evidence and Proof, Aldershot etc., Dartmouth, 1992, 3, at 23: 'There is no general need to write rules of proof into the law, nor to define a corresponding level of intellectual qualification for triers of fact. We need only a reasonable layman, not a logician or statistician, to determine what is beyond reasonable doubt.'

race or religion'. The above Court has stated that such characteristics 'identify their bearers almost always permanently and stick to them as an, as it were, ground for "latent" endangerment that may easily be updated again'. Accordingly, the Bundesverwaltungsgericht has stressed the special caution with which the relevant prognostic rules should be applied in cases where such a collective persecution has already occurred in the past in the refugee's state of origin⁹⁵.

CONCLUSION

The prognosis with regard to the risk of persecution which an individual refugee runs in the country of origin constitutes undoubtedly one of the major, if not the major, evaluation problems with which an administrative or judicial organ is to cope in asylum adjudication. The task of predicting with an as much accuracy as possible the likelihood of occurrence (or repetition) of persecution in case of the refugee's return to the potentially persecuting state of origin is indeed onerous, not only because the adjudicating organ has to deal, in effect, with the future on a diagnostic factual basis concerning the past and/or the present of the refugee applicant's own life. It is also, and especially, so because

⁹⁵See judgment of 27 April 1982, 9 C 308.81, 65 BVerwGE 250, at 252-3, judgment of 30 October 1984, 9 C 24.84, 70 BVerwGE 232, at 234-5, judgment of 26 June 1984, 9 C 185.83, 69 BVerwGE 320, at 323, judgment of 25 September 1984, 9 C 17.84, 70 BVerwGE 169, at 171; see also Dürig, J., op. cit. supra n. 1, at 50-52. On the problématique of cases of collective persecution see Chapter V Section 2.

on the 'utility', that is to say, the consequences⁹⁶ of such a prediction may, in the majority of genuine refugee status claims, well hinge, literally, the life and/or liberty itself of an individual refugee applicant. Consequently, the responsibility borne by the executive and the judiciary transcends mere legal procedural intricacies and reaches substantive issues of a life-or-death significance.

From the foregoing analysis of European refugee status jurisprudence it is clear that the three major European case law sets examined in the course of the present thesis' research have adopted a very similar stance vis-à-vis the question of prognosis of refugee persecution-risk. In all the above three European states it has been established that the standard of proof borne by the refugee applicant in the context of the persecution prognosis, albeit based on probabilities, should not be a rigorous one founded upon a high degree of probability which would contravene the humanitarian considerations that should prevail in territorial asylum procedures. The standard of proof should be, in the words of the House of Lords, one of a 'reasonable degree of likelihood'. This view has been indeed accepted by all three

⁹⁶See Eggleston, R., Evidence, Proof and Probability, London, Weidenfeld and Nicolson, 1983, Second Edition, at 31 where it is stressed that in cases where a probability estimate may not be made with mathematical accuracy '...we can only make an estimate based on the common course of human experience. In all cases, however, there is one factor to be taken into account, namely the consequences of a decision one way or the other, sometimes referred to as the utility or disutility of the decision.'; see also Cohen, L.J., The Probable and the Provable, Oxford, Clarendon Press, 1977, at 56.

European jurisdictions using a similar phraseology. The French courts have thus laid down that the fear of persecution should be sufficiently substantiated so that it may be regarded as reasonable, while German jurisprudence has also accepted the 'less than 50% probability' standard based on a 'sensible assessment' of the circumstances of the case.

The bifurcated evidential assessment established in German case law may be viewed as a mechanism being particularly lenient to refugees who have already suffered persecution. This view, however, should not be accepted as correct. No doubt, German courts have shown themselves willing, and felt obliged, under the pressure of the internationally unique constitutional asylum safeguard, to differentiate theoretically between cases where persecution has already occurred, and cases where no persecution has been suffered by the refugee applicant, as in cases of refugees sur place. It is also true and reasonable that this theoretical bifurcation between prevention of repetition of persecution and occurrence of persecution for the first time should be made in the course of examination of the asylum request, so that the administration and the courts are on the alert, given that the subjection of a refugee applicant to persecutory measures already once emphasises, as a rule, her/his vulnerability and precarious position in the context of jurisdiction of the state of origin. However, the fact that places such cases at the same, in effect, assessment level with the cases where there is a lack of pre-existent persecution is the actual

objectification of risk assessment. In all three European countries the objective background-theoretical method of risk assessment has been rightly established as the one which should be applied in asylum adjudication. The rejection of the prioritisation of the subjective evaluation theory is to be regarded as correct, since the fundamental aim of territorial asylum is the grant to individual refugees of protection from real and serious situations of endangerment. As a consequence, the objective method, endorsed by German jurisprudence as well, has led even the German bifurcation theory to accept that the standard of proof in cases where persecution has already occurred should not be one of 'any low possibility of renewed persecution', but the standard of a 'real possibility', on the basis of the prevailing objective background regarding the actual source of persecution, viz. the refugee's country of origin.

PART THREEAETIOLOGY OF REFUGEE PERSECUTIONINTRODUCTION TO THE AETIOLOGICAL FRAMEWORK OF PERSECUTION

The refugee's fear of persecution, as well as persecution itself have acquired their own specific aetiological background in international law, and concurrently in domestic law, where it has been established that both should be grounded upon some (actual or even, in some cases, imputed) intrinsic characteristics of the refugee applicant¹. According to the 1951/1967 Refugee Convention, the personal characteristics that may provide the basis for persecution, and the framework within which the genesis of refugeehood may be traced, are the following: the refugee's race, nationality, religion, political opinion, or membership in a particular social group. These were considered by the drafters of the above Convention to represent the basic and most fundamental elements of the personality of a refugee that were worthy of effective protection by a state of asylum. The specific reference to the

¹It has been a 'Rechtsüberzeugung', that is, a fundamental premise of German asylum law, based upon the constitutional principle of inviolability of the human dignity, that 'no state has the right to endanger or violate the life, limb or personal freedom of the individual on grounds that lie solely in his political opinion or religious faith, or in inalienable characteristics which are attached to every man by birth', see judgments of Federal Constitutional Court, 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 157-8, 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 333, 4 December 1991, 2 BvR 657/91, 11 NVwZ (1992) 561, at 562; see also judgments of Federal Administrative Court, 17 May 1983, 9 C 36.83, 67 BVerwGE 184, at 187, 12 July 1985, BVerwG 9 CB 104.84, 8 InfAuslR (1986) 78. In recent case law both the above Supreme Courts have used verbatim the 1951/1967 Convention grounds for persecution, see judgment of 8 November 1990, 2 BvR 933/90, 13 InfAuslR (1991) 25, at 28, judgment of 17 May 1983, 9 C 36.83, 67 BVerwGE 184, at 187, judgment of 9 February 1988, BVerwG 9 C 256.86 (transcript copy) at 12.

above five reasons for persecution emanates, in fact, from the history of refugeehood itself. Except for the above-mentioned novel fifth ground (membership in a particular social group), all the other grounds for persecution have been deeply rooted in and interwoven with the history and development of refugee movements and refugee protection in the course of the twentieth century, as shown in the first chapter of the present thesis².

Moreover, the enumeration of the aforementioned persecution grounds is intrinsically connected, but from the substantive viewpoint of persecution not identified, with some post-war fundamental UN human rights instruments the genesis of which is based, at least partially, on the same historical ground as

²See also Mr Henkin (USA), member of the Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/SR.3, 26 January 1950, at 10, para. 45, in Takkenberg, A., Tahbaz, C.C. (eds.), The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees, vol. I, Amsterdam, Dutch Refugee Council, 1990, 161, at 165 where he referred to the 'group of "neo-refugees", the definition of which was broad enough to allow the inclusion of persons who had left their homes since the beginning of the second world war as the result of political, racial or religious persecution, or those who might be obliged to flee from their countries for similar reasons in the future.'. See also Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 136: 'The rationale for this limitation was not that other persons were less at risk, but was rather that, at least in the context of the historical moment, persons affected by these forms of fundamental socio-political disfranchisement were less likely to be in a position to seek effective redress from within the state.'. See also Grahl-Madsen, A., The Status of Refugees in International Law, vol. I, Leyden, A.W. Sijthoff, 1966, at 217. See also Hathaway, J.C., 'A reconsideration of the underlying premise of refugee law', 31 HarvILJ (1990) 129, at 144 infra, Gagliardi, D.P., 'The inadequacy of cognizable grounds of persecution as a criterion for according refugee status', 24 Stanford Journal of International Law (1987-88) 259, at 267-9.

the 1951 Refugee Convention. The Refugee Convention itself in its Preamble makes reference to two such fundamental instruments in which the whole post-World War II international legal order was grounded: the UN Charter and the 1948 Universal Declaration of Human Rights, both of which 'have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'³. By virtue of Article 55 (c) of the UN Charter all the state members of the United Nations have indeed undertaken to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'⁴. In the same vein, Article 2 of the UN Declaration of Human Rights⁵ has prescribed the enjoyment of the Declaration's human rights by 'everyone', laying down a longer list of proscribed grounds for 'distinction': 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The same grounds for discrimination in the enjoyment of human rights have been verbatim proscribed by Article 2.2 of the 1966 UN Covenant on Economic, Social, and Cultural Rights⁶, as well as by Article

³See Preamble to the 1951 Convention Relating to the Status of Refugees, 189 UNTS 137, at 150.

⁴Text reproduced in Brownlie, I. (ed.), Basic Documents in International Law, Oxford, Clarendon Press, 1983, Third Edition, 1, at 18-19.

⁵UN GA Resol. 217 A (III), UN Doc. A/810, at 71 (1948).

⁶993 UNTS 3.

2.1 of the 1966 UN Covenant on Civil and Political Rights⁷.

Consequently, there is no doubt that the five persecution grounds of the 1951/1967 Refugee Convention reflect the internationally recognised basic sources of discriminatory measures that forcibly displaced individuals used to suffer in their country of origin, as a rule during the decades that preceded the adoption of the above Convention, and which were thus reasonably and correctly expected to continue to be valid in the future⁸. Another irrefragable fact is that what the five grounds really correspond to is the violation of the refugee's civil and political rights which, in contrast to the 'aspirational' social and economic rights, were and still are considered by the majority of the states members of the international society in the conventional international law context, as seen in chapter five, to constitute the basic human rights in a position to trigger granting of effective protection by a state in the context of territorial asylum⁹.

⁷999 UNTS 171. On the promotion of the principle of non-discrimination in the UN context see McKean, W., Equality and Discrimination under International Law, Oxford, Clarendon Press, 1983, at 52 infra.

⁸See Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 26-7; see also Jackson, I.C., 'The 1951 Convention relating to the Status of Refugees: A universal basis for protection', 3 IJRL (1991) 403 infra.

⁹See Mr Stolz (American Federation of Labor) NGO consultant, Ad Hoc Committee on Statelessness and Related problems, UN Doc. E/AC.32/SR.17, 6 February 1950, at 3, in Takkenberg, A., Tahbaz, C.C. (eds.), op. cit. supra n. 2, 268, at 269 where he 'recalled that people sometimes left their country for social or economic reasons, an eventuality which was not specifically mentioned' in the provisional draft of parts of the Refugee Convention definition article; see also Switzerland, 'A possible Swiss strategy for a refugee and

However, it is indisputable that the causes of contemporary refugeehood are founded on a more complex factual basis including violations not only of 'first' but also of 'second' and 'third' generation human rights¹⁰. Nevertheless, this may detract nothing from the contemporary validity of the persecution grounds originating in violations of civil and political rights: the only human rights the protection of which the vast majority of the states members of the international society has, as yet, shown itself willing and ready to undertake in an international legally binding framework.

Finally, it is to be stressed that the established persecution

asylum policy in the 1990s', IJRL, Special Issue, September 1990, 252, at 267; see also Fairweather, G., 'Immigrants and refugees: Present problems and future needs-A Canadian perspective', ibid. 283, at 286.

¹⁰See supra Chapters I and V. See also, inter alia, Coles, C.J.L., 'The human rights approach to the solution of the refugee problem: A theoretical and practical enquiry', in Nash, A.E. (ed.), Human Rights and the Protection of Refugees under International Law, Halifax, Canadian Human Rights Foundation, The Institute for Research on Public Policy, 1988, 195, at 216 where he stresses 'the complexity of the modern [refugee] problem and the serious inadequacy of attributing the main cause of today's problem to a classical notion of 'persecution' (i.e., a grave violation of civil and political rights). At issue now are wider questions, including respect for social, economic and cultural rights, development, the non-use of force, non-intervention in internal affairs, solidarity, and so on.'; see also Coles, C.J.L., 'Refugees and human rights', Bulletin of Human Rights 91/1, New York, United Nations, 1992, 63 infra, Shacknove, A.E., 'Who is a refugee?', 95 Ethics (1985) 274, at 277-281, Martin, D.A., 'Reforming asylum adjudication: On navigating the coast of Bohemia', 138 University of Pennsylvania Law Review (1990) 1247, at 1270-9, Hathaway, J.C., 'Reconceiving refugee law as human rights protection', 4 Journal of Refugee Studies (1991) 113, at 120 et seq., Garvey, J.I., 'Towards a reformulation of international refugee law', 26 HarvILJ (1985) 483 infra.

grounds may, and do in practice, as demonstrated below, come into play in asylum adjudication either jointly or severally. Indeed, they are all inter-related, given that they all refer to fundamental characteristics that have moulded the individual refugee's personality. They constitute elements that identify and delimit a refugee's (as every other individual's) personal political, lato sensu, position and character in a domestic society, the existence and/or expression and development of which have not been tolerated in the state of origin. Thus, it has rightly been stressed by UNHCR in its Handbook that '[i]t is immaterial whether the persecution arises from any single one of the reasons or from a combination of two or more of them...the reasons for persecution under these various headings will frequently overlap'¹¹.

¹¹See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979, (hereinafter UNHCR, Handbook) at 17, paras. 66, 67; see also Weis, P., 'The concept of the refugee in international law', 87 JDI (1960) 928, at 970-2.

CHAPTER VIII

PERSECUTION BY REASON OF ETHNIC ORIGIN

With the term 'ethnic origin' we intend to cover both grounds of 'race' and 'nationality' referred to in the 1951/1967 Refugee Convention. As noted by UNHCR, race, in the asylum law context, 'has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage'¹². As to 'nationality', this has not been interpreted by UNHCR as meaning solely 'citizenship'. Thus, it has been commented that it 'refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race" '¹³. However, nationality, stricto sensu, is rather difficult, if not impossible, to come into play as a persecution ground in asylum adjudication, given that a state (or a group of similar political force) does not usually persecute its own nationals on the basis of their citizenship. Nor is the genesis of refugeehood possible in the case of persecution of a foreign national in a country of residence, since, under normal circumstances, (s)he would enjoy the protection of her/his country of nationality¹⁴.

¹²See UNHCR, Handbook, at 18, para. 68.

¹³Ibid., at 18, para. 74.

¹⁴See Robinson, N., Convention Relating to the Status of Refugees: Its History, Contents and Interpretation, New York, Institute of Jewish Affairs, 1953, at 53: 'The reference to "nationality" was apparently taken over from Art.2 of the Universal Declaration of Human Rights, to which reference is made in the Preamble.'. Article 2 of the 1948 Universal Declaration makes reference, in fact, to everyone's entitlement to the Declaration's rights and freedoms without distinction of, inter alia, 'national or social origin'; see also Goodwin-Gill, G.S., op. cit. supra n.8 at 29

The fact that in contemporary international law the notions 'race', 'nationality' and 'ethnic origin' have been intermingled and employed in no stringent manner has been demonstrated by Article 1.1 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination¹⁵. Here, the term 'racial discrimination' is defined as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'¹⁶. The word 'race' has also been used in a stricter sense by the 1971 International Convention on the Suppression and Punishment of the Crime of Apartheid¹⁷. Article II of the above Convention has defined 'the crime of apartheid' as including racial segregation and discrimination practised in southern Africa, applicable to 'inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'. Such acts have been specified by the same provision as

¹⁵660 UNTS 195.

¹⁶See also Al-Qasem, A., Racial Discrimination and Refugee Law, London, The International Organisation for the Elimination of All Forms of Racial Discrimination, Paper No. 34, presented at the Seminar on Asylum and Refugee Law in Arab Countries, International Institute for Humanitarian Law, San Remo 16-19 January 1984, at 4 et seq..

¹⁷1015 UNTS 244.

consisting of, inter alia, 'Denial to a member or members of a racial group or groups of the right to life and liberty of person', 'deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part', 'Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups'.

However, apart from the above 1971 Apartheid Convention, in contemporary international law the usage of the word 'race' has rather disappeared and been replaced by 'ethnic group/origin'. A clear example has been provided by the international law of minority protection, where the notion of ethnic minorities has actually replaced the notion of racial minorities. Accordingly, while the notion 'racial minorities' was used in UN resolutions and documents up to 1950, since then this was substituted by 'ethnic minorities', a notion that does not refer only to 'inherited physical characteristics', like the former, but covers also 'all biological, cultural and historical characteristics [of the relevant minority]'¹⁸. 'National minority' is another similar term that

¹⁸See Capotorti, F., Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, New York, United Nations, 1979, at 34-35. See also Deschênes, J., Proposal concerning a definition of the term "minority", UN Doc. E/CN.4/Sub.2/1985/31, 14 May 1985, at 16. See also Article 27 of the 1966 International Covenant on Civil and Political Rights which

has been defined by an authority, in an international law context, so as to refer to 'persons who belong to a group owing allegiance on account of nationality to a State other than the one in which they are residing and who are numerically less than the other inhabitants of the state or residence'¹⁹.

In domestic case law the term 'ethnic group' seems also to be

refers to the protection to 'ethnic, religious or linguistic minorities' without using the adjective racial; on this provision see Thornberry, P., International Law and the Rights of Minorities, Oxford, Clarendon Press, 1991, at 158-163, Oxenknecht, R., Der Schutz ethnischer, religiöser und sprachlicher Minderheiten in Art. 27 des Internationalen Paktes über bürgerliche und politische Rechte vom 16. Dezember 1966, Frankfurt a.M. etc., P. Lang, 1988, at 110; Tomuschat, Ch., 'Protection of minorities under Article 27 of the International Covenant on Civil and Political Rights', in Bernhardt, R. et al. (Hrsg.), Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte, Festschrift für H. Mosler, Berlin etc., Springer-Verlag, 1983, 949, at 954 infra. See also UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 18 December 1992, UN Doc. A/RES/47/135, 3 February 1993. See also Brownlie, I., 'The rights of peoples in modern international law', in Crawford, J. (ed.), The Rights of Peoples, Oxford, Clarendon Press, 1988, 1, at 5, Kimminich, O., 'The function of the law of ethnic groups in the international system', 23 Law and State (1981) 37 infra. See also Cashmore, E., 'Ethnicity', in Cashmore, E. et al., Dictionary of Race and Ethnic Relations, London, Routledge, 1988, Second Edition, 97: 'In its contemporary form, ethnic... describes a group possessing some degree of coherence and solidarity composed of people who are, at least latently, aware of having common origins and interests.', and at 98: '...whereas 'race' stands for the attributions of one group, ethnic group stands for the creative response of a people who feel somehow marginal to the mainstream of society.'; see also Harris, M., 'Race', in International Encyclopedia of the Social Sciences, vol. 13 (1968) at 263 infra. See also Haney López, I.F., 'The social construction of race: Some observations on illusion, fabrication, and choice', 29 Harvard Civil Rights-Civil Liberties Review (1994) 1, at 10 et seq.

¹⁹See Elles, D., International Provisions Protecting the Human Rights of Non-Citizens, UN Doc. E/CN.4/Sub.2/392/Rev.1 (1980), at 25.

established as a general term, replacing and covering at the same time the notion 'racial group'. On this basis, the House of Lords in Mandla and another v. Dowell Lee and another²⁰ established in British case law that 'For a group to constitute an ethnic group in the sense of the 1976 [Race Relations] Act, it must...regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics.' Lord Fraser went on to lay down two 'essential' and five 'relevant' conditions for the characterisation of a group as an 'ethnic' one. As 'essential conditions' were regarded '(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.' The House of Lords established the following 'conditions relevant' to the above two essential ones: '(3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community...'²¹.

²⁰[1983] 1 All ER HL 1062.

²¹Ibid. at 1066-7. The Court concluded that Sikhs should be regarded as an ethnic group. Gipsy groups have also been regarded by case law as 'racial groups', see Commission for Racial Equality v. Dutton, Court of Appeal, [1989] 1 Law Reports: Queen's Bench Division 783. Rastafarians, by

In refugee case law ethnic origin as a ground for persecution has been utilised by domestic courts on a case-by-case basis, with no actual theoretical elaboration on the notion of ethnic origin. In British case law one of the ethnic groups that have made their presence clear in asylum adjudication has been the one represented by Kurdish refugee applicants, the majority of whom have originated in Turkey and Iraq²². Most of these Kurdish refugee status claims have combined multiple grounds for persecution, including ethnic origin. Since a large number of the Turkish Kurds who have applied for asylum have been Alevis by religion, their refugee status applications/appeals have been grounded on religious grounds as well²³. Persecution on grounds of ethnic origin and political opinion has also been encountered in these cases frequently, since a large

contrast, have not been accepted to constitute an ethnic group, but only a religious sect, see Crown Suppliers (Property Services Agency) v. Dawkins, Employment Appeal Tribunal, [1991] Industrial Cases Reports 583; affirmed by Court of Appeal (Civil Division), in Dawkins v. Department of the Environment, 29 January 1993 (transcript copy). Jews in New Zealand have been also recognised as a group with common ethnic origins, see King-Ansell v. Police, Court of Appeal, [1979] 2 New Zealand Law Reports 531.

²²See e.g. Nagat Baghat Asad Al Kazie v. Secretary of State for the Home Department, Immigration Appeal Tribunal, [1984] Imm AR 10.

²³See R. v. Secretary of State for the Home Department ex parte "O", Queen's Bench Division, CO/397/90, 25 May 1990 (transcript copy), R. v. Secretary of State for the Home Department ex parte Celal Yurekli, [1990] Imm AR 334, R. v. Secretary of State for the Home Department ex parte Murat Akdogan, [1990] Imm AR 341, Re D, Court of Appeal, 11 April 1990 (transcript copy), R. v. Secretary of State for the Home Department ex parte "K", [1990] Imm AR 393, R. v. Secretary of State for the Home Department ex parte Ayhan Gulbache, [1991] Imm AR 526, R. v. Secretary of State for the Home Department ex parte H. Bolat, [1991] Imm AR 417, R. v. Secretary of State for the Home Department ex parte Kosar, Queen's Bench Division, CO/623/90, 16 March 1992 (transcript copy).

number of the Kurdish asylum applicants have been involved in, mostly illegal, active political groups, parties or organisations²⁴. The large numbers of Kurdish asylum seekers who entered the UK in the 1980s, especially in 1989, have forced the authorities of this country to face the plight of the Kurds in the course of the individual assessment of refugee status claims²⁵. It is noteworthy that in the vast majority of such cases the actual forms of persecution have ranged from systematic harassment by governmental authorities to ill-treatment and torture that have led the British courts to regard these cases as being grave ones 'with the potential for most serious consequences' requiring, accordingly, 'the most anxious scrutiny'²⁶.

Another ethnic group which has constituted a serious source of refugee status applications in the UK is Tamils from Sri Lanka. These cases have been set in the framework of civil war in the above state, a situation compounded by the fact that persecution may be carried out in the course of civil war not

²⁴See R. v. Secretary of State for the Home Department ex parte Halil Direk, Queen's Bench Division, 5 March 1992, [1992] Imm AR 330, R. v. Secretary of State for the Home Department ex parte Parmak, Queen's Bench Division, CO/702/90, 23 January 1992 (transcript copy), R. v. The Secretary of State for the Home Department ex parte Gulazi Ozdemir, Queen's Bench Division, CO/397/90, 31 March 1992 (transcript copy), R. v. Secretary of State for the Home Department ex parte Ayse Oran, [1991] Imm AR 290, Celal Yurekli v. Secretary of State for the Home Department, [1991] Imm AR 153.

²⁵See R. v. Secretary of State for the Home Department ex parte Hidir Gunes, [1991] Imm AR 278, at 280.

²⁶See R. V. Secretary of State for the Home Department ex parte Gulabi Ozdemir, Queen's Bench Division, CO/397/90, 31 March 1992 (transcript copy); see also supra notes 23, 24, 25.

only by governmental agents, but also by groups the activities of which the former may not be able or even willing to control. Again, as in the cases of Kurds, British courts have emphasised that every Tamil asylum applicant was to be examined on the ground of the evidence the individual case provided, since the sole fact of membership in that particular ethnic group might not constitute a sound basis for a successful asylum application²⁷.

Asylum seekers arriving in the UK from African states, especially Uganda and Ethiopia, have also frequently claimed refugee status for fear of persecution on ethnic grounds. In Ali (M.M.H.) and another v. Secretary of State for the Home

²⁷See Basil Vedasingh Rajamanie v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/122313/84 (3519), 18 October 1984 (transcript copy), Nirmaladevi Salvadorai/Sellathurai v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/130924/84 (3993), 23 May 1985 (transcript copy), R. v. The Secretary of State for the Home Department ex parte Coomaraswamy and another, Queen's Bench Division, CO/331/84, 28 June 1985 (transcript copy), R. v. The Secretary of State for the Home Department ex parte Jeyakumaran, Queen's Bench Division, 28 June 1985, [1994] Imm AR 45, Subramanian Moganthas and another v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/124094/84 (3780), 5 March 1985 (transcript copy), Vadivelu Yogaratnam v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/124368/84 (3822), 7 March 1985 (transcript copy), R. v. Secretary of State for the Home Department ex parte Kandiah Navaratnam and others, Queen's Bench Division, CO/1522/87, CO/1525/87, CO/1467/87, CO/1469/87, CO/1470/87, 25 September 1987 (transcript copy), R. v. Secretary of State for the Home Department ex parte Ganeshanathan, Court of Appeal, 27 July 1988, R. v. Secretary of State for the Home Department ex parte Sivakumaran, [1988] 1 All ER (HL) 193, Secretary of State for the Home Department v. Sittampalam Thirukumar and others, Court of Appeal, [1989] Imm AR 402, Yvonne Carmen Somasundaram and others v. Entry Clearance Officer, Colombo, Immigration Appeal Tribunal, Appeal No. TH/2877/88 (6603), 6 July 1989 (transcript copy).

Department²⁸ the Immigration Appeal Tribunal had before it a case of two Kenyan asylum seekers of Indian origin. They claimed refugee status because of fear of persecution in Kenya, due to the policy of 'Africanisation' pursued by the government at that time against the minority population of Asian extraction. The appeal was dismissed, since the main applicant's dismissal from his employment in Kenya, the most vital basis of the persecution claim, was not considered by the Tribunal sufficient to substantiate a refugee status claim. Similar cases were R. v. Immigration Appeal Tribunal ex parte Mawji²⁹ before the Queen's Bench Division, concerning an asylum seeker of Asian origin who was driven from Uganda by the Amin regime in 1972, and Antero Ajikua Amboritua v. Secretary of State for the Home Department³⁰ which concerned an asylum seeker who belonged to an allegedly persecuted Sudanese ethnic group in Uganda. Yvonne Rukyalekere v. Secretary of State for the Home Department³¹ concerns a successful asylum claim of a Rwandese Ugandan citizen. The appellant claimed before the Immigration Appeal Tribunal that, as a Rwandese in Uganda, she was persecuted after the fall of President Amin who had allegedly shown a 'preference' to her ethnic group while in power. The evidence adduced by the appellant had as an effect the allowing of the appeal by the

²⁸[1987] Imm AR 126.

²⁹[1982] Imm AR 97.

³⁰Immigration Appeal Tribunal, Appeal No. TH/119144/84 (4046), 19 June 1985 (transcript copy).

³¹Immigration Appeal Tribunal, Appeal No. TH/26403/86 (5718), 25 January 1988 (transcript copy).

Tribunal³².

Finally, Eritrean asylum seekers from Ethiopia constituted another significant ethnic group with which British case law has dealt. In some of these cases persecution in the form of discrimination against Eritreans due to their ethnic origin³³ has been combined with persecution for political activity in the context of Eritrean militant organisations fighting for the independence of the province of Eritrea³⁴. In all these cases, the Immigration Appeal Tribunal, even when it accepted the fact that persecution was suffered by that particular ethnic group, always proceeded to examine every case on its own individual merits, since the mere substantiated submission of membership in a persecuted ethnic group/minority population may never entail per se the judicial recognition of an asylum seeker's refugee status.

Ethnic origin has been a frequently used ground for persecution in French refugee status jurisprudence as well.

³²See also R. v. Secretary of State for the Home Department ex parte Rose Solomy Alupo, [1991] Imm AR 538, an unsuccessful case of a Ugandan asylum seeker claiming refugee status on the ground of persecution because of her belonging to the Itebo tribe in Uganda.

³³See Genet Woldu v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/93591/82 (2705), 26 April 1983 (transcript copy), Sillasa Habte Micael Zerazion v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/15674/86 (5151), 9 April 1987 (transcript copy).

³⁴See Asfaha Saba Ghile v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/18701/86 (5641), 22 January 1988 (transcript copy).

Neither the Commission des Recours des Réfugiés nor the Conseil d'Etat has ever elaborated on the notion of race or ethnic origin in the asylum context, employing them, in the same manner as British case law, as a term the meaning of which needs no clarification and which, consequently, is easily applied to the individual cases before them. There have been some particular ethnic groups that have often arisen in France and, as a consequence, have produced a series of decisions able to clarify the notion of ethnic origin in refugee law. The first such ethnic group is that of Tamils originating in Sri Lanka. The majority of the Tamil cases have related to, personal or close relatives', real or imputed, activism in favour of their movement for ethnic independence in Sri Lanka, as well as to persecution emanating from forces of the majority Sinhalese community in the form of either official state persecution or unofficial persecution carried out by the Sinhalese population³⁵. The second largest ethnic group with which French jurisprudence has dealt is that of the

³⁵See M. Chrysostom, CE No. 20.839, 24 July 1981, M. Balakrishnan, CRR No. 21.518, 12 July 1985, M. Gabrielmoximian, CRR No. 19.650, 5 December 1985, M. Srigandan, CRR No. 30.037, 15 September 1986, M. Nadanasabapathy Sarma, CRR No. 23.914, 23 October 1986, Mle Lambert, CRR No. 43.599, 25 September 1986, Mle Mari Yanayakam, CRR No. 19.918, 15 October 1987, M. Thurai, CRR No. 47.083, 25 February 1987, M. Vigneswaran, CRR No. 102.603, 25 September 1990, M. Kankesan, CRR No. 130.543, 19 November 1990, M. Thisaveerasingh, CRR No. 124.803, 26 July 1990, Mle Yaotha, CRR No. 56.307, 22 May 1990, M. Sinnathamby, CRR No. 65.432, 15 May 1990, M. Joy Sutharsan, CRR No. 120.373, 5 July 1990, M. Thavapavaananthan, CRR No. 130.741, 19 November 1990, Mle Solomons, CRR No. 075.517, 11 January 1991, M Thisokumar, CRR No. 072.928, 8 January 1991, Mle Thuriappah, CRR No. 072.794, 19 June 1991, M. Arulsothy, CRR No. 089.242, 10 June 1991, M. Sivanesan, CRR No. 174.444, 14 June 1991, M. Thushyanthan, CRR No. 227.016, 10 July 1992 (transcript copies).

Kurds. The majority of Kurdish refugees in France, similarly to the UK, have originated in Turkey where they have usually claimed to fear persecution relating to their direct or indirect relation with their people's attempt for self-determination³⁶. Kurdish refugee cases in France have also originated in Iraq³⁷ and Iran³⁸.

A third large refugee-generating ethnic group has been Armenians coming from Turkey³⁹, or Iran⁴⁰, or Syria⁴¹, or

³⁶See M. Karagan, CRR No. 74.765, 23 December 1988, M. Sirmsir, CRR No. 45.780, 25 November 1988, M. Disli, CRR No. 129.995, 15 November 1990, M. Ozden, CRR No. 139.641, 27 November 1990, M. Topbas, CRR No. 93.517, 22 February 1990, M. Baruc, CRR No. 108.249, 12 April 1990, M. Cakmak, CRR No. 145.293, 13 December 1990, M. Sahin, CRR No. 133.550, 12 November 1990, M. Bingol, CRR No. 138.032, 12 November 1990, M. Dogan, CRR No. 140.172, 29 November 1990, M. Gorduc, CRR No. 141.645, 13 December 1990, M. Koyun, CRR No. 139.775, 12 December 1990, M. Aktas, CRR No. 144.882, 13 December 1990, M. Gurcan, CRR No. 197.193, 14 November 1991, M. Salikara, CRR No. 150.251, 7 January 1991, Mle Erdogan, CRR No. 177.840, 4 July 1991, M. Ocalan, CRR No. 198.797, 10 January 1992 (transcript copies).

³⁷See M. Abid Ali Haydari, CRR No. 23.229, 5 March 1985, M. Jabour Sultan, CRR No. 58.483, 13 February 1990 (transcript copies).

³⁸See M. Jamali, CRR No. 33.129, 16 January 1986, M. Zamani Kord, CRR No. 110.351, 12 April 1990 (transcript copies).

³⁹See M. Dayan, CRR No. 25.959, 18 February 1986, M. Sari, CRR No. 29.001, 21 March 1986, Mle Yaldiz, CRR No. 45.501, 13 March 1987, M. Hazaroglu, CRR No. 32.827, 9 December 1988 (transcript copies).

⁴⁰See Mle Sharbatiam, CRR No. 62.042, 19 October 1987, M. Booloozian, CRR No. 30.206, 9 November 1987, Mle Kaspar Sarkissian, CRR No. 41.070, 28 November 1988, Mle Heshmati, CRR No. 60.025, 19 December 1989, M. Davoudian, CE No. 94.693, 31 July 1992 (transcript copies).

⁴¹See M. Markarian, CRR No. 26.007, 24 September 1984, M. Yacoub, CRR No. 27.146, 9 December 1985 (transcript copies).

Azerbaijan⁴², while another ethnic group with which French refugee status law has dealt, especially in recent years, has been Romas originating in eastern European countries, like former Czechoslovakia⁴³ or Romania⁴⁴. Members of the above ethnic group has successfully claimed refugee status on the ground of persecution emanating from extreme right or skin heads' groups, while state protection has been non-existent.

Jews have also constituted an ethnic (it may also be, and has been, categorised in case law as religious) minority group recognised by the Commission des Recours des Réfugiés as falling within the protective framework of the 1951/1967 Refugee Convention. Jews have been regarded by the Commission as either a minority religious⁴⁵ or an ethnic group⁴⁶, persecuted in various countries either by official state agents, or by majority population groups uncontrollable by the refugee's state of origin.

⁴²See Mme Grigorian, CRR No. 185.200, 10 December 1992, M. Prokhorov, CRR No. 185.199, 10 December 1992 (transcript copies).

⁴³See Mme Gaborova, CRR No. 227.597, 3 September 1992, M. Gabor, CRR No. 227.596, 3 September 1992, Mme Ondriez, CRR No. 227.595, 3 September 1992 (transcript copies).

⁴⁴See M. Tirnovanu, CRR No. 75.009, 25 May 1989 (transcript copy).

⁴⁵See Mle Jacob, CRR No. 56.802, 18 September 1989 (transcript copy).

⁴⁶See Mle Pedvisocar, CRR No. 26.346, 31 August 1984, M. Abdel Hakam Mahmoud, CE No. 52.944, 9 January 1985, M. Beida, CRR No. 59.304, 9 May 1988, M. Zoui, CRR No. 233.897, 18 January 1993 (transcript copies).

Other ethnic groups recognised in France as having been actually or potentially subjected to persecution in the asylum context have been Assyrians in Iraq⁴⁷, Assyro-Chaldeans in Iraq and Turkey⁴⁸, ethnic Chinese in Vietnam⁴⁹, ethnic Albanians in Yugoslavia⁵⁰, Catalans in Spain⁵¹, ethnic Hungarians in Romania⁵², Erithreans in Ethiopia⁵³, Negro-Africans in Mauritania⁵⁴, Mauritanians of Halpulaar origin⁵⁵, ethnic Touregs in Mali⁵⁶, Bengalis of Bihari origin⁵⁷,

⁴⁷See Mle Yousif, CRR No. 148.628, 15 January 1991 (transcript copy).

⁴⁸See M. Hermis, CRR No. 27.322, 9 September 1985, M. Berberoqlu, CRR No. 44.571, 6 July 1989 (transcript copies).

⁴⁹See OFBRA c/ M. Ly So Oai, CE No. 45.410, 27 September 1985, M. Ta Chea Houi, CRR No. 39.101, 29 September 1986, Mme Eav, CRR No. 42.776, 2 December 1988, Mle Nguy, CRR No. 52.217, 1 June 1989 (transcript copies).

⁵⁰See M. Avdyli, CRR No. 24.872, 30 September 1985, M. Jasar, CRR No. 105.091, 5 November 1990 (transcript copies).

⁵¹See M. Ines Torres, CRR no. 43.021, 24 July 1990 (transcript copy).

⁵²See M. Condeescu, CRR No. 175.257, 26 June 1991, M. Erdei, CRR No. 174.872, 16 October 1991 (transcript copy)

⁵³See Mle Meheretab, CRR No. 25.777, 30 September 1985, M. Seifu, CRR No. 32.820, 11 December 1986, Mme Neghi, CRR No. 49.922, 7 April 1987, M. Abubeker, CRR No. 47.215, 2 June 1989 (transcript copies).

⁵⁴See M. Aliou Tigampo, CRR No. 52.824, 29 June 1989 (transcript copy).

⁵⁵See M. Wone, CRR No. 173.033, 14 June 1991 (transcript copy).

⁵⁶See M. Toure, CRR No. 211.484, 16 March 1992 (transcript copy).

⁵⁷See M. Rahman, CRR No. 30.534, 5 March 1985 (transcript copy).

Algerians of Kabyle origin⁵⁸, Mauritians of Indian origin⁵⁹, Guineans of Malinke origin⁶⁰, Liberians belonging to the Ghio ethnic group⁶¹, and Pakistanis of the Mirzai community⁶².

Refugee status claims on the ground of persecution because of membership in a specific ethnic group have been accepted also in German refugee law where it has been stressed that such originate in multi-ethnic states. As noted in the earlier chapters of the present thesis, the German Supreme Courts have expressly recognised the legitimacy of state actions aiming at the maintenance of the state's unity and the latter's territorial integrity. However, refugee status claims may legitimately commence to arise as soon as a particular multi-ethnic state does not heed the internationally or nationally lawful interests of ethnic groups existing on its territory along with the dominant ethnic group, or when, as in cases of forced assimilation of minorities, the state totally denies the ethnic or religious identity of some groups, thus preventing them from enjoying `a type of existence

⁵⁸See M. Nabet, CRR No. 20.342, 25 May 1987 (transcript copy).

⁵⁹See Mle Gopee, CRR No. 110.074, 12 April 1990 (transcript copy).

⁶⁰See M. Toure, CRR No. 20.392, 22 October 1987 (transcript copy).

⁶¹See M. Togbah, CRR No. 176.409, 30 September 1991 (transcript copy).

⁶²See M. Khan, CRR No. 37.967, 2 May 1988 (transcript copy).

corresponding to their own identity'⁶³.

Turkish Kurdish⁶⁴ and Sri Lankan Tamil⁶⁵ refugees constitute the two ethnic groups which have provided both the German Federal Constitutional Court and its administrative counterpart with the bulk of refugee case law⁶⁶. The above German courts, similarly to the British and French, have not elaborated on the notion of 'national character' ('Volkstum'),

⁶³See judgment of 12 July 1985, BVerwG 9 CB 104.84, 8 InfAuslR (1986) 78.

⁶⁴See judgments of 17 November 1988, 2 BvR 442/88 (transcript copy), 20 December 1988, 2 BvR 1083/83, 11 InfAuslR (1989) 134, 20 December 1989, 2 BvR 749/89 (transcript copy), 2 May 1989, 2 BvR 235/89 (transcript copy), 20 December 1989, 2 BvR 958/86, 81 BVerfGE 142, 10 January 1990, 2 BvR 1434/89, 12 InfAuslR (1990) 202, 9 January 1990, 2 BvR 1631/88 (transcript copy), 19 July 1990, 2 BvR 2005/89, 13 InfAuslR (1991) 89, 19 June 1990, 2 BvR 369/90, 13 InfAuslR (1991) 81, 25 April 1991, 2 BvR 1437/90, 13 InfAuslR (1991) 257, 20 May 1992, 2 BvR 205/92, 11 NVwZ (1992) 1081, 24 June 1992, 2 BvR 176/92 etc. (transcript copy), 4 March 1993, 2 BvR 1440, 1559, 1782/92 (transcript copy). See also judgments of 16 April 1985, BVerwG 9 C 115.84 (transcript copy), 2 July 1985, BVerwG 9 C 35.84, 7 InfAuslR (1985) 274, 27 May 1986, BVerwG 9 C 34.86 (transcript copy), 20 October 1987, BVerwG 9 C 147.86 (transcript copy), 19 May 1987, BVerwG 9 C 130.86 (transcript copy), 17 January 1989, BVerwG 9 C 62.87, 11 InfAuslR (1989) 163, 23 July 1991, BVerwG 9 C 154.90, 88 BVerwGE 367, 30 June 1992, BVerwG 9 C 24.91 (transcript copy).

⁶⁵See judgments of 12 July 1983, 1 BvR 1470/82, 65 BVerfGE 76, 10 July 1989, 2 BvR 502, 1000, 961/86, 80 BVerfGE 315, 5 March 1990, 2 BvR 938, 1467/89, 12 InfAuslR (1990) 165, 26 June 1991, 2 BvR 427/91, 13 InfAuslR (1991) 360, 25 August 1992, 2 BvR 1433/92, 107 DVB1 (1992) 1538. See also judgments of 16 July 1986, BVerwG 9 C 155.86, 8 InfAuslR (1986) 294, 17 January 1989, BVerwG 9 C 44.87 (transcript copy), 20 November 1990, BVerwG 9 C 74.90, 106 DVB1 (1991) 541, 20 November 1990, BVerwG 9 C 72/90, 10 NVwZ (1991) 384, 20 November 1990, BVerwG 9 C 73.90, 13 InfAuslR (1991) 181, 8 September 1992, BVerwG 9 C 62/91, 12 NVwZ (1993) 191.

⁶⁶On German refugee case law relating to applicants from Sri Lanka and Turkey see also Marx, R., Asylrecht, Band 3, Baden-Baden, Nomos Verl.-Ges., 5. Auflage, 1991, at 1283 et seq., and 1392 et seq. respectively.

nor of 'ethnic origin' ('Volkszugehörigkeit') of the refugee applicants under consideration. Nonetheless, they have expressly accepted these notions as 'characteristics of significance to asylum' and, in particular, as 'inalienable characteristics...that mould [the individual refugee's] different nature ['Anderssein']' in the socio-political context of the country of origin⁶⁷.

Ethnic origin has thus been recognised in German refugee case law as one of the bases of persecution usually combined with that of political opinion which finds expression through militancy in favour of the ethnic groups' struggle for self-determination. In the case of Kurds, it is to be finally noted that a usually combined basis has been also that of religion, since many of the Kurdish refugees instituting judicial proceedings in Germany have been members of the religious group of Yazidis subjected to repressive measures, either by the islamic majority population, or/and by state authorities.

CONCLUSION

None of the three European jurisprudential sets under consideration has provided any substantial clarification of the notion of ethnic origin as a ground for persecution. The reason for the lack of any relevant jurisprudential controversy should arguably lie in the fact that ethnicity constitutes a rather more objective aetiological factor of

⁶⁷See judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 333, judgment of 4 December 1991, 2 BvR 657/91, 11 NVwZ (1992) 561, at 562.

persecution than the other ones. Indeed, ethnic origin is an objective element in the context of persecution, not only in the sense that the individual refugee is inextricably bound by it from the very moment of her/his birth, something possible with the other grounds as well. Moreover, it is an inalienable human characteristic the protection of which (unlike the protection of the other more 'vulnerable', at least from a legal viewpoint, characteristics covered by the legal concept of refugeehood) has been established in contemporary international human rights law in an unqualified manner⁶⁸. However, 'ethnic origin' has been extensively, directly or indirectly, employed by all the above-examined domestic courts in a very large number of asylum cases. Ethnic origin has constituted indeed the main aetiological background of refugee exodus in the whole course of the twentieth century, especially since, following the collapse of former empires, the structure of nation-states started to establish itself on the European continent in the most violent possible manner⁶⁹. 'Ethnic cleansing'⁷⁰ has regrettably continued to dominate the world's socio-political scene, forcing masses of people to flee their countries of origin and become refugees.

⁶⁸See 1966 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

⁶⁹See, inter alia, Arendt, H., The Origins of Totalitarianism, New York, Harcourt, Brace & World, Inc., 1966, at 269 et seq.; see also supra Chapter I.

⁷⁰See Petrovic, D., 'Ethnic cleansing - An attempt at methodology', 5 European Journal of International Law (1994) at 342 infra.

Ethnic origin, a term utilised in contemporary international and domestic law in the place of 'race', refers to a specific set of inalienable characteristics shared by individual members of groups of people, the most important of them being: long history, cultural tradition, language, and religion⁷¹. These are characteristics that mould ethnic groups or communities, since they are shared for a very long period of time in a way that makes the latter really distinct social entities on a specific national, or even on the international, level. Thus, it is obvious that ethnic origin is a rubric that in refugee status law may be employed in order to cover a wide range of a refugee's significant, inalienable personal characteristics that constitute the potential ground for her/his (well-founded fear of) persecution. It provides, in fact, an aetiological framework that may in many cases accomodate, or alternate with, the persecution grounds of (except, of course, 'race') 'nationality' and, to a certain extent, 'religion' as well.

In practice, however, what the examination of European refugee case law showed is that ethnic origin has been usually employed in conjunction with other persecution grounds, such as political opinion and religion. This was evident in cases concerning especially Kurdish (from Turkey or Iraq), and Sri Lankan Tamil refugee applicants: unquestionably the biggest ethnic groups that have initiated asylum litigation in European domestic courts. No doubt, in the majority of cases

⁷¹See supra n. 20 and accompanying text.

involving Kurds, persecution-related jurisprudence has been able to combine, in its aetiology, ethnic origin with political convictions and their expression, as well as religion. As to the vast majority of the Sri Lankan Tamil applicants, in European refugee case law, they have been rather linked solely with their ethnic origin. However, in view of the fact that a large number of these cases have involved individual Tamils in the framework of a domestic political fight for self-determination, it is obvious that political opinion is another ground that may be (and in many cases has been) jointly employed in asylum procedures. There may consequently be no doubt that, as happens with every persecution ground established in international law, ethnic origin represents a significant, commonly employed factor that may readily, and does in judicial practice, overlap with most of the other aetiological elements of refugee persecution.

CHAPTER IX

RELIGION AS A GROUND FOR THE GENESIS OF REFUGEEHOOD

SECTION 1. FREEDOM OF RELIGION AND REFUGEEHOOD IN THE INTERNATIONAL LAW CONTEXT

Religious grounds for persecution have been ubiquitous throughout the long history of refugeehood¹. Religion, like 'race' and 'nationality', was therefore established, without any objection, by the states that participated in the drafting of the 1951 Refugee Convention as one of the basic contemporary reasons for the initiation of persecution and for subsequent refugee production².

¹See, inter alia, Zolberg, A.R., Suhrke, A., Aguayo, S., Escape from Violence Conflict and the Refugee Crisis in the Developing World, New York, Oxford, Oxford University Press, 1989, at 5-8; see also supra Chapter I; see also Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, where 'religious group' has been established as one, along with 'national, ethnical, racial' groups, of the basic groups the intentional destruction of which, 'in whole or in part', has been covered by the Convention definition of genocide.

²See Draft proposal for Article 1 of the United Kingdom, UN Doc. E/AC.32/L.2, 17 January 1950, in Takkenberg, A., Tahbaz, C.C. (eds.), The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees, vol. I (hereinafter Travaux), Amsterdam, Dutch Refugee Council, 1990, at 358; see also United States: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons) (E/AC.32/2), UN Doc. E/AC.32/L.4, 18 January 1950, in Travaux at 359, Ad Hoc Committee on Statelessness and Related Problems, 'Provisional Draft of Parts of the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees, Prepared by the Working Group on this Article', UN Doc. E/AC.32/L.6, 23 January 1950, in Travaux, at 361, see also UN Doc. E/AC.32/L.6/Rev.1, 30 January 1950, in Travaux at 363, UN Doc. E/AC.32/L.20/Rev.1, 2 February 1950, in Travaux at 370. See also Annex II, Chapter I Article 1 of the Report of the Ad Hoc Committee on Statelessness and Related Problems, 17 February 1950, UN Doc. E/1618 and Corr. 1, in Travaux 405, at 415.

Although no generally accepted legal definition has been established, religion in contemporary international human rights law has been described as a notion that includes 'theistic, non-theistic and atheistic beliefs'³. The right to freedom of religion, along with that of thought and of conscience, has always had a bifurcated nature in international human rights law, which has been actually transplanted, as will be demonstrated below, into refugee status case law. On the one hand, the freedom to have and change religion has been recognised in international law. On the other hand, it has been established the concomitant 'freedom, either alone or in community with others and in public or private, to manifest [one's] religion...in teaching, practice, worship and observance'⁴. The above fundamental, substantive duality established in the 1948 UN Declaration of Human Rights was also adopted by the 1966 International Covenant on Civil and Political Rights (ICCPR)⁵. In this

³See Article I of the UN Draft Convention on the Elimination of all Forms of Religious Intolerance, 1967, prepared by the UN Human Rights Commission and the Social Committee of the Economic and Social Council, text reproduced in Brownlie, I., (ed.), Basic Documents on Human Rights, Oxford, Clarendon Press, 1981, Second Edition, at 111. On the lack of consensus over the workability of any legal definition of religion on the international plane see Nafziger, J.A.R., 'The functions of religion in the international legal system', in Janis, M.W. (ed.), The Influence of Religion on the Development of International Law, Dordrecht etc., Kluwer, 1991, 147, at 148-151. On religion from an anthropological view see Geertz, C., 'Religion-Anthropological study', in International Encyclopedia of the Social Sciences, vol. 13 (1968), at 398 et seq.

⁴See Article 18 of the 1948 UN Declaration of Human Rights, G.A. Res. 217 A(III), UN Doc. A/810, at 71 (1948).

⁵999 UNTS 171.

Covenant the form of the above bifurcation has not only been kept but also clarified. Thus, while the individual freedom to 'have or to adopt a religion' of one's own choice has been enshrined in Article 18.2 of the above Covenant as an absolute freedom, subject to no restriction, this has not been the case with the freedom to 'manifest one's religion'. The manifestation of one's religion or beliefs has been recognised as an indispensable part of the freedom of thought, conscience and religion. However, that manifestation may be subjected to such limitations, according to the clawback clause of Article 18.3 of ICCPR, 'as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. This is a clause firmly established also in the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief⁶. The above duality has also been established in provisions of regional instruments for the protection of human rights, like Article 9 of the European Convention on Human Rights⁷. In the jurisprudential context of this Convention, it has been emphasised that any such restriction of the freedom of religious manifestation should

⁶UN G.A. Res. 36/55, UN Doc. A/36/51, at 171 (1981), Article 1.2, and 1.3. See also Krishnaswami, A., Study of Discrimination in the Matter of Religious Rights and Practices, New York, United Nations, 1960, at 14-21. On the 1981 Declaration see also World Conference on Religion and Peace Report, New York, January 25, 1982, Odio Benito, E., Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief, New York, United Nations, 1989, at 48-50, van Krieken, P., Apostasy and Asylum, Raoul Wallenberg Institute, Lund, Report No. 14, 1993, at 23-31.

⁷213 UNTS 221. See also Article 12 of the 1969 American Convention on Human Rights, 1144 UNTS 123.

not only be justified by a need to protect legitimate interests of a state's community but, as stressed by the European Court of Human Rights in Kokkinakis⁸, is also to be 'proportionate to the legitimate aim pursued'.

Persecution of individuals or groups⁹ on religious grounds has been inherently related to measures or actions of a particular state's agents or of individuals respectively, tolerated or even backed by state organs, the expression of which demonstrates the existence of a policy, or of an environment of religious discrimination and/or intolerance on the territory of the state of origin¹⁰. 'Intolerance and discrimination based on religion or belief' has been defined by Article 2.2 of the aforementioned 1981 UN Declaration as 'any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect

⁸See Kokkinakis v. Greece, European Court of Human Rights Series A, No. 260, judgment of 25 May 1993, 17 European Human Rights Reports 397, at 422, para. 49; see also ibid. at 419-422, paras. 36-48.

⁹See Article 27 of ICCPR which concerns, inter alia, religious minorities and prescribes that such minorities 'shall not be denied the right, in community with the other members of their group, to profess and practise their own religion...'; see also Thornberry, P., International Law and the Rights of Minorities, Oxford, Clarendon Press, 1991, at 161-3, and at 191 et seq., Capotorti, F., Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, New York, United Nations, 1979, at 37-9.

¹⁰See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979 (hereinafter UNHCR, Handbook), at 18, paras. 71-3; see also Grahl-Madsen, A., The Status of Refugees in International Law, vol. I, Leyden, A.W. Sijthoff, 1966, at 218, Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 27-8, Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 145-8.

nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis'. The above international definition may well prove to be of great value to asylum adjudication, given that its all-embracing nature covers not only and simply impairment of human rights because of intolerance or discrimination on the ground of religion or belief, but also violations of a greater degree that may acquire the form of 'nullification' of human rights and fundamental freedoms, and which have generated indeed so many cases of individual or massive refugee exoduses¹¹.

Religion as a ground for refugee persecution has also given rise to the particular type of refugees-conscientious objectors to military service, a type of refugeehood encountered in a number of asylum cases. Religious conviction has been the most common ground for conscientious objection recognised as valid on the international plane¹². Asylum

¹¹Developments in the field of international human rights law may and should be utilised in an effective interpretational manner in refugee status adjudication, and vice versa, see Kimminich, O., Grundprobleme des Asylrechts, Darmstadt, Wissenschaftliche Buchgesellschaft, 1983, at 57 et seq.

¹²See Eide, A., Mubanga-Chipoya, Ch., Conscientious Objection to Military Service, UN Doc.E/CN.4/Sub.2/1983/30/Rev.1, 1985, at 11 et seq.; see also UN Commission on Human Rights Resolution 1993/84, Conscientious objection to military service, 10 March 1993, in UN Commission on Human Rights, Report on the 49th Session, ECOSOC Official Records, 1993, Suppl. 3, 1993, 249, at 250-1; see also UN Human Rights Committee, Decision of July 27, 1993, Communication No. 402/1990, Brinkhof v. The Netherlands, 14 Human Rights Law Journal (1993) 410. See also Noone, Jr., M.F., 'Legal aspects of conscientious objection: A comparative analysis', in Moskos, C.C., Chambers II, J.W. (eds.), The New Conscientious Objection, New York, Oxford, Oxford University Press, 1993, at

claims may legitimately arise in cases where such religious convictions, in the words of UNHCR, 'are not taken into account by the authorities of [the refugee's country of origin]'¹³. The main practical difficulties with which a refugee applicant should cope in such cases would be firstly, the substantiation of the genuineness of her/his beliefs, an examination which should require 'a thorough investigation of [the refugee applicant's] personality and background'¹⁴, and secondly, the establishment of the well-founded fear of persecution in the country of origin. Given that in the majority of these cases there would exist an (or the real potential of an) initiation of prosecution against the individual refugee applicant/conscientious objector the basic, if not sole, persecution-related issue that should be examined would be the proportionality of the impending punishment¹⁵.

177 infra, Lippman, M., 'The recognition of conscientious objection to military service as an international human right', 21 California Western International Law Journal (1990-91) at 31 infra.

¹³See UNHCR, Handbook, at 40, para. 172.

¹⁴Ibid. at 41, para. 174. See also United States v. Seeger, US Supreme Court, March 8, 1965, 380 US 163, 13 L Ed 2d 733, at 747: '...while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held". This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact - a prime consideration to the validity of every claim for exemption as a conscientious objector.'

¹⁵See UNHCR, Handbook, at 40, para. 169: '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. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.' See also supra Chapter V, Section 3.

The above questions were directly dealt with by the US Court of Appeals in Canas-Segovia¹⁶, a well-known case concerning two brothers who were Jehovah's Witnesses-conscientious objectors from El Salvador where no exemption for religious reasons was recognised by the government's conscription policy. The court upheld the appeal, there existing no doubt about the genuineness of the appellants' beliefs, accepting that the appellants would 'suffer disproportionately severe punishment [by imprisonment] when forced to serve in the military because that service would cause them to sacrifice their religion's fundamental principle of pacifism'¹⁷.

SECTION 2. RELIGION AND GENESIS OF REFUGEEHOOD IN THE FRAMEWORK OF EUROPEAN REFUGEE CASE LAW

Even though the number of asylum claims related to persecution on religious grounds has not been large in British refugee case law, such cases have nevertheless raised and tackled substantively the issue of religious persecution. Atibo v. Immigration Officer, London (Heathrow) Airport¹⁸ is one of the early cases examined by the Immigration Appeal Tribunal. It concerned an active member of the Church of the Assembly of God from Mozambique, who claimed territorial asylum on the ground that the authorities of the above state had 'ordered

¹⁶Canas-Segovia v. INS, US Court of Appeals, Ninth Circuit, April 24, 1990, 902 F.2d 717.

¹⁷Ibid. at 728. See also Goodwin-Gill, G.S. et al., 'Canas-Segovia v. INS Brief Amicus Curiae of the UNHCR', 2 IJRL (1990) 390 infra.

¹⁸[1978] Imm AR 93.

all churches to reduce their activities'. As a consequence, while the appellant was allowed to practise his religion within the church, he was not allowed to do so outside of the church through proselytising. However, the facts that the appellant was never personally harassed by the Mozambique authorities, and that he was able to worship inside a church were regarded by the Tribunal as elements disqualifying him from refugee status.

Similar was the reasoning used by the High Court in R. v. Secretary of State for the Home Department ex parte Ahmad and others¹⁹, a case concerning four refugee applicants members of the Ahmadiya community in Pakistan, the nature of which is evangelical. The appellants had based their case upon the repressive Pakistani Penal Code which through a 1984 Ordinance prohibited first, the 'Misuse of epithets, descriptions and titles reserved for certain holy personages and places' by Ahmadis and second, 'Ahmadis from calling themselves Muslim', thus creating 'an offence by any Ahmadi who "calls or refers to his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims".'²⁰ The concomitant punishment for the above offences was imprisonment up to a term of three years, along with a liability to fines.

¹⁹Queen's Bench Division, CO/681/85, 9 March 1988 (transcript copy).

²⁰Idem.

Even though the court acknowledged the overtly discriminatory nature of the above legislation affecting the appellants and its subsequent potential to generate persecution able to lead to granting of refugee status, it dismissed the applications on the following two basic grounds: firstly, none of the applicants had 'indicated or mentioned any personal persecution either by prosecution or assault or intimidation', despite their 'complaint of discrimination in economic, academic and employment fields'; secondly, the information provided by the Foreign Office, according to which 'although there was clearly discrimination against Ahmadi Muslims it was not sufficiently serious to be considered as persecution on account of their religion', while 'any action against Ahmadis was occasional and was not government inspired'²¹.

British case law has subsequently developed a restrictive and cursory interpretational model regarding refugee status applications lodged by Ahmadis. Farquharson LJ, delivering the judgment on behalf of the Court of Appeal in Gulzar Ahmad and others v. Secretary of State for the Home Department²²,

²¹ Idem. See also R. v. Immigration Appeal Tribunal ex parte Ahmed, Queen's Bench Division, CO/1109/89, 2 October 1989 (transcript copy), another case concerning an Ahmadi from Pakistan where the court, in an overrestrictive and, at the same time, cursory manner, reasoned with reference to the severe prohibitions imposed on Ahmadis that although 'To this country's mind, such an Ordinance may seem to be repressive or suppressive...but if that is the law in Pakistan, it has to be obeyed. There is no reason why...this man, should not, in my judgment, carry on [his life] perfectly happily, behave within the Ordinance and remain, allowing [himself] to be and to practise as members of the Ahmadi sect.'

²² 6 October 1989, [1990] Imm AR 61.

dismissed a similar to the above-mentioned appeal of Ahmadi refugee applicants, having stressed that 'a person cannot obtain refugee status on the basis that he has a fear of persecution if he returns to his national country and proceeds to break its laws. At the same time I do not consider that there are no circumstances in which a person could claim to be a refugee if he proposes to exercise what are widely regarded as fundamental human rights in the knowledge that persecution will result. In a religious context the position of a priest may be different from that of an ordinary member of the community, or the offending statute itself may be so draconian that it would be impossible to practise the religion at all. It would depend to a very large extent on where, in the spectrum of religious observance, a particular applicant proposed to be active; somebody who merely attended his place of worship from time to time throughout the year would...be contrasted with an active clerical figure.'²³

Persecution of members of a religious group by another religious group and not by state authorities has also been accepted in principle by British case law as a legitimate basis of religious persecution and subsequent recognition of refugee status, as demonstrated by the Immigration Appeal

²³Ibid. at 66. Sikh refugee applicants have also raised the question of religious persecution in India but their cases have been overwhelmed by questions regarding basically extradition and political offences, see Jangbahadur Singh v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/19121/86 (6510), 26 April 1989 (transcript copy), R. v. Secretary of State for the Home Department ex parte Chadal, Queen's Bench Division, CO/1634/91, 2 December 1991 (transcript copy).

Tribunal in Khodr Ali Boutari v. Secretary of State for the Home Department²⁴. The Tribunal held, on the basis of the available evidence, that the persecution of the appellant, a Sunni Muslim, by Shi-ites who controlled the area in southern Beirut, Lebanon, where he lived, amounted to persecution that qualified the former as a refugee²⁵.

An issue which has attracted attention in British refugee case law has been the objection to military service on the ground of religious beliefs. The British locus classicus is Kyriakos Doonetas v. Secretary of State for the Home Department²⁶. The appellant was a Greek citizen and a practising Jehovah's Witness who refused to perform his compulsory military service in his country, claiming that the religious order to which he belonged precluded him from undertaking military service. The Immigration Appeal Tribunal dismissed the appeal, rendering a rather contradictory judgment which fell moreover into the same restrictive mode of interpretation encountered in the aforementioned case law regarding claims of religious persecution on the basis of discriminatory legislation. The

²⁴Appeal No. TH/7065/89 (7349), 14 August 1990 (transcript copy) at 11-12.

²⁵See also Awatef Mahmoud Reslan et al. v. Immigration Officer-Heathrow, Immigration Appeal Tribunal, Appeal No. TH/122233/84 (3844), 5 March 1985 (transcript copy), a successful appeal of Lebanese Muslims fearing persecution by 'other factions'. See also R. v. Secretary of State for the Home Department ex parte Tanak, Queen's Bench Division, CO/666/90, 26 November 1990 (transcript copy), an unsuccessful appeal of a Turkish Kurd of Alevite religion who claimed persecution by Sunnis in Turkey.

²⁶Immigration Appeal Tribunal, 14 October 1976, reported in 71 ILR (1986) 496.

Tribunal, although it acknowledged that 'the sort of sentences being imposed in Greece for refusal of military service [five years imprisonment in the first instance, extended if the convicted person still refused to serve when due for release, with the potential of an extension anew and indefinitely] amount to persecution', went on to say that 'the immediate cause of the persecution is a refusal to obey the law of the land' which, according to the Tribunal, was of a general scope and did not discriminate against Jehovah's Witnesses so as to make the appellant refuse to obey. As a consequence, in the words of the Tribunal, 'the fact that such refusal may be due to religious beliefs or political opinion is...only the secondary cause'. However, what the Tribunal did in this case was not simply a relegation of the appellant's religious beliefs to a 'secondary cause' but, in effect, a complete disregard to the main cause of the refugee applicant's fear of persecution which was indeed based on an unchallenged, genuine faith of a religious nature.

Nonetheless, the Immigration Appeal Tribunal overturned, in effect, Doonetas when it considered later a similar case, Pinhas Peter Matkov v. Secretary of State for the Home Department²⁷, where an Israeli 'practising Christian' citizen refused to do his military service on the ground, inter alia, of his religious beliefs. The appeal was dismissed by the Tribunal which, in a rather rare moment of elaborated judicial

²⁷Appeal No. TH/106300/83 (3331), 24 May 1984 (transcript copy).

reasoning, laid down three significant substantive theoretical rules/criteria which would be most useful in similar asylum adjudication: firstly, it was accepted expressis verbis, contrary to Doonetas, that if a law that provides for compulsory military service 'discriminates against those holding political or religious opinions (given penalties which amount to persecution) the basis is laid for a plea of asylum'; secondly, the Tribunal prescribed that 'even if there is no such discrimination the purpose of the law is relevant in that if the law is directed at imposing a course of conduct abhorrent to a fundamental concept of our society any sanctions imposed to enforce it may amount to persecution, provided the refusal to carry out the course of conduct was based on a ground specified by the Immigration Rules [on asylum]'²⁸; finally, the Immigration Appeal Tribunal added that even if the law is not contrary to a 'fundamental concept of society', an asylum seeker may not claim refugee status on the sole basis of punishment in case of refusal to comply with the law. However, this punishment may amount to persecution in case the state which enforces the relevant legislation, in the words of the Tribunal, 'exceed[s] that which is thought to be acceptable limits in enforcement because of its national interests'²⁹. The Tribunal regrettably did not elaborate on the two key-concepts that it employed in the above case, that is, 'fundamental concept of [the asylum state's] society' and 'acceptable limits in [statutory] enforcement'. However,

²⁸Ibid. at 6.

²⁹Ibid. at 7.

contextually it may be deduced that the first concept effectively makes reference to the fundamental human rights standards recognised and established in the country of asylum, while the second one refers to the notion of proportionality between prosecution and offence. While the principle of proportionality has been established in British refugee case law, the other theoretical, assessment-related concept which is based on human rights standards of the country of asylum, has not been established in British refugee law, as shown by the above-mentioned cases concerning Ahmadis, nor in any of the other two national jurisprudential frameworks under examination³⁰. The Immigration Appeal Tribunal in Matkov obviously considered the impending punishment to be proportionate since, according to the evidence provided, the usual penalties imposed in the appellant's country of origin in such cases was imprisonment for terms ranging from seven to forty days, subject to renewal several times with a maximum imprisonment of five years, penalties more lenient than those provided by Greek law in Doonetas. As a consequence, the Tribunal concluded that there was no evidence showing that the appellant 'might be singled out for particularly severe treatment'³¹, and thus be subjected to a disproportionate punishment.

In French jurisprudence, religious beliefs have also been recognised as persecution grounds, on condition that the

³⁰See supra Chapter V.

³¹See supra n. 29.

alleged persecution has acquired the dynamic and particularised form required by the French courts and tribunals. As a consequence, mere holding of religious convictions and a general persecution state policy against a religious group have not been recognised, in and of themselves, as sufficient for the recognition of an individual's refugee status.

Accordingly, in M. Bwanda Lemba³² the Conseil d'Etat rejected the petition for annulment of the above Zairian Jehovah's Witness, having placed particular emphasis on and examined the 'particular situation of the applicant', in conjunction with the 'attitude adopted by the authorities of his country of origin towards the religious organisation' to which he belonged. The Commission des Recours des Réfugiés followed and reiterated the above legal interpretational stance towards religious persecution in a clearer manner in Mle Hassan³³. This case concerned an Egyptian Muslim alleging that she was not able to practise her religion in her country in the manner she considered as proper, especially since she could not wear the veil. The Commission des Recours rejected her appeal on the ground that the appellant did not mention 'any ill-treatment or any discrimination to which she would be personally subjected or any fear of persecutions that she could personally experience'³⁴.

³²CE No. 101.506, 13 May 1992 (transcript copy).

³³CRR No. 237.836, 12 January 1993 (transcript copy).

³⁴See also M. Singh, CRR No. 33.855, 30 April 1985, M. Mohamed, CRR No. 31.931, 4 March 1985, Mme Pham, CRR No. 31.930, 4 March 1985, M. Massamba, CRR No. 25.179, 12 July

In cases where religious persecution clearly emanated from state authorities, in the context of an official state policy against a particular religious group, the substantiation of that adverse treatment did not generate serious problems, as demonstrated in several appeals involving Jehovah's Witnesses subject to persecution³⁵. However, this has not been the case with claims of persecution originating in groups of the population of the country of origin, which usually belong to the religious majority of that country. In such cases, the refugee applicant had to bear the onerous burden to prove that persecution in the above context has been either encouraged or intentionally tolerated by the state authorities³⁶.

Of particular interest has been M. Kurtic³⁷, a case where the religion of the refugee applicant from former Yugoslavia constituted the individual characteristic of, and thus represented, a whole ethnic group on a state territory, which had rested dehors any kind of state protective shield. The

1985, M. Machouch, CRR No. 21.091, 29 June 1987, M. Behzadi, CRR No. 50.851, 19 October 1987 (transcript copies).

³⁵See M. Ndoma, CRR No. 35.614, 3 July 1986, M. Nsamu Diavula, CRR No. 31.865, 9 October 1987, M. Noundou, CRR No. 58.273, 23 November 1989, M. Ndongala Siyala, CRR No. 86.232, 23 November 1989, Mle Toko N'Dona, CRR No. 103.413, 5 January 1990 (transcript copies).

³⁶See M. Taher, CRR No. 214.012, 6 April 1992, M. Haruna, CRR No. 20.515, 16 December 1985 (transcript copies).

³⁷CRR No. 227.353, 27 November 1992, reported in Documentation-Réfugiés, Supplément au No 223, 17/30 Août 1993, at 7. See also the successful case of Dujic, CRR No. 230.571, 12 February 1993, ibid. at 8. This case concerned a Catholic Croat who claimed persecution by military forces of the 'self-proclaimed Serb Republic of Krajina', backed by the federal Yugoslavian armed forces.

Commission des Recours des Réfugiés accepted that the above appellant had a well-founded fear of persecution as a Muslim Bosnian, member of an ethnic (defined as such on the sole basis of religion) group persecuted by the Serbian forces controlling the territory of his state, who refused to serve in the Yugoslavian federal army under Serbian command. Christians in a variety of states with a Muslim majority population, ranging from Pakistan to Nigeria and Croatia³⁸, as well as Ahmadis in Pakistan³⁹, and Bahais in Iran⁴⁰ and in Morocco⁴¹ have also been presented frequently in French jurisprudence as religious minorities individual members of which have been subjected to persecutory measures by intolerant and repressive state authorities, and/or by individuals of the religious majority, transformed into actual agents of persecution.

³⁸See M. Misquita, CRR No. 26.289, 31 August 1984, Mle Moshi, CRR No. 25.971, 19 November 1984, M. Glica, CRR No. 34.141, 12 June 1987, Mle Zhu, CRR No. 67.612, 20 April 1988, Mme Kecsmar, CRR No. 54.002, 20 June 1989, M. Nohra, CRR No. 88.793, 20 October 1989, M. Nassar, CRR No. 70.558, 5 January 1989, M. Mallouhie, CRR No. 54.665, 2 October 1989, M. D'Mello, CRR No. 57.033, 5 September 1989, M. Nassar, CRR No. 70.557, 13 March 1989, M. Tawil, CRR No. 130.321, 3 December 1990, M. Zagbi, CRR No. 098.960, 10 December 1990, Mle Dorina, CRR No. 157.103, 31 May 1991, M. Nyarko, CRR No. 120.323, 3 January 1991, M. Sarkissian, CRR No. 213.161, 16 March 1992, M. Farayibi, CRR No. 209.339, 27 February 1992, M. Adeya, CRR No. 215.050, 23 March 1992 (transcript copies), M. Dujic, CRR No. 230.571, 12 February 1993, supra n. 37.

³⁹See M. Riaz, CRR No. 86.927, 29 May 1989, M. Ahmed, CRR No. 91.934, 1 June 1989, M. Taqi, CRR No. 183.801, 4 October 1991 (transcript copies).

⁴⁰See Mle Safaie, CRR No. 58.216, 21 December 1987 (transcript copy).

⁴¹See M. El Bahi, CRR No. 214.512, 2 April 1992 (transcript copy).

In German jurisprudence religious 'motives and goals' have been recognised and established as some of the commonest and most significant causes of 'oppression and persecution of dissidents ['Andersdenkende']'⁴². The Federal Constitutional Court has categorised the right to 'free religious practice' as a right derivative of the fundamental right of personal freedom which constitutes, along with the individual 'lawful interests' of life and limb, one of the basic objects of protection of the institution of asylum⁴³. Accordingly, the above Federal Court has established that discrimination and restrictions of a religious nature may well fall into the category of 'political persecution' of the German constitutional provision on asylum and thus lead to recognition of refugee status⁴⁴.

Religion-based objection to performance of military service has been recognised as a cause of creation of a situation of 'conflict of duties', in the sense that duties deriving from a religious faith may well clash with the ones demanded by the state. In such cases, if the state takes action against its citizens this action may result in persecution as well, depending on 'a sensible assessment of the [individual]

⁴²See judgment of Federal Constitutional Court, 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 357-8; see also judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 158.

⁴³Idem; see also judgment of 20 May 1992, 2 BvR 205/92, 11 NVwZ (1992) 1081, at 1082. See also judgment of 18 February 1986, BVerwG 9 C 16.85, 74 BVerwGE 31, at 37.

⁴⁴54 BVerfGE 341, at 357-8.

case'⁴⁵. In such cases, the basic parameter of persecution assessment established by the Federal Administrative Court is the legislative framework concerning the nature and proportionality of punishment of conscientious objectors in the country of origin, and the actual legal position of the individual asylum seeker therein. Thus, the above Court has acknowledged the well-foundedness of the fear of persecution of a conscientious objector based on religious grounds, who had been convicted, like his brothers, to long-term imprisonment for his refusal to do his military service, and who could be expected with certainty to be subjected to a more severe punishment, in case he returned and was forced by his religious conviction to refuse anew to join his state's military force⁴⁶.

German refugee status case law has stressed on a number of occasions that religious (like every other kind of) persecution in a specific state should not be examined on the basis of the human rights standards set in the German Basic Law. The Bundesverfassungsgericht has emphasised (as shown in Chapter V) that the 'humanitarian intention' of the institution of asylum was not to offer the high standard-human rights protection of the German Constitution to asylum seekers, but to provide protection only to those persons who find themselves in a 'hopeless situation'. Therefore, the

⁴⁵See judgment of Federal Administrative Court, 29 June 1962, I C 41.60, 78 DVB1 (1963) 146.

⁴⁶Idem.

restrictions or infringements of the religious freedom should demonstrate such a 'gravity and intensity' that a violation of the 'human dignity' may be clearly demonstrated. In the words of the above Supreme Court, such restrictions or infringements 'must possess such a gravity that they infringe upon the elementary sphere of a moral person in which the [person's] self-determination must remain possible in favour of an existence worthy of a human being, [while] the metaphysical principles of a human existence should not be ruined'⁴⁷.

⁴⁷See judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 158. Accord, judgment of 18 February 1986, BVerwG 9 C 16.85, 74 BVerwGE 31, at 37-8. See also judgment of 14 May 1987, BVerwG 9 B 149.87, 102 DVBl (1987) 1113, where the Court pointed out that 'measures which are connected with a direct danger to life and limb, or with restrictions of the personal freedom may constitute facts of persecution only if they are so intense and grave that they violate the human dignity and surpass what the population of the persecuting state has to accept'. Accordingly, the standard of measuring a religious persecution should be 'whether the believer through the restrictions or duties imposed upon him is affected as a religious personality in a manner as serious as in cases of violations of the freedom from bodily harm or of the physical freedom, so that he finds himself in an emergency where it is not possible any more a religion-oriented life and a "personal existence" moulded by religion in the sense of the "minimum of a religious existence"'; see also judgment of 30 October 1990, BVerwG 9 C 72.89 (transcript copy) at 17-18: 'Whether criminal law provisions have as a consequence a violation of the religious practice contravening Art.16 Abs.2 Satz 2 GG is to be viewed neither according to the wide religious freedom, as enshrined in Art. 4 GG...nor according to the religious community's or of the individual believers' own conception of the significance of an element of the faith which is affected by the state action...What is much more decisive is an objective measure...'. See also judgment of 12 June 1990, BVerwG 9 C 37.89 (transcript copy) at 21-22: 'To the right of asylum are entitled those aliens in general who, with reference to their political or religious conviction and practice, have to face in their homeland a forced re-education, forced assimilation or a deliberate disciplining aiming at their subjugation...'; see also judgment of 12 June 1990, BVerwG 9 C 23.90 (transcript copy) at 13; see also Winter, J., 'Religionsfreiheit und politische Verfolgung', in ZDWF (Hrsg.), Festschrift anlässlich des 10jährigen Bestehens der ZDWF, Bonn, ZDWF, 1990, 87 infra.

As a consequence, persecutory measures may well play a crucial role in establishing refugee status when their identifiable aim would be, for example, the physical extinction of the members of a specific religious group, or to threaten them with similarly harsh sanctions (e.g. expulsion or withholding of elementary life conditions), or when they aim at depriving individuals of their religious identity. This would be the case if, for example, under the threat of imposing penalties that affect life, limb or personal freedom, these individuals are asked to deny or to wholly abandon the basic principles of their religion, or in case they are prevented from professing their own faith, as they understand it, in private and by themselves⁴⁸. German jurisprudence has therefore linked

⁴⁸See judgment of 18 February 1986, BVerwG 9 C 104.85, 74 BVerwGE 41, at 45: 'An asylum claim of the applicant on the ground of violation of his religious freedom could...be considered only if there existed a serious probability that the state of Pakistan would give way in the near future to the far-going demands of the Mullahs to introduce the death penalty for apostates, the punishment of a violation of the dogma of finality, as well as the ban of the common religious practice of the Ahmadis'. See also judgment of 25 October 1988, BVerwG 9 C 37.88 (transcript copy) at 8: 'Violations of the freedom of religious faith and practice constitute an impairment of the believer's human dignity if he is affected by the restrictions and conduct duties imposed, as a religious personality in a manner similar to cases of violations of the freedom from bodily harm or of the personal liberty...This is the case *inter alia* with measures that aim at the denial or even abandonment by the believer of the content of his faith, and consequently at the deprivation of his religious identity'; *ibid.* at 9: 'The interest protected by asylum law is not the religious freedom in the sense of Art.4 Abs.1 GG, but the minimum space of freedom in religious practice guaranteed by the principle of the human dignity...Therefore, the mere explanation and concretization of the criterion of the human dignity for the assessment of a violation of the freedom of religious practice refer to the objective standard of the human dignity, and consequently the important objective criterion of the intensity and gravity of the violation remains in the core of the religious personality'. The Court rejected the subjective basis of the individual refugee's

refugee status claims on religious grounds with and conditioned them on (potential) violations of the core of the freedom of religion of the individual asylum seeker in the country of origin. Accordingly, the Federal Administrative Court has stressed, in a case concerning Christian children in Turkey obliged to participate in Islamic religious classes, that 'the minimum of religious existence guaranteed by the human dignity is not affected by the duty to participate in Islamic religious lessons for persons of a different religion in the state schools in Turkey, because in this case there is no connected duty to profess one's faith in Islam, which would violate the core of the religiously moulded personality'⁴⁹.

German refugee case law has proceeded and effectively established a bifurcated framework of protection in the context of asylum, in a manner similar to (but, as demonstrated below, actually deviating from) the

feelings as a basis for assessing any such violation, and consequently did not consider the obligation imposed on Jehovah's Witnesses to salute their country's flag as of significance to their claim. By contrast, the complete ban of their religion, including the private religious practice with other believers has been regarded as a violation of the core of the religious freedom and, consequently, as a valid ground for asylum, ibid. at 12-13; see also judgment of 6 March 1990, BVerwG 9 C 14/89, 9 NVwZ (1990) 1179, at 1181: 'violations of the freedom of religious faith and practice show a limitation of the believer's human dignity which is relevant to asylum when the measures aim to deprive him from his religious identity'.

⁴⁹See judgment of 6 March 1990, BVerwG 9 C 14/89, 9 NVwZ (1990) 1179, at 1182; see also judgment of 12 June 1990, BVerwG 9 C 37.89 (transcript copy) at 22, judgment of 24 July 1990, BVerwG 9 C 38.89 et al. (transcript copy) at 18, judgment of 6 March 1990, BVerwG 9 C 16.89, 12 InfAuslR (1990) 240, at 242, judgment of 24 July 1990, BVerwG 9 C 20.89 (transcript copy) at 10.

aforementioned international human rights law standards, on the basis of whether the alleged persecutory measures may be assessed as violating the core and substance of the individual's freedom of religion. Accordingly, the Federal Constitutional Court has emphasised that `the private, in-house religious practice, as for example the house service, as well as the possibility to speak about one's own faith and to profess one's religious faith, and also the prayer and religious service away from publicity in a private circle with other believers in a place where they should, in good faith, remain private, belong, from the viewpoint of the human dignity and according to international standards, to the elementary sphere required by men as "a minimum of religious existence" in order to live and exist as moral persons'⁵⁰. Thus, the principle of the religiöse Existenzminimum has been established in Germany as one which is to be respected and taken into account in all cases with no exception, since it is a concept that represents, in effect, the core of the individual's freedom of religion⁵¹. Although no clear-cut

⁵⁰See judgment of 1 July 1987, 2 BvR 478,962/96, 76 BVerfGE 143, at 158-9, emphasis added; see also judgment of 9 November 1988, 2 BvR 288,388/88 (transcript copy) at 3-4.

⁵¹See judgment of Federal Constitutional Court, 8 November 1990, 2 BvR 945,955,1049,1068,1083/90 (transcript copy) at 7. Accord, judgment of 18 February 1986, BVerwG 9 C 16.85, 74 BVerwGE 31, at 38. See also judgment of 17 September 1986, BVerwG 9 C 96.85 (transcript copy) at 14 where the Court pointed out that the standard by which a religious persecution may be assessed is whether `the believer through the restrictions imposed upon him is affected as a religious personality in a severe manner similar to that of attacks against the freedom from bodily harm, so that he consequently finds himself in an emergency where a religion-oriented life and the concomitant existence moulded by faith is not possible any more even in the sense of [the] "minimum religious

definition has been provided by the German Supreme Court jurisprudence, the Federal Administrative Court has pinpointed that to the 'minimum religious existence' belongs 'as an inalienable core not only the forum internum of domestic worship, but also the possibility of common prayer and of service in common with other believers in accordance with the [religious] tradition'⁵². In this vein, the same Court has laid down that 'In assessing the minimum of religious existence there must be taken into account the special prerequisites of the religious practice that are quite simply essential for the religious life, in accordance with the general religious praxis'⁵³. In consequence, the above Court acknowledged that the prohibition of the use, according to religious tradition, of Aramaic by Syriac Orthodox Christians in Turkey, in common religious services, violated the core of the individual refugee's religious faith⁵⁴.

The above-described private forms of exercise of religious freedom have been characterised by the Federal Constitutional Court as forms of religious expression that belong to the 'inalienable core of [every human being's] private sphere

existence"'.

⁵²Judgment of 17 September 1986, BVerwG 9 C 96.85 (transcript copy) at 14.

⁵³Judgment of 23 July 1991, BVerwG 9 C 154.90, 13 InfAuslR (1991) 363, at 367.

⁵⁴Judgment of 22 September 1987, BVerwG 9 B 305.87 (transcript copy) at 3.

("privacy")', but 'they do not go any further'⁵⁵. The Court has thus distinguished, on the one hand, this highly sensitive, prioritised and almost totally protected 'internal area' of individual members of a religious group. However, even in such private forms of religious practice there has been recognised the state's authority to intervene if e.g. 'the special nature and manner of profession or expression of a faith would trespass, in a considerably peace-disrupting manner, the sphere of life of other citizens, or when they would be irreconcilable with the principle of ordre public'⁵⁶.

On the other hand, German jurisprudence has outlined, in a restrictive vein, an outer sphere ('Außensphäre') of a religious community and/or its members, which may not be considered, in principle, immune from state action. This is a stance that contravenes contemporary international human rights law where externalisation of religious beliefs has been established, in principle, as part and parcel of the freedom of religion. The Federal Administrative Court has stressed that 'If the state measures are limited...to forbidding [allegedly for reasons of public order] the publicity of specific names, features and symbols or forms of worship,

⁵⁵Judgment of 1 July 1987, 2 BvR 478,962/96, 76 BVerfGE 143, at 159.

⁵⁶See Federal Constitutional Court judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 159, where 'suttees or sacrifices of children' were mentioned by the Court as examples of religion-related practices resting anyhow under state authority control.

there is no violation of relevance to asylum, even if these are of a decisive nature for the religious community'⁵⁷. However, domestic legislation encroaching solely upon the freedom of public manifestation of a religious faith should not be perceived per se as a factor which would disqualify a claim of persecution. In this vein, German jurisprudence has emphasised that particular weight should be attached to the actual interpretation/application of the above legislation by the 'competent authorities and courts'. If such a statutory application effectively leads to the violation of the internal religious sphere of a refugee applicant, then asylum should not be denied. Accordingly, the Federal Constitutional Court has attached particular significance to the interpretation by the Pakistan Sharia Court of the domestic Penal Code provisions which were considered by the latter court to be in harmony with the country's Constitution. The Pakistan Sharia Court had actually concluded that 'the Ahmadis would be able to profess that they believe in the unity of God and the prophetic nature of the founder of their religion, but not that they are Muslims and that their faith is Islamic'. This application of domestic legislation was rightly regarded by the German Federal Constitutional Court as an actual violation

⁵⁷Judgment of 30 October 1990, BVerwG 9 C 72.89 (transcript copy) at 18; see also judgment of 7 April 1992, BVerwG 9 C 58.91 (transcript copy) at 14-17, judgment of 30 June 1992, BVerwG 9 C 51.91 (transcript copy) at 11-12, judgment of 9 April 1991, BVerwG 9 C 15.90 (transcript copy) at 14-17.

of the internal sphere of a religious personality⁵⁸, a violation that should consequently lead to an acceptance of a claim of persecution on religious grounds. In the same vein, the German Federal Administrative Court, in its judgment of 13 May 1993⁵⁹, upheld the appeal of a Pakistani Ahmadi refugee applicant, convicted and thus subject to imprisonment for many years, in accordance with the Pakistani Penal Code, on the ground of using in public the Muslim call of prayer. The above Court had no qualm at all about recognising the persecutory character of this kind of legislation and its application, which result not merely in the restriction of a religious practice, but above all in the violation of the individual refugee's personal liberty⁶⁰.

As already noted, German case law has regarded the 'special prerequisites for the exercise of [a] religious form' as being of a particular significance, especially when this religion 'has been moulded by ancient and oral tradition' and which prerequisites are considered as 'quite simply essential, according to the general accomplished religious praxis'. Consequently, in a case regarding persecution of the Kurdish

⁵⁸See judgment of 14 January 1992, 2 BvR 1300/89 et al., 38 Bayerische Verwaltungsblätter (1992) 369, at 369-370; see also judgment of 9 November 1988, 2 BvR 288,388/88 (transcript copy) at 3-5, judgment of 12 March 1992, 2 BvR 1353/89 etc., 107 DVB1 (1992) 821, at 822-3. See also judgments of 23 February 1988, BVerwG 9 C 85.87 (transcript copy) at 6, of 26 July 1988, BVerwG 9 C 51.87 (transcript copy) at 10-11, of 30 October 1990, BVerwG 9 C 60.89, 106 DVB1 (1991) 535, at 537.

⁵⁹BVerwG 9 C 49.92, 92 BVerwGE 278.

⁶⁰Ibid. at 280.

religious group of Yazidis, the Federal Constitutional Court has recognised the particular significance of the 'maintenance of a family structure, in the sense of a group cohesion which is necessary for the practice of the rituals and for its accompaniment, [the maintenance] of a link with a family of priests'⁶¹. Accordingly, German case law accepted that (state or 'third party') persecution may exist when members of such a group are 'impeded from reaching that degree of cohesion in a "religious family" which they possibly require for the maintenance of their religious existence'⁶².

Nevertheless, any such persecution has been recognised as a valid refugee status ground only with regard to those Yazidis who 'are still existentially bound to their religion, and especially those who strive to live in an essential, according to this religion, community'⁶³. This has been actually a general condition valid for every case of religious

⁶¹See judgment of 10 November 1989, 2 BvR 403,1501/84, 9 NVwZ (1990) 254; see also judgments of 8 November 1990, 2 BvR 945/90 etc. (transcript copy), of 9 January 1990, 2 BvR 1631/88 (transcript copy), of 23 January 1991, 2 BvR 902/85 and 515,1827/89, 83 BVerfGE 216, of 7 June 1991, 2 BvR 989/89 etc. (transcript copy), of 14 June 1991, 2 BvR 219/91 etc. (transcript copy), of 27 June 1991, 2 BvR 352/88, 13 InfAuslR (1991) 280.

⁶²9 NVwZ (1990) 254, at 255.

⁶³Idem. See also judgment of 22 May 1990, 2 BvR 1487 etc./89, 12 InfAuslR (1990) 282, at 282-3; see also judgment of 8 November 1990, 2 BvR 945,955,1049,1068,1083/90 (transcript copy) at 7. The personal involvement of the individual refugee applicant in a religious process has been given a prominent place by the Federal Constitutional Court, see also judgment of 19 November 1990, 2 BvR 158/90 (transcript copy) at 2-3, judgment of 4 March 1993, 2 BvR 1440,1559,1782/92 (transcript copy).

persecution. Indeed, as stressed by the Federal Administrative Court, persecution aiming at the religious faith and practice of a refugee may be accepted as falling within the asylum protective zone, 'if the person is affected by these measures as a religion-bound personality in a grave manner similar to that of attacks against the freedom from bodily harm or physical freedom'. The Court has defined the 'religion-bound personality', and thus, indirectly, 'religion', saying that this characteristic, 'as a prerequisite for the persecutory quality of limitations and hindrances of the practice of a faith, possesses only he who has taken on the credos and demands of his faith as a fundamental element of his views towards the world and men. By contrast, it does not suffice that the person affected by the attack against the freedom of the practice of [his] faith belongs or is attributed to the religious community merely in a formal sense, but he does not regard the doctrines and precepts of that religion -any more- as binding for himself, and he also makes no more the effort to live in accordance with them...'⁶⁴.

Finally, German case law has provided a most significant, probably unique, example of collective religious persecution of a severity and intensity that has been in a position to justify a prognosis of individual persecution as well. The basic relevant case originated in Pakistan and concerned

⁶⁴See judgment of 17 August 1993, BVerwG 9 C 8.93, 109 DVB1 (1994) 60, at 61; ibid.: 'In principle the same is valid also for children...[but] it may not be demanded...in this case a religious conviction consolidated and rooted to the same extent as in the case of an adult'.

Ahmadis subject to state and/or orthodox Muslim individual pogroms in the mid-1970s⁶⁵. Members of the Ahmadi Muslim minority initiated a pivotal case in Germany, providing evidence which demonstrated arguably one of the most overwhelming types of collective religious persecution that may occur in a state, and especially in a theocratic one. Ahmadis were declared a non-Muslim religious minority by virtue of the Pakistan Constitution in 1974, while in 1975 to be an Ahmadi and propagate the relevant religious credo were made criminal offences according to the above state's Penal Code⁶⁶. Overt discrimination and severe violence originating from the majority Muslim community, backed by the official theocratic state, against people of the Ahmadi faith had therefore stretched in Pakistan, engulfing not only individual Ahmadis at administrative levels but also even students who were consequently barred from the official state education institutions. The situation was described as a 'total social boycott'⁶⁷ of a whole religious minority.

⁶⁵See judgment of 2 July 1980, 1 BvR 147,181,182/80, 54 BVerfGE 341, at 345 et seq.; see also the case of Syriac Orthodox Christians persecuted by the Moslem majority in Turkey, judgment of Federal Administrative Court, 2 August 1983, 9 C 599.81, 67 BVerwGE 314.

⁶⁶54 BVerfGE 341, at 345 et seq. On religious persecution with special extensive reference to the case of Pakistani Ahmadis see Marx, R., Umfang und Grenzen der Religionsfreiheit im Asylrecht unter besonderer Berücksichtigung der pakistanischen Strafpraxis gegenüber Ahmadis, Bonn, ZDWF-Schriftenreihe Nr. 52, Februar 1993.

⁶⁷54 BVerfGE 341, at 350; see also judgment of 19 November 1990, 2 BvR 158/90 (transcript copy) at 2-4. On the situation of Ahmadis in Pakistan see also judgments of 14 January 1992, 2 BvR 1300/89 etc., 38 Bayerische Verwaltungsblätter (1992) 369, 12 March 1992, 2 BvR 1353/89 etc., 107 DVB1 (1992) 821. See also judgment of 26 March 1985, BVerwG 9 C 114.84

German refugee jurisprudence has set down some relevant applicable rules referring to a margin of state action which may infringe upon religious freedom in the name of establishment of public order, if endangered by various religious factions that show an aggressive, intolerant attitude towards other such factions. Under this kind of circumstances it may be permissible to the state to forbid a religious minority to use in public certain names, marks, symbols or forms of faith profession, even though they are equally important both for the religious minority and majority. Here, German jurisprudence has followed a restrictive interpretational direction, in harmony with its aforementioned view regarding the very limited protection of a person's religious 'outer sphere'. Thus, the legitimacy of the occurrence of such religious restrictions was recognised, especially in cases of states with a 'state religion', that is, states whose 'existence is based on a specific religion', as has been the case with many Islamic countries. The Bundesverfassungsgericht accepted the lawful character of such measures which aim at the establishment of 'a more precise definition and demarcation as well as at the protection of the membership of that specific state religion'. That, however, on conditions that the restrictions do not attain the above-described, unlawful 'degree of intensity' and consequently do not affect the individual's 'minimum religious existence'⁶⁸.

(transcript copy) at 6.

⁶⁸See judgment of 1 July 1987, 2 BvR 478,962/86, 76 BVerfGE 143, at 159-160.

Accordingly, the above Court has differentiated between permissible state measures emanating from the state's 'political duty to keep the order [on its territory]', limited to the expression of a religious belief in public, and impermissible measures that 'encroach upon the internal sphere of the religious community and its members, that is, on the ability to have and to profess their faith as they perceive it in private and in places where they should remain, in good faith, out of publicity together with like-minded individuals'⁶⁹.

CONCLUSION

Even though the cursory nature of French refugee jurisprudence has not been in a position to provide any image and substance of a detailed reasoning in cases where religious persecution has been involved, British and German case law, by contrast, have provided a quite substantial, each of them for rather different reasons, corpus of relevant case law.

The fundamental common points of British and German case law have been the establishment of the requirement of a deep and genuine religious conviction on the part of the refugee applicant, as well as the recognition of the actual duality of the freedom of religion in refugee status law. Thus, while the possession of a genuine religious faith and the internal practice of it have been recognised in both states as

⁶⁹Ibid. at 160. Accord, judgment of 18 February 1986, BVerwG 9 C 16.85, 74 BVerwGE 31, at 38-41.

inalienable rights falling always, in principle, in the protective framework of asylum, the externalisation of such a faith has not been accepted, in principle, as a facet of the freedom of religion worthy of effective protective by a state of asylum. This thesis, raised basically in cases concerning Ahmadi refugees from Pakistan, is one that deserves some further thoughts.

It should be clarified from the beginning that the above principal thesis established in both the British and German refugee case law contravenes the contemporary international human rights standards concerning freedom of religion. As noted above, freedom to manifest one's religious faith has been recognised and established in international law as an indispensable part of an individual's religious freedom. The fact that it may be subjected to restrictions for reasons of general community interest detracts nothing at all from its substantive principal significance for an individual's personality, and from its subsequent prominent international legal position⁷⁰.

In the case of British case law, courts have laid down in their judgments a type of reasoning which not only lacks a

⁷⁰See preambular text of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN G.A. Res. 36/55, UN G.A.O.R. Suppl. (No. 51), UN Doc. A/36/51, at 171 (1981), where it is stressed that 'religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed'.

substantive and substantial theoretical background with regard to the above duality of protection, but also demonstrates a mentality which may not be considered to be in harmony with the internationally established humanitarian prerequisites of asylum adjudication. The prioritisation, for example, inside the Court of Appeal's judicial reasoning of the thought that 'a person cannot obtain refugee status on the basis that he has a fear of persecution if he returns to his national country and proceeds to break its laws'⁷¹ has clearly shown, firstly, a lack of judicial consideration for the real substantive issue at stake which should be tackled in asylum adjudication, that is, the effective protection of an individual from a serious human right violation in the country of origin, on condition that the rest of the refugee status conditions have been met. Secondly, it was presented a judicial mentality which prioritises without any justification state interests to the detriment of the legitimate interests of the individual refugee, a situation at odds with the one that should prevail in a legal system regarding refugee protection.

By contrast, the German jurisprudence analysed above has demonstrated a paradigmatic theoretical framework of principled, to a certain extent, judicial reasoning with regard to the bifurcated protection of the freedom of religion in refugee law. Here, the erroneous differentiation between the internal sphere of religious life which should, in

⁷¹See supra notes 22-23.

principle, always be covered by the protective force of asylum, and the external sphere of a person's religiousness which should not be, in principle, so covered has been theoretically founded on the limited nature of protection through asylum, as well as on the necessarily serious nature of persecution in the context of asylum protection.

However, apart from the erroneous (according to contemporary international human rights law) fundamental theoretical starting point concerning the principal, as it were, unworthiness of such protection of the externalisation of religion, relevant German jurisprudence has not been without further flaws. German courts, albeit always ready to examine the actual ramifications of general legislative rules encroaching upon the external form of religious practice, have shown an unjustifiable willingness to acknowledge the legitimacy of such restrictions by a, theocratic, as in the cases of Pakistani Ahmadi refugees, state. What, however, they have not actually paid heed to is whether these restrictions may be founded or not upon relevant internationally accepted and established legal standards. International human rights law, as noted above, has conditioned such kind of restrictions regarding religious freedom on objective societal/state community situations, as well as on the notion of proportionality between state and individual interests, without distinguishing between theocratic and secular states.

Although the German Federal Constitutional Court has cursorily referred to international legal standards of religion protection⁷², it has not elaborated any further. The policy of the Court has been arguably in favour of a calculated neutrality vis-à-vis the actual nature of a theocratic state's measures, allegedly in the name of public order, which restrict the manifestation of religious beliefs. But this is exactly the point where the German jurisprudential thought has been additionally flawed. Even though the principle of judicial neutrality in asylum adjudication, as well as the consideration for legitimate state interests have always been justified and established in refugee law and policy, this may not be interpreted so as having as a consequence the deliberate, or not, lack of heed to internationally accepted legal standards and conditions concerning human rights protection. German courts have not actually examined, as they should, the legality or lawfulness of state measures restricting the internationally recognised human right of religious manifestation by the international legal standards that govern the permissibility of restriction of religious practice. Thus, although stressing, correctly, the absolute legal international character of the right to possess and change a religious faith, the above courts have abstained from examining the international justification grounds relating to the curtailment of manifestation of religion which constitutes an inalienable element of the right to freedom of religion in international law. The consequence of this legally defective

⁷²See supra n. 50.

reasoning is an overrestrictive judicial interpretation favouring, in effect, state interests of a dubious, to say the least, international legitimacy. At the same time, the courts have left individual refugee applicants without any protection, exposed to an almost uncontrollable range of repressive state action which is overtly detrimental to an effective enjoyment by the former of the freedom of religion in their country of origin.

CHAPTER X

THE REFUGEE'S 'POLITICAL OPINION' AS A GROUND FOR PERSECUTION

SECTION 1. 'POLITICAL OPINION' IN CONTEMPORARY INTERNATIONAL LAW

'Political opinion' as a basis of refugee persecution has been inextricably linked with the international politicisation of the concept of refugeehood in international law in the course of the twentieth century. Even though the issue of contemporary refugee protection, along with the concomitant question of the legal conceptualisation of refugeehood, has been described and generally accepted, at least in the context of the UN refugee protection efforts, as one 'of a political order'¹, there has never been so far any widely accepted (established) opinion, in the context of asylum law, with regard to what the adjective 'political' should actually correspond to².

The term 'political opinion' in the UN Refugee Convention was, at least until 1967 when the New York Protocol to the above Convention eliminated the Eurocentric geographical and

¹See Mr Giraud, Division of Human Rights, in Minutes of the 327th Meeting, UN ECOSOC, Ninth Session, 8 August 1949, UN Doc. E/OR(IX) pp. 634-648, in Takkenberg, A., Tahbaz, C.C. (eds.), The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter Travaux), vol. I, Amsterdam, Dutch Refugee Council, 1990, 102, at 108: 'The two ideas of refugees and stateless persons were not to be confused. The idea conveyed by the term "refugee" was of a political order, whereas that conveyed by the expression "stateless person" was of a legal order.'

²See Marx, R., Eine menschenrechtliche Begründung des Asylrechts, Baden-Baden, Nomos, 1984, at 185-6; see also Grahl-Madsen, A., The Status of Refugees in International Law, vol. I, Leyden, A.W. Sijthoff, 1966, at 220.

temporal limitation of the international legal refugee concept³, strongly linked for historical reasons with the dichotomous ('East-West') political premises that had formed the international political basis of and had led to the drafting and adoption of the Refugee Convention after World War II⁴. The UN Ad Hoc Committee on Statelessness had made that clear in 1950 when it commented that 'The expression "as a result of events in Europe" [after 3 September 1939 and before 1 January 1951, as it was originally proposed] is intended to apply to happenings of major importance involving territorial or profound political changes, as well as systematic programmes of persecution in this period which are after-effects of earlier changes'⁵. The political polarisation among states of the 'west' and states of the 'eastern block', which would inexorably reflect the final refugee definition adopted by the 1951 Conference of Plenipotentiaries in Geneva,

³See Article I of the Protocol Relating to the Status of Refugees of 31 January 1967, 606 UNTS 267. See also supra Chapter I, Section 4.

⁴See, inter alia, Hathaway, J.C., 'A reconsideration of the underlying premise of refugee law', 31 HarvILJ (1990) 129, at 151 et seq., Hathaway, J.C., 'Reconceiving refugee law as human rights protection', 4 Journal of Refugee Studies (1991) 113, at 123, Bevis, L.D., '"Political opinions" of refugees: Interpreting international sources', 63 Washington Law Review (1988) 395, at 408-9.

⁵Annex II, Chapter I, Article 1 of Report of the Ad Hoc Committee on Statelessness and Related Problems, 17 February 1950, UN Doc. E/1618 and Corr. 1, in Travaux vol. I, 405, at 415. See also Mr Rochefort (France) of the Ad Hoc Committee on Refugees and Stateless Persons, UN Doc. E/AC.32/SR.33, 20 September 1950, at 5, Travaux vol. II, 64, at 66 where he stated that the questions of the preamble to the Refugee Convention and of the definition of the term refugee 'were two questions of a political character which it was absolutely essential to examine substantively before referring them to the General Assembly'.

was moreover compounded by the abstention of eastern European states from the preparation of the Refugee Convention⁶. However, while it might have been possible (albeit wrong) until 1967 to construe the term 'political opinion' in a narrow manner that would reflect the above political reality of the preparatory history of the Refugee Convention, attaching particular weight to protection of individuals fleeing persecution in the former 'eastern bloc states' or in states with a similar political framework, this would be absolutely groundless following the above-mentioned 1967 Refugee Protocol, and especially in a contemporary political context where the East-West geopolitical dichotomy has ceased to exist.

In the context of international human rights law, freedom of opinion and expression has been established in Article 19 of the 1948 Universal Declaration of Human Rights (UDHR)⁷, along with the concomitant freedom 'to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'. The above basic freedoms have also been enshrined in Article 19 of the 1966 International Covenant on Civil and Political Rights (ICCPR)⁸ which has subjected the expression/manifestation of opinions to 'special duties and responsibilities', that is,

⁶On this issue and the international political context of the 1951 Refugee Convention see supra Chapter I, Section 4.

⁷UN GA Res. 217 A (III), UN Doc. A/810, at 71 (1948).

⁸999 UNTS 171.

`restrictions...as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals'. Both the above international instruments have employed, without however providing a relevant definition, the term `political or other opinion', in their non-discrimination Articles (Article 2 UDHR, Article 26 ICCPR), as a proscribed potential ground for discrimination concerning the enjoyment of the human rights and freedoms of UDHR, and the `equal protection of the law' in the context of ICCPR.

Political opinion in the framework of refugee status law should always be interpreted in a contextual manner, that is, in a way that heeds and corresponds to the special nature of refugee protection as it has developed and is developing on the international and/or domestic legal plane. Refugee protection essentially constitutes `humanitarian protection'⁹ from persecution, and has been conceived on the international legal plane basically as protection from serious human rights infringements, ultimately or directly imputable, in principle,

⁹On the actual inapplicability of a general definition of `political' to all legal fields, and the consequent need of a contextual legal interpretation, see Kokott, J., `Der Begriff "politisch" im Normenzusammenhang nationalen und internationalen Rechts', 51 ZaöRV (1991) 603 infra, and esp. 632-6, where she supports the workability in the asylum law context of the definition of `political' proposed by Carl Schmitt. C. Schmitt has conditioned the political characterisation on the premise of a `differentiation between friend and enemy' (`die Unterscheidung von Freund und Feind'); see Schmitt, C., Der Begriff des Politischen, 3. Auflage der Ausgabe von 1963, Berlin, Duncker & Humblot, 1991, at 26 et seq.

to the refugee's state of origin. This kind of protection constitutes the primary and ultimate aim and object of territorial asylum. In this vein, G. S. Goodwin-Gill has commented that 'political opinion' should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of state, government, and policy may be engaged'¹⁰. A similar stance has been adopted by G. Köfner and P. Nicolaus who have liaised 'political conviction' in the asylum context with its 'relation to systematic, organised, mental, social action, which works persistently towards the creation, maintenance or change of the societal order'¹¹.

Despite the validity of the above authors' views with regard to persecution emanating from governmental authorities¹²,

¹⁰Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 31. See also Grahl-Madsen, A., op. cit. supra n. 2 at 220, where he commented that the term 'political opinion' in the 1951 Refugee Convention 'covers persecution of persons on the simple ground that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party'. Accord, Kälin, W., Grundriss des Asylverfahrens, Basel, Frankfurt a.M., Helbing & Lichtenhahn, 1990, at 98.

¹¹Köfner, G., Nicolaus, P., Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Band 2, Mainz, München, Grünewald/Kaiser, 1986, at 459.

¹²See decision of the US Immigration Judge in Guo v. Carroll, DC EVa, No. CV 93-1377-A, 14 January 1994, 62 Law Week 2453, a successful case concerning a Chinese refugee seeking asylum on the ground of the fact that 'after the birth of his first child, government family planning officials ordered him and his wife to report for sterilization operations'. Ellis, J. found in favour of the applicant, stating that 'The heart of the alien's asylum claim is that his opposition to the PRC's coercive population control

their drawback lies in their actual, direct or indirect, focus on the state machinery as the main factor from which persecution on a political opinion ground may well emanate¹³. However, as already mentioned above¹⁴, the nature of the agents of contemporary persecution has been polymorphous, transcending classic state mechanism structures. Accordingly, non-governmental 'political forces' in a state territory that may also carry out persecution should always be taken into account as potential persecutors on grounds relating to a refugee's political opinion¹⁵. This has been the theoretical direction followed by the Supreme Court of Canada in Canada

policies constitutes a "political opinion" within the meaning of the statute...there can be no doubt that the phrase "political opinion" encompasses an individual's views regarding procreation. To begin with, "political" is commonly defined as "of or pertaining to exercise of rights or privileges." Black's Law Dictionary 1158. And it is settled that the right to bear children is one of the basic civil rights of man.'

¹³The same classic state-oriented view of persecution for political opinion has been adopted by UNHCR in its Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979, (hereinafter UNHCR, Handbook), at 19, para. 80: 'Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods.'; see also Marx, R., op. cit. supra n. 2, at 46-8.

¹⁴See supra Chapter VI.

¹⁵See Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 149, where he claims, on the basis of the preparatory history of the 1951 Refugee Convention, that 'protection on the ground of political opinion was to be extended not only to those with identifiable political affiliations or roles, but also to other persons at risk from political forces within their home community'.

(Attorney General) v. Ward¹⁶, a case concerning a member of a terrorist organisation (INLA) in Northern Ireland who claimed fear of persecution by the above organisation by which he had been 'sentenced to death' for refusing to execute and for the subsequent freeing of hostages, since he believed that 'the killing of innocent people to achieve political change is unacceptable'¹⁷. The above Court diagnosed and accepted that the above stance/act of the refugee applicant actually constituted expression of a political opinion against the aforementioned terrorist organisation by which he would be persecuted if returned to the UK or to Ireland¹⁸.

¹⁶June 30, 1993, 153 National Reporter 321.

¹⁷Ibid. at 389.

¹⁸Idem: 'This act [the freeing of hostages held by INLA]...made Ward a political traitor in the eyes of a militant para-military organization, such as the INLA, which supports the use of terrorist tactics to achieve its ends. The act was not merely an isolated incident devoid of greater implications. Whether viewed from Ward's or the INLA's perspective, the act is politically significant. The persecution Ward fears stems from his political opinion as manifested by this act.' On persecution by non-governmental political forces on the ground of political opinion see also INS v. Elias-Zacarias, US Supreme Court, January 22, 1992, 117 L Ed 2d 38, a case concerning a Guatemalan who resisted forced recruitment by guerrillas and where the Court, reversing the judgment of the US Court of Appeals, found that 'not taking sides with any political faction' may not be regarded 'itself' as 'the affirmative expression of a political opinion', ibid. at 45. On this case see also UNHCR Brief Amicus Curiae in the US Supreme Court, October Term, 1991, INS v. Elias Zacarias (copy provided by UNHCR, Geneva), Helton, A.C., 'Resistance to military conscription or forced recruitment by insurgents as a basis for refugee protection: A comparative perspective', 29 San Diego Law Review (1992) 581 infra, Einhorn, B.J., 'Political asylum in the Ninth Circuit and the case of Elias-Zacarias', 29 San Diego Law Review (1992) 597 infra. See also Hunker III, P.B., 'Conflicting views of persecution on account of political opinion: The Ninth Circuit and the Board of Immigration Appeals', 5 Georgetown Immigration Law Journal (1991) 505, at 517: 'Persecution on account of political opinion is harm inflicted because a person possesses a

Political opinions should not be required to have acquired always publicity through expression by the individual refugee applicant in the country of origin. UNHCR has commented that in cases of non-expression (concealment) of political opinions, reasonably there should be in place two basic situations: either 'it may be reasonable that [the refugee applicant's] opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities'¹⁹, or a test of well-founded fear should be carried out 'based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned'²⁰. Accordingly, UNHCR and refugee case law have also accepted that a political opinion may constitute a persecution ground not only if it is actually held by the refugee applicant, but also in cases where it has been imputed to her/him. However, refugee case law has clarified that imputability of political opinion may act as a basis for persecution on condition that objective elements exist that are connected with the refugee's life (e.g. relation of the refugee's employment to the political context in the country of origin, or persecution of family members on political grounds), able to prove the politicisation of the refugee's societal presence in the country of origin by the persecuting

politically offensive belief. A viewpoint is offensive when it impedes the political goals of the persecutor, be that a strong opinion that communism is evil, or a refusal to fight with guerrilla forces.'

¹⁹See UNHCR Handbook, at 20, para. 82.

²⁰See UNHCR, Handbook, at 20 para. 83.

agent²¹.

Political opinion has been a common potential ground, along with religious beliefs, for army desertion or draft evasion and subsequent persecution²². UNHCR has recognised two basic categories of refugeehood creation by reason of desertion/draft evasion on political grounds. The first category refers to cases where the refugee applicant is threatened with a disproportionate punishment for her/his desertion or evasion based on genuine political opinion. To the second category belong cases where even without any impending prosecution, a genuine conviction against participation in a particular state

²¹See UNHCR, Handbook, at 19, para. 80. See also, from relevant rich US case law, Hernandez-Ortiz n. INS, US Court of Appeals, Ninth Circuit, December 2, 1985, 777 F.2d 509, at 517: '...it is irrelevant whether a victim [of persecutory measures] actually possesses any of these opinions as long as the government believes that he does.'; see also Arqueta v. INS, US Court of Appeals, Ninth Circuit, May 7, 1985, 759 F.2d 1395, Desir v. Ilchert, US Court of Appeals, Ninth Circuit, May 26, 1988, 840 F.2d 723, at 728; see also Blanco-Lopez v. INS, US Court of Appeals, Ninth Circuit, September 29, 1988, 858 F.2d 531, Beltran-Zavala v. INS, US Court of Appeals, Ninth Circuit, August 31, 1990, 912 F.2d 1027, Aguilera-Cota n. INS, US Court of Appeals, September 21, 1990, 914 F.2d 1375, Rivas v. INS, US Court of Appeals, Ninth Circuit, March 29, 1990, 899 F.2d 864, Canas-Segovia v. INS, US Court of Appeals, July 10, 1992, 970 F.2d 599, at 601-2.

²²See Council of Europe Committee of Ministers Recommendation No. R (87) 8 Regarding Conscientious Objection to Compulsory Military Service, 9 April 1987, reprinted in UN Commission on Human Rights, The Role of Youth in the Promotion and Protection of Human Rights, Including the Question of Conscientious Objection to Military Service, UN Doc. E/CN.4/1989/30, 20 December 1988, p. 19, at 20: 'Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service...Such persons may be liable to perform alternative service;'; see also ibid. at 24 where 'compelling reasons' has been clarified as meaning reasons 'impossible to resist'.

military action may in itself provide a sound basis for granting refugee status. UNHCR has provided the relevant example of military action which 'is condemned by the international community as contrary to basic rules of human conduct'²³. Similarly, the UN General Assembly expressly recognised in 1978 the 'right of all persons to refuse service in military or police forces which are used to enforce apartheid'²⁴. The UN General Assembly has moreover recognised the eligibility for refugee status or simple refuge of all these persons. Thus, it has called upon the UN member states 'to grant asylum or safe transit to another State, in the spirit of the Declaration on Territorial Asylum, to persons compelled to leave their country of nationality solely because of a conscientious objection to assisting in the enforcement of apartheid through service in military or police forces', urged them 'to consider favourably the granting to such persons of all the rights and benefits accorded to refugees under existing legal instruments', and finally called upon 'appropriate United Nations bodies...to provide all necessary

²³See UNHCR, Handbook, at 39-40, paras. 167-171. 'Condemnation by the international community' should not be construed restrictively as meaning condemnation made solely by inter-governmental organisations, but regard should also be had to views of international non-governmental organisations, like Amnesty International whose evidential human rights-related authority has been firmly established in asylum case law, see Berg, C.D., 'The conscientious objector applying for political asylum: Forced to bear arms and the brunt of M.A. A26851062 v. INS', 14 Loyola of L.A. International and Comparative Law Journal (1991) 139, at 168-9.

²⁴UN GA Resolution 33/165, 20 December 1978, 'Status of persons refusing service in military or police forces used to enforce apartheid', G.A.O.R., Thirty-Third Session Suppl. No. 45 (A/33/45) at 154.

assistance to such persons'²⁵. In a later Resolution, the UN General Assembly stressed the importance of dissemination 'among youth [of] the ideals of peace, respect for human rights and fundamental freedoms', as well as 'the imperative need to harness the energies, enthusiasms and creative abilities of youth to the tasks of nation-building, the struggle for self-determination and national independence, in accordance with the Charter of the United Nations'²⁶. In this vein, in its Resolutions 1987/46, and 1993/84, the UN Commission on Human Rights emphasised that states should recognise an individual's conscientious objection to military service -deriving 'from principles and reasons of conscience, including profound convictions, arising from religious, ethical or similar motives'- as a 'legitimate exercise of the right to freedom of thought, conscience and religion recognized by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights'²⁷.

²⁵Idem; see also view of UNHCR, 9 July 1988, in UN Commission on Human Rights, The Role of Youth in the Promotion and Protection of Human Rights, Including the Question of Conscientious Objection to Military Service, UN Doc. E/CN.4/1989/30, 20 December 1988, at 17: 'An application for asylum may...be justified if the type of military action with which the person concerned refuses to associate himself for reasons of conscience is condemned by the international community as being contrary to the most elementary rules of conduct in the matter.'

²⁶UN Resolution 37/48, 3 December 1982, 'International Youth Year: Participation, Development, Peace', G.A.O.R., Thirty-Seventh Session Suppl. No.51 (A/37/51) at 182.

²⁷Resolution 1987/46 of 10 March, 1987 (Conscientious objection to military service, adopted by a roll-call vote of 26 to 2, with 14 abstentions), in UN Commission on Human Rights, Report on the 43rd Session, ECOSOC, Official Records, 1987, Suppl. No.5, 1987, 108, at 109; see also homonymous Resolution 1993/84, 10 March 1993 (adopted without a vote), in

It may be safely concluded that, in the above-described international (basically UN) context, a strong movement seems to have been firmly established in favour of the individual's potential right to resist participation in military mechanisms which would contravene her/his genuine political beliefs, and/or would be contrary to the basic international human rights principles enshrined in the UN Charter. Accordingly, the UN Rapporteurs on conscientious objection to military service have recommended that 'international standards should be established which will ensure a favourable attitude towards conscientious objectors requesting asylum in conformity with obligations under international law'²⁸.

UN Commission on Human Rights, Report on the 49th Session, ECOSOC Official Records, 1993, Suppl. No.3, 249, at 250-1. On the former Resolution see Lippman, M., 'The recognition of conscientious objection to military service as an international human right', 21 California Western International Law Journal (1990-91) 31, at 50 et seq.

²⁸See Eide, A., Mubanga-Chipoya, Ch., Conscientious Objection to Military Service, UN Doc. E/CN.4/Sub.2/1983/30 Rev.1, 1985, at 18, para. 153 in fine. The above Rapporteurs defined 'conscience' as 'genuine ethical convictions, which may be of religious or humanist inspiration, and supported by a variety of sources, such as the Charter of the United Nations, declarations and resolutions of the United Nations itself or declarations of religious or secular non-governmental organizations', ibid. at 3, para. 21. See also Schaffer, P., Weissbrodt, D., 'Conscientious objection to military service as a human right', The Review-International Commission of Jurists, December 1972, 33, at 37 et seq., Noone, Jr., M.F., 'Legal aspects of conscientious objection: A comparative analysis', in Moskos, C.C., Chambers II, J.W. (eds.), The New Conscientious Objection, New York, Oxford, Oxford University Press, 1993, 177, esp. at 192-5; Musalo, K., 'Swords into ploughshares: Why the United States should provide refuge to young men who refuse to bear arms for reasons of conscience', 26 San Diego Law Review (1989) 849, at 877 et seq., Kuzas, K.J., 'Asylum for unrecognized conscientious objectors to military service: Is there a right not to fight?', 31 VaJIL (1991) 447, at 452 et seq.

SECTION 2. INTERPRETATION OF 'POLITICAL OPINION' AS A GROUND FOR PERSECUTION BY EUROPEAN DOMESTIC COURTS

Persecution on the ground of political opinion is one of the commonest bases, if not the commonest one, in which refugee status claims have been grounded in the UK, a common phenomenon actually in all three European case law sets under consideration. In the majority of such cases in the UK, the above claims have been put forward before the judicial asylum-adjudicating organs in conjunction with substantiated political activism, that is, an obvious expression of the asylum seeker's stance towards the political situation of the country of her/his origin (e.g. in the form of active membership of political organisations, or active and open attachment to a country's political forces). That stance usually has triggered the reaction of, in the majority of the cases, state authorities intolerant of any challenge to the state's political status quo²⁹.

²⁹See Crosby Kofi Enninful v. Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/119683/84 (3423), 30 August 1984, Alo-Appiah Gyan v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/129398/84 (4026), 10 June 1985, Richard Kofi Ofori and another v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/118324/83 (3900), 16 April 1985, Kojo Osei v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/109458/83 (3899), 16 April 1985, Kwaku Duodu and others v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/134346/84 (4174), 24 September 1985, Msolini Mguni and others v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/123009/84 (4056), 2 July 1985, Victoria Toff-Mensah and another v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/117381/83 (4568), 13 May 1986, Phillip Zamani Mbelle v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/16676/86 (4682), 2 June 1986, Daud Khan v. The Secretary of State for the Home Department,

However, in a number of cases 'political opinion' has been interpreted by British courts and tribunals as a refugee status ground in favour of the applicant, even if the latter's participation in politics in the country of origin had not been actually important or influential over the domestic political context, or even existent, but the refugee applicant had nonetheless suffered persecution on the ground of imputation of a political opinion. In such cases, the imputed political stance of the applicant has been dependant on political activism or influence that other members of her/his family and/or close acquaintances had on the political scene of the state of origin³⁰. In the event that such claims were substantiated, they had a successful outcome. An equally important factor in these case has been the grant of refugee status to an applicant's (politically active) close relatives, and the continuation of the former's personal relation with

Immigration Appeal Tribunal, Appeal No. TH/132891/84 (4781), 2 September 1986, Mohdi Mohamed A Kajeji and another v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/29091/87 (6805), 9 October 1989, R. v. Secretary of State for the Home Department ex parte Parmak, Queen's Bench Division, CO/702/90, 23 January 1992 (transcript copies), R. v. Secretary of State for the Home Department ex parte Halil Direk, Queen's Bench Division, 5 March 1992, [1992] Imm AR 330.

³⁰See Edna Akainyah and others v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/7186/85 (4444), 6 March 1986, Ernest Obeng-Odei v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/124755/84 (4744), 7 July 1986 (transcript copies), R. v. Secretary of State for the Home Department ex parte Ayse Oran, Queen's Bench Division, [1991] Imm AR 290.

them³¹. However, apart from such inter-personal contexts, it has been accepted that political opinion may also be imputed by a persecuting agent in completely different frameworks, as shown in Isaac Kwabena Duodu v. The Secretary of State for the Home Department³². This case concerned a Ghanaian refugee applicant who feared persecution by his state's authorities because of an illegal currency transaction in which he had unknowingly participated and which had been organised by political opponents of the government. The Immigration Appeal Tribunal held that a well-founded fear of persecution might exist 'not only where a person has done that which would occasion persecution but also when circumstances have arisen where a person albeit innocent of any intention to offend has become involved in transactions which will lead the authorities to conclude that the person is hostile or in some way an enemy of the regime'³³. In the similar case of Isaac Amaning Asante and another v. Secretary of State for the Home Department³⁴, the Tribunal reiterated the above thesis, pointing out that 'It would be...wholly contrary to the spirit of the [1951/1967 Refugee] Convention if it [political opinion] did not encompass those who would suffer persecution for the reason that those in power in a country believed that

³¹See Amanuel Ghebray G/Jesus v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/19458/86 (5308), 26 June 1987 (transcript copy).

³²Immigration Appeal Tribunal, Appeal No. TH/18702/86 (5803), 24 March 1988 (transcript copy).

³³Ibid. at 4.

³⁴[1991] Imm AR 78.

the individual held certain political opinions or was thought likely to commit acts in support of a political cause'³⁵. Such situations represent active 'pull factors' of a refugee status application since they constitute, in fact, indirect elements of politicisation of the asylum seeker, that may, nonetheless, play, and have played, a crucial role in the refugee status adjudication process.

Political beliefs have performed the role of an asylum claim basis in the UK also for individuals objecting to performing their military service. A first category of such claims is that of asylum seekers from South Africa who did not wish to participate in any way in that state's racist mechanism of apartheid that dominated all the state institutions and especially the military one. One of the earliest cases in the 1980s in British case law was Henry Alexander Church v. The Secretary of State for the Home Department³⁶. Church had performed one part of his military service, but objected to any further military participation, and consequently claimed that he feared persecution by the authorities of his state. Persecution in this case would allegedly take the form of

³⁵Ibid. at 81. Accord, Nicholas Akwasi Opoku v. Immigration Officer, Heathrow, Immigration Appeal Tribunal, Appeal No TH/43862/91 (9914), 17 March 1993 (transcript copy), at 6.

³⁶Immigration Appeal Tribunal, Appeal No. TH/69153/80 (2288), 16 March 1982 (transcript copy). UNHCR participated as a third party in this case. See also Exile-Newsletter of the [British] Refugee Council, March 1991 no. 47 at 4: 'Over the last ten years, more than 23,000 white men left South Africa to avoid military conscription. At the height of the 'State of Emergency' as many as two a week were applying for asylum in Britain on the grounds of refusing to "defend apartheid".'

fining and imprisonment or, if the appellant returned to the army, ill-treatment and detention in barracks. The Immigration Appeal Tribunal distinguished Church from Doonetas³⁷ where the asylum claim relating to conscientious objection to military service was founded on religious belief, and accepted the UNHCR's submission that 'the South African Army is crucial to the maintenance of apartheid, which in itself is a violation of human rights'³⁸. The Tribunal allowed the appeal, having accepted the genuineness of the appellant's political opinion and having found reliable the evidence adduced before them. Such cases have established that objection to performance of military service in political contexts like that of apartheid may well constitute a qualifying factor in asylum adjudication on two main conditions. According to the first condition, the applicant should demonstrate and prove that her/his political beliefs are genuine. Such genuineness, directly liaised with the 'well-founded fear of persecution' may be established on the basis, e.g., of past political activism and/or past

³⁷See supra Chapter IX, Section 2.

³⁸Ibid. (transcript copy) at 5. A similar reasoning was applied in Derek Goldman v. The Secretary of State for the Home Department, Desmond Roy Van Zyl and another v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal Nos. TH/97569/82, TH/97524/82 (2616), 18 February 1983 (transcript copies); see also Steven Miller v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/120585/84 (4258), 4 November 1985 (transcript copy), and R. v. Immigration Appeal Tribunal ex parte Steven Miller, [1988] Imm AR 1, Cecil Selwyn Swick v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/98626/82 (2892), 20 September 1983 (transcript copy); see also R. v. Secretary of State for the Home Department ex parte Terence Stephen Range, Queen's Bench Division, [1991] Imm AR 505, Dragi Petrovski v. Secretary of State for the Home Department, Immigration Appeal Tribunal, 22 October 1992, [1993] Imm AR 134.

persecution suffered in the hands of the state authorities. The second condition that has played an important role in the adjudication of such cases is the condemnation by the international society of the particular political situation which is opposed by the refugee applicant, and which would be favoured in case of acceptance of the legitimacy of the latter's obligation to perform military service. The most common form of international condemnation has been, as mentioned earlier, the one originating in inter-governmental organisations like the United Nations. Thus, refugee status applications made by genuine South African conscientious objectors have had a rather high rate of success, due, to a great extent, to the aforementioned special negative categorisation of the former S. African regime by the international society, and especially by the UN, an international condemnation the universal and strong character of which has been indeed unique.

By contrast, the majority of the asylum applications made by Iranian and Iraqi nationals who objected to military service on the basic ground that they did not wish to participate in the former Iran-Iraq war, were unsuccessful when they reached the appeal stage before the Immigration Appeal Tribunal. The reason for this seems to be the fact that in these cases the appellants had to overcome not only the burden of proof regarding the genuineness of their political/religious beliefs, but also the fact that the above war constituted a political situation, in the context of global geopolitics of

that period, whose condemnation by the international community, albeit substantial, never attained the intensity of the case of apartheid in S. Africa³⁹. The Immigration Appeal Tribunal has, however, emphasised that even if the background of the asylum application is related to wars like the Iran-Iraq one, each case should be individually assessed. Accordingly, in Abdul Salam Ali v. The Secretary of State for the Home Department⁴⁰, the Tribunal upheld the appeal of an Iraqi national who was politically active in the UK, had no passport, came from a politically active family and whose objection to military service and subsequent involvement in the above war would have as a consequence punishment by

³⁹See Afshin Sabeghi v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/1869/85 (4281), 14 November 1985, Mezban Batti Hassan v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/127614/84 (3943), 1 May 1985, Ali-Reza Faridani Torkzadeh v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/127959/84 (3856), 14 March 1985, Seid Abol Hassan Razavi v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/10274/85 (4819), 10 September 1986, Jamal Anafcheh v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/10804/85 (4941), 8 December 1986, Mohammad Hassad Amir Hosseini v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/8341/85 (4870), 21 July 1986, Medhi Khorshhidian v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/1105/85 (4402), 6 February 1986, Ali Kasim and others v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/21157/86 (5479), 21 September 1987 (transcript copies); see also R. v. Secretary of State for the Home Department ex parte Alaa Mohamed El Sayed Hashem, Queen's Bench Division, [1991] Imm AR 577, Paullus Zemariam Kinfu v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/135/88 (6241), 14 October 1988, Abdul Salam Ali v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/38339/87 (6565), 10 May 1989 (transcript copies).

⁴⁰Appeal No. TH/38339/87 (6565), 10 May 1989 (transcript copy).

imprisonment or even death penalty.

A final crucial issue raised, rather solely, by British refugee status case law is whether an asylum application may succeed even if the refugee applicant may not face persecution in the country of origin if (s)he is able to refrain from an expression of her/his political beliefs. This issue was actually raised by the High Court in R. v. Immigration Appeal Tribunal ex parte Daniel Boahim Jonah⁴¹. In this case, the court found in favour of the appellant, considering unreasonable any demand towards the latter to abstain from politics in his country of origin, since such a demand in that case would have as a consequence his living in a 'remote village', as an alternative inland area of asylum, 'separated from his wife and unable to pursue the employment as a trade union official which he has carried out for 30 years'⁴². The above issue, which is directly related to the question of the internal subsidiarity of asylum⁴³, was further examined, without reaching any final conclusion, by the Court of Appeal in Viraj Jerome Mendis v. Immigration Appeal Tribunal and Secretary of State for the home Department⁴⁴. Even though the above-mentioned question was looked into by the court in the context of Article 33 (1) and not of Article 1 A.(2) of the

⁴¹[1985] Imm AR 7.

⁴²Ibid. at 12-13.

⁴³See analysis of the concept of the 'subsidiarity of asylum' supra Chapter IV.

⁴⁴Court of Appeal, 17 June 1988, [1989] Imm AR 6.

1951/1967 Refugee Convention, two important points made by the Court of Appeal are to be noted. First, a distinction was made between hard and soft, as it were, established grounds for persecution. It was held that 'a distinction can be drawn between these grounds because whereas a man cannot change his race and may only be able to change his nationality with great difficulty he has a choice whether or not to practise his religion and (a fortiori) whether or not to voice any political opinion. Accordingly, so the argument would run, a man cannot claim to be a refugee on the basis of a fear of persecution arising from some future activity in which he can refrain from taking part'. However, the court qualified this rigid and extremely restrictive thesis, saying that there may be cases 'where a man of settled political conviction may be able to claim refugee status because it would be quite unrealistic to expect him, if he were returned to a foreign country, to refrain from expressing his political views for ever'⁴⁵. The court regrettably did not elaborate further on the phrase 'it would be quite unrealistic', nor on the conditions on which that impossibility depended. However, what the above two cases have established in British case law is that refraining from political activities, that is, as a rule, from expression of political opinions, may be viewed and used by the adjudicating organ as a disqualifying factor in asylum cases if the persecution-related harm risked by the applicant may not be considered to be unreasonable, and/or if the strength of the political opinions held may not be judged to

⁴⁵Ibid. at 18.

be sufficient to provide a ground for a well-founded fear of persecution⁴⁶.

In France, the Commission des Recours des Réfugiés has used the term 'political opinions'⁴⁷, or 'political convictions'⁴⁸, as a ground for refugee persecution without, however, having analysed or defined the above terms. In the majority of refugee status cases, analysis of these terms has been actually ignored, having been substituted by a case-by-case examination of activities of the refugee applicant, which were considered to fall within the category of political activism. The Commission des Recours has thus taken into consideration actual expressions of political opinions or convictions of the applicant, which have been the reason for the objective activation of persecution against the applicant.

One of the most common expressions of political opinion, accepted as valid for refugee status recognition by the Commission des Recours des Réfugiés, is active membership or participation in political parties in the state of origin, the activities of which have not been tolerated by the dominant state regime, or by non-state political forces able to carry

⁴⁶See also Luis Carlos Rojas Cortes v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/25618/86 (6088), 1 September 1988 (transcript copy).

⁴⁷See Mle Abdool Rasool, CRR No. 23.432, 12 July 1985, M. Bereciartua Echarri, CRR No. 10.513, 30 July 1984 (transcript copies).

⁴⁸See M. Fulu Mbemba, CRR No. 64.639, 29 November 1988 (transcript copy).

out persecution⁴⁹. Another political, lato sensu, stance which has been accepted as able to trigger persecution by state authorities is the independent monitoring of the human rights situation in a particular state, and subsequent criticism of the above country's human rights record⁵⁰. In a similar vein, active participation in the work of political (non-party) opposition movements⁵¹, or of groups working for the enhancement of the position of a minority population in a country⁵², or active militant opposition movements⁵³, have

⁴⁹See M. Poor Kazemi Dogouri, CRR No. 44.382, 23 December 1986, M. Afat, CRR No. 49.492, 10 July 1987, M. Muamba Kasongo Niembo, CRR No. 29.141, 30 January 1987, M. Villablanca Novoa, CRR No. 40.914, 28 November 1988, Mle Niang, CRR No. 84.501, 14 March 1989, M. Amjad, CRR No. 89.174, 3 November 1989, M. MD Sarwar Hossain, CRR No. 127.343, 8 November 1990, M. Ozdemir, CRR No. 130.676, 19 November 1990, M. Noel, CRR No. 101.124, 13 November 1990, M. Mendes, CRR No. 144.949, 13 December 1990, M. Kut, CRR No. 119.874, 12 December 1990, M. Hazarat, CRR No. 138.884, 5 December 1990, M. Sahin, CRR No. 130.644, 19 November 1990, M. Pinoki, CRR No. 139.573, 6 December 1990, M. Nsimba, CRR No. 139.473, 28 November 1990, M. Cakmak, CRR No. 145.293, 13 December 1990, M. Birladeanu, CRR No. 171.505, 6 June 1991, M. Mohammad Ouais, CRR No. 160.720, 11 September 1991, M. Matumona, CRR No. 170.140, 4 June 1991, M. Ranasinghe Arachchige, CRR No. 224.268, 1 July 1992, M. Mendes Pereira, CRR No. 209.400, 24 February 1992, M. Blanc, CRR No. 207.675, 23 March 1992, Mle Hoyam Tawfiq, CRR No. 226.842, 15 September 1992 (transcript copies).

⁵⁰See M. Aljanabi Mu Waffaq, CRR No. 20.661, 9 June 1987, M. Matumona, CRR No. 170.140, 4 June 1991, M. Owusu, CRR No. 172.191, 12 June 1991, Mle Hoyam Tawfiq, CRR No. 226.842, 15 September 1992 (transcript copies).

⁵¹See M. Moya Suarez, CRR No. 30.638, 15 September 1986, M. Rifai, CRR No. 34.964, 21 February 1986, M. Sarvananthan, CRR No. 31.559, 28 January 1986, M. Maga, CRR No. 60.962, 26 January 1988, M. Navarette Henriquez, CRR No. 69.888, 16 June 1989, M. Konate, CRR No. 50.570, 18 September 1989 (transcript copies).

⁵²See M. Karim, CRR No. 19.886, 31 October 1985, M. Radic, CRR No. 63.254, 4 January 1988, M. Singh, CRR No. 99.292, 19 January 1990, Mle Dimitrova, CRR No. 181.466, 12 September 1991 (transcript copies).

been taken into account in French refugee status jurisprudence as expressions of political convictions. Moreover, clear and open participation in activities of trade unions, whether or not they have been officially recognised by the state of the refugee's origin, sparking off the reaction of state authorities, is another form of politicisation which has led to persecution and subsequent recognition of refugee status by the Commission des Recours⁵⁴.

Imputation of political opinions has been recognised in France, like in the UK, as able to constitute the basis for a refugee status claim. A political stance may be imputed to an individual by the state authorities, e.g., either by reason of the direct political activism of the applicant's relatives⁵⁵, or because of legal proceedings instituted by a refugee

⁵³See M. Nasrullah, CRR No. 20.524, 18 April 1986, M. Shah Nazim Husain, CRR No. 37.687, 2 November 1987, Mme Arunasalam, CRR No. 127.771, 7 January 1991, M. Ozen, CRR No. 130.884, 4 June 1991 (transcript copies).

⁵⁴See M. Ciennik, CRR No. 48.474, 2 March 1987, Mme Reategui, CRR No. 40.798, 13 January 1989, M. Sutcu, CRR No. 89.821, 6 June 1989, Mle Brito Morais, CRR No. 41.823, 1 June 1989, M. Gan, CRR No. 137.002, 25 October 1990, M. Yilmaz, CRR No. 136.778, 12 November 1990, M. Lutonadio, CRR No. 153.957, 10 June 1991, M. Bromley Lazo, CRR No. 194.102-193.908, 20 January 1992, Mle Piskova, CRR No. 207.608, 20 February 1992 (transcript copies).

⁵⁵See Mle Dorzema, CRR No. 25.290, 30 July 1984, Mme Goicoechea, CRR No. 18.913, 20 December 1985, M. Dao, CRR No. 29.311, 6 January 1986, Mme Nezereian, CRR No. 33.699, 20 January 1987, M. Bolongo Bolaya Folo, CRR No. 66.081, 14 April 1988, M. Gun, CRR No. 131.953, 29 November 1990, M. Pathmanathan, CRR No. 125.909, 5 November 1990, Mle Ambaute Ololo, CRR No. 143.967, 7 January 1991, Mle Ha, CRR no. 173.215, 20 June 1991, M. Elpenord, CRR No. 175.006, 11 July 1991, M. Rivera Velasquez, CRR No. 154.006, 17 June 1991, M. Sivananthasothy, CRR No. 210.591, 25 June 1992 (transcript copies).

applicant against the person liaised with an authority, perceived by the latter as having political oppositional significance⁵⁶. Other bases for imputing a political opinion to a refugee applicant have been the applicant's professional activities with the potential to link her/him with political forces and thus activate her/him politically⁵⁷, or moreover the refugee applicant's refusal to co-operate with and aid a particular regime, or to become a member of the dominant political party⁵⁸.

Finally, political opinion has been accepted also in France as a valid basis of asylum claims based on draft evasion, grounded in the refugee applicant's refusal to serve in a particular army for reasons of conscience. This has happened for example in cases where any such participation would inexorably have as a consequence the participation in military activities against people with whom the applicant has been actually liaised from an ethnic or political viewpoint. To this factual framework belongs M. Dabetic⁵⁹, a successful case

⁵⁶See Mle Bibomba, CRR No. 148.834, 7 January 1991 (transcript copy).

⁵⁷See M. Mutume, CRR No. 100.769, 7 December 1990, M. Kilanda, CRR No. 110.503, 19 September 1990 (transcript copies).

⁵⁸See Mle Ghegediban, CRR No. 64.100, 5 October 1987, Mme Marinescu, CRR No. 67.688, 21 April 1988, Mme Ardeleanu, CRR No. 91.664, 10 July 1989, Mle Psarras Silvia Balescu, CRR No. 78.534, 20 April 1990, M. Surmeli, CRR No. 171.080, 6 June 1991 (transcript copies).

⁵⁹CRR No. 229.956, 29 January 1993, reported in Documentation-Réfugiés, Supplément au No 223, 17/30 Août 1993, at 6.

concerning a Yugoslavian national of Montenegro family origins who was subject to conscription by the Croatia military forces, in the course of the armed conflict in former Yugoslavia. The appellant objected to such a military service on genuine conscientious grounds, since once in the Croatian army he would be obliged to participate in military operations against people of his own ethnic origin. The fact that such an objection would have as a consequence 'heavy sanctions' against him, was additionally taken into account by the Commission des Recours des Réfugiés in order to allow the appeal⁶⁰. In the same vein, the French Conseil d'Etat had upheld the appeal of M. Bakhci⁶¹, a case concerning an Afghan refugee applicant who objected to serving in his country's army, since that would have as a necessary consequence a fight, contrary to his own political opinions, against the then Afghan resistance⁶². By contrast, army desertion on the ground of the general 'conditions under which functions' a particular national army has not been allowed as a valid ground for fear of persecution by the Commission des Recours des Réfugiés⁶³.

⁶⁰See also M. Lozancic, CRR No. 232.259, 12 February 1993, ibid. at 8, Djukic, CRR No. 229.937, 29 January 1993, ibid. at 6, Sporea, CRR No 217.894, 29 January 1993, ibid. at 7, Tairovski, CRR No 228.252, 12 February 1993, ibid. at 5. See also Tiberghien, F., 'La crise yougoslave devant la Commission des Recours', ibid. at 1.

⁶¹CE No 83 344, 28 July 1989 (transcript copy).

⁶²See also M. Razavi, CRR No 25.788, 12 July 1985, M. Wali, CRR No. 182.683, 31 March 1992 (transcript copies).

⁶³See M. Sebaibi, CRR No. 32.157, 12 July 1985 (transcript copy).

German jurisprudence has provided the notion of 'political persecution', in the context of the German constitutional 'asylum guarantee', with a rather wide interpretational prism. The Federal Constitutional Court has pointed out that 'What is meant by the attribute "political" ["politisch"] in Art. 16 II 2 GG is not an objectively demarcated area of politics, but [the above attribute] identifies a characteristic or quality that may be taken on by measures in every field under certain circumstances'⁶⁴. It is in this theoretical framework that the above Supreme Court in a case concerning an Albanian folk-music group banned in Yugoslavia, the country of refugee origin, and active in the country of refuge, accepted that although the forms of expression, through singing and dancing, of the national culture were normally non-political, they have nonetheless taken on, objectively, a political quality by reason of the state repression of the Albanian ethnic minority in Yugoslavia. In consequence, the German Constitutional Court stressed that 'the participation in cultural activities of such a nature seems to be, and also is regarded as, a declaration of political belief in a particular national group'⁶⁵. Thus, the centre of the political characterisation has not been identified by German jurisprudence solely with the individual refugee's political credo and character, but it has been examined in the political context of the state of origin where a refugee should have the right to express

⁶⁴Judgment of 31 January 1992, 2 BvR 1621/90, 11 NVwZ (1992) 559, at 560.

⁶⁵Idem.

her/himself politically lato sensu, thus including the right to cultural expression, and to live in a state of freedom. To be sure, the commonest form of expression of political opinions, inside or outside (as in cases of refugees sur place) of the country of origin, which has been established also in German case law is the direct and open channelling out of such opinions in a manner that normally has as a consequence the jeopardising of the refugee's life and/or freedom on the territory of the country of origin⁶⁶. Accordingly, the Federal Constitutional Court accepted that a fear of persecution may be well-founded ('justified') in case, e.g., a political opinion has been expressed through membership in an active political organisation outlawed by the refugee's state of origin, and which has made known its anti-governmental/anti-regime character⁶⁷. The stigmatisation as a 'political opponent' that such an expression of a political opinion would entail has been considered to add a special weight to the well-foundedness of the refugee's fear of persecution.

German asylum jurisprudence has established the principal significance of the individual's right to express her/his political convictions in public, usually inside the country of

⁶⁶See judgment of 10 July 1989, 2 BvR 502,1000,961/86, 80 BVerfGE 315, at 336; see also judgment of 8 October 1990, 2 BvR 643/90, 13 InfAuslR (1991) 20, judgment of 15 March 1990, 2 BvR 496/89, 12 InfAuslR (1990) 197, at 199.

⁶⁷See judgment of 4 February 1959, 1 BvR 193/57, 9 BVerfGE 174, at 182-4; see also judgment of 22 May 1990, 2 BvR 1036/89, 13 InfAuslR (1991) 79, at 80-81.

origin. Freedom of political opinion has thus been rightly approached by the German courts, in the context of refugee status law, in a much more liberal perspective than the freedom of religion whose public externalisation has not been accepted, in principle, as worthy of protection by asylum law⁶⁸. Accordingly, the Federal Administrative Court has stressed that any prosecution aiming at the 'mere holding' of a political opinion 'indicates as a rule an intention of political persecution'. However, the holding of such a conviction is not to be understood as being limited to the area of the individual's 'forum internum'. The above Court has clarified that, unlike the case of the freedom of religion, holding of a political conviction should also 'include a minimum of possibilities of expression and activism'⁶⁹. The same Court, pointing out that the standard of safeguarding fundamental rights under the German Basic Law should not be in principle the measure of assessment of persecution, made it clear that the political opinion of an individual refugee may be considered to be violated 'when a state through its criminal law really attacks...the life, limb or the personal freedom of the individual because he does not "keep for himself" his political opinion, which is not in accordance with the state interests, but he makes it known and it is heard in comparison with that [i.e. the political opinion] of third persons and, consequently, necessarily has an

⁶⁸See supra Chapter IX.

⁶⁹Judgment of 19 May 1987, BVerwG 9 C 130.86 (transcript copy) at 8.

intellectual effect upon people, exerting an opinion-forming influence upon others'⁷⁰.

The factual and legal framework within which a state attack against political opinion may be measured has been suggested by the Federal Administrative Court to be 'the range of the freedom of speech as it is legally granted and actually respected [in the refugee's country]⁷¹. Consequently, what should then be assessed is whether the state through its legislative provisions regarding its own protection allows the 'possibility of criticism, orally or in writing, of the principles protected [by the above provisions] and of the opposition [to those principles] by other principles [presented] as "the right ones", whose aim is the formation of [political] opinions...exerting convincing influence upon others, consequently, whether it is possible in this manner an intellectual debate between the principles of the respective state order and the ideas that clash with them'⁷². Such an

⁷⁰Ibid. at 8-9.

⁷¹Judgment of 19 May 1987, BVerwG 9 C 198.86 (transcript copy) at 15; see also judgment of 21 November 1989, BVerwG 9 C 36.89, 12 InfAuslR (1990) 168, at 169, judgment of 30 May 1989, BVerwG 9 C 44.88 (transcript copy) at 17-18, judgment of 4 December 1990, BVerwG 9 C 93.90, 106 DVB1 (1991) 542, at 544.

⁷²Judgment of 19 May 1987, BVerwG 9 C 198.86 (transcript copy) at 15-16; see also judgment of 19 May 1987, BVerwG 9 C 200.86 (transcript copy) at 14-15, judgment of 19 May 1987, BVerwG 9 C 184/86, 6 NVwZ (1987) 895, at 897, judgment of 9 February 1988, BVerwG 9 C 256.86 (transcript copy) at 14-15, judgment of 23 February 1988, BVerwG 9 C 32.87 (transcript copy) at 9-10, judgment of 29 April 1988, BVerwG 9 C 66.87 (transcript copy) at 9-10. See also judgment of 16 March 1990, BVerwG 9 C 97.89, 12 InfAuslR (1990) 206, at 207 where the examination of the freedom of expression was linked by the

obvious asylum-related example of oppression by a totalitarian state is the case of the 'long-lasting obligatory re-education and political indoctrination for the genesis, change or repression of the political conviction especially in special camps or training areas'. The Bundesverwaltungsgericht has laid down three prerequisites for regarding such state-organised, systematic 'brain washing' as being of significance to asylum adjudication. Firstly, 'the political re-education and indoctrination in special camps or training areas in the home country of the asylum seeker, or in a third state specified by it from the beginning, must take place during a long period, normally for a few months, so that training which took place once and was of a short term, for example one week or on a weekend, will not reach, with no exception, on the ground of its intensity and gravity the degree [of gravity] of "persecution" in the sense of [the constitutional asylum provision]'. Secondly, such a political indoctrination should involve a violation of the asylum-related characteristic of the political opinion 'if this forced education and indoctrination leads to a cadre education without or against the will of the person in question, [and] as a consequence he is a mere object of state decisions, and could not free himself from the planned political (re-)education which would lead to a [formation of a] cadre, except solely under unreasonable circumstances taking risks of persecution'. Thirdly, in any such forced training there should not exist

Court with the special character of the state of origin, its totalitarian type, the radical nature of its goals and the means used for their realisation.

'the required minimum standard of freedom of expression of a deviating political opinion'⁷³.

However, it has been accepted by German jurisprudence as well that persecution on the ground of political opinion may also be taken into account when the personal life of the refugee applicant has not been actually politicised, unlike the social milieu to which (s)he belongs (imputed political opinion). In such cases persecution may take on a reflective/indirect form. Accordingly, persecution may be traced even when 'state measures are taken against, themselves non-political, persons because they have been categorised as belonging to the personal milieu of other persons who on their part constitute object of political persecution'. Consequently, in a case where the brother of the refugee applicant was actually a politically active person subject to persecution, the Federal Constitutional Court stressed that any consequent direct, adverse implication for the life and personal freedom of the applicant is to be seriously assessed in the process of asylum adjudication⁷⁴.

As mentioned earlier in Chapter V on persecution, German

⁷³Judgment of 4 December 1990, BVerwG 9 C 93.90, 87 BVerwGE 187, at 189. The Court, stressing the importance of proving the genuine lack of the refugee's political agreement, accepted the significance of such kind of 'education' on young persons as well, provided that any objection to that training would have adverse lasting consequences, ibid. at 190.

⁷⁴Judgment of Bundesverfassungsgericht, 28 January 1993, 2 BvR 1803/92, 15 InfAuslR (1993) 142, at 145; see also judgment of 31 March 1981, BVerwG 9 C 6.80, 62 BVerwGE 123, at 124-5.

asylum jurisprudence has embarked on a reasoning of balance of lawful rights which are to be protected in the framework of a state. Drawing on every state's inherent right to self-defence, especially in cases where violent separatist or revolutionary activities have been involved, German refugee case law has rejected, in principle, the asylum-related significance of any expression of political opinion that aims against lawful interests of a state's citizens. Accordingly, criminalisation and subsequent punishment of any such political activity has not been of any significance to asylum, so far as the punishment is not directed against the political conviction of the political activist, but at the criminal components of the latter's political activism, and the treatment suffered in the hands of state authorities does not surpass the usual degree or harshness usual in similar prosecution cases in the state of persecution⁷⁵. On this theoretical basis, German case law has placed, in principle, dehors the asylum protective boundaries any political opinion that is expressed by terrorist means. Any such 'political struggle' has been disapproved by the international legal order and has thus been also excluded, in principle, from the refugee protective zone by German courts. As a consequence, German courts have recognised, in principle, the non-persecutory character of anti-terror state measures 'if these measures are directed against the active terrorist, at the

⁷⁵See judgment of Federal Constitutional Court, 20 December 1989, 2 BvR 958/86, 9 NVwZ (1990) 453, at 453-4; see also judgment of 8 October 1990, 2 BvR 508/86, 13 InfAuslR (1991) 18, at 19-20.

accomplice in a criminal sense, or against a person who openly provides support to terrorist activities, without an actual participation in these activities'⁷⁶. Nor may any such terrorist or terrorism-related activity carried out in the country of refuge lead to granting of refugee status, since any such activity has been emphatically deemed by German case law to be out of tune with the '[kind of] protection and peace that the right to asylum wishes to safeguard'⁷⁷. However, even in such cases persecution is possible to be substantiated, depending on the actual nature and intensity of the prosecutory measures taken by the state in defence of itself and/or its citizens⁷⁸.

German case law has also accepted the possibility of generation of refugeehood following an individual's refusal to join a particular army on the ground of political opinions. The Federal Administrative Court has established that in such cases persecution may be recognised only if there may be proved 'special circumstances...from which it is concluded that...the intention of the military force recruitment is also [in addition to the general duty/obligation of military service] to affect individuals subject to military service by

⁷⁶Judgment of 20 December 1989, 2 BvR 958/86, 9 NVwZ (1990) 453, at 454; see also 80 BVerfGE 315, at 338-9 where the legitimacy of state actions has been excluded in cases of persons who just 'speak in favour of separatist or other political aims, but do not support terrorist activities or are only forced to do so'.

⁷⁷Idem.

⁷⁸Idem; see also supra Chapter V.

reason of characteristics of significance to asylum, especially because of a real or suspected political opinion which deviates from the dominant state doctrine, for example through political disciplining, political reeducation or intimidation'⁷⁹. Accordingly, any individual attempting to ground an asylum claim in military evasion on the basis of political opinions should be in a position to prove first of all either the actual imputation of these opinions, as a rule by the state of origin, or the real and genuine holding of such political beliefs on her/his part⁸⁰. As a consequence, the German Federal Administrative Court has not accepted that the punishment of a draft evader, per se, would entail persecution, even if the individual refused through this evasion to join national forces forcibly under foreign command. Every case should be examined individually in order to assess and establish whether the punishment in such circumstances aims at the political opinion of the refugee applicant. Accordingly, the Federal Administrative Court upheld the appeal of an Afghan draft evader who refused to join his state army, which was under the Soviet high command, 'in view of the fact that the appellant originates from an oppositional family, his long residence abroad and his admissible asylum application in Germany': elements that were

⁷⁹Judgment of 6 December 1988, BVerwG 9 C 22.88, 81 BVerwGE 41, at 42, and at 44; see also judgment of 26 September 1974, BVerwG I B 57.74, 28 Die Öffentliche Verwaltung (1975) 286 (Leitsatz), judgment of 19 August 1986, 9 C 322.85, 102 DVB1 (1987) 47, at 47-8, judgment of 24 November 1992, BVerwG 9 C 70.91, 15 InfAuslR (1993) 154 at 155.

⁸⁰81 BVerwGE 41, at 44-6.

in a position to trigger 'grave reactions of the state organs of Afghanistan', and not merely a 'regular [criminal] punishment'⁸¹. In the same vein, the above Court dismissed the appeal of an Iranian national who refused to join his state's army and thus participate in a 'war for the spread of the Islamic faith contrary to international law', since any such political opinions on the part of the appellant had never been expressed by him before his arrival in the state of asylum⁸².

It is to be noted that German case law has also acknowledged the possibility of persecution in cases of forced recruitment not only by state forces but also by non-state ones, like that of 'El-Fatah', a Palestinian commando force in Lebanon. The Federal Administrative Court stressed in its judgment of 31 March 1981 that even such non-governmental forces may be in a position to carry out persecution through the medium of forced recruitment if, for example, they have as an aim, like in cases of state force recruitment, 'a political disciplining and intimidation of political enemies inside their ranks, a reeducation of dissidents or a forced assimilation of minorities'⁸³. The above Court has laid down that such 'intentions' on the part of the potential persecuting agent might be discerned with the aid of 'important gauges of

⁸¹Judgment of 26 June 1984, BVerwG 9 C 185.83, 69 BVerwGE 320, at 322-3.

⁸²Judgment of 27 June 1989, BVerwG 9 C 1.89, 82 BVerwGE 171, at 175.

⁸³Judgment of 31 March 1981, BVerwG 9 C 6.80, 62 BVerwGE 123, at 125.

persecution tendencies of regulations which do not demonstrate a deliberate discrimination at first glance'. Such 'gauges' may be, according to the Federal Administrative Court, the 'special form of the forced military conscription...its operation in practice...its function in the general political system of the organisation', as well as the 'totalitarian character of an organisation...the radical character of its goals, the status that it attributes to the individual and his interests...the extent of the required and actual subjugation'⁸⁴. Additional consideration should be given in such circumstances to the possibility that such draft evaders or deserters may be 'viewed as traitors of the whole cause and consequently be punished exceedingly hard, be ordered to participate in especially dangerous missions or be generally ostracized'⁸⁵. Accordingly, all these elements should lead an asylum adjudicating organ to the recognition of the well-foundedness of a fear of persecution and, subsequently, of the applicant's refugee status.

CONCLUSION

From the foregoing analysis of case law originating in the UK, France and Germany it is evident that all three jurisprudential sets under consideration have acted on a similar theoretical and practical jurisprudential basis with regard to persecution on the ground of political opinion, despite the substantial differences of style of approach to

⁸⁴Idem.

⁸⁵Idem; see also relevant US case law, supra n. 18.

and analysis of the above issue by the domestic courts.

No general definition of 'political opinion' has ever been utilised by domestic courts in the above-examined case law. However, what has emerged from the analysis is that the notion of political opinion has been made dependant by all the aforementioned courts, in principle, on its link with a basic confrontation of an individual with the state apparatus in the country of origin, that represented basically by the executive. This has been a confrontation directly related to ideological viewpoints regarding the basic societal structure and development of that particular state. An opinion and/or its expression is to be, consequently, regarded as political, in the asylum law context, whenever it is directly connected with, that is, clashes with, the fundamental theses of political, lato sensu, powers that attempt to forcibly apply them for the maintenance or change of form of a certain society. German case law has made particularly clear that refugeehood may be generated by an individual's conflict, on the ground of a political opinion, not only with a state mechanism, but additionally with political/military forces which act as real and integral political units on a state territory, de facto influencing, or attempting to influence, the societal structure therein, and which are able to apply violence, and thus carry out persecution of 'dissidents'. Although this has not been expressly laid down by the other European jurisprudential sets targeted by the present research, in their 'political opinion' case law, it has to be

accepted that the same view should be shared and applied also by the other two national case law sets in France and in the UK, in accordance with their established common opinion that persecution may not be limited to the state, but may be carried out also by agents able to act with the same force as persecutors⁸⁶.

What is also worth noting is the interpretational stance of German case law vis-à-vis the protection of the right of political opinion in the asylum context. In contradistinction to their overrestrictive interpretation of religious freedom contravening the established fundamental international human rights law standards⁸⁷, German courts have rightly accepted in principle that the right of political opinion should be protected in both its principal, substantive forms. That is to say, the right of political opinion should be covered by asylum law not only in its internal but also in its external form. As already noticed, the right of expression of a political opinion in public has been established in contemporary international law, in principle, as a fundamental substantive component of the freedom of political opinion, as in the case of religious freedom. Thus, German courts, in common with the other European courts, have correctly accepted that the freedom of political opinion is to be regarded as violated and worthy of protection in refugee status law when

⁸⁶On the issue of agents of persecution see supra Chapter VI.

⁸⁷See supra Chapter IX, Section 2.

its fundamental element of public externalisation in a societal context has been seriously attacked by an agent of persecution.

Accordingly, the domestic courts in all those three major European states have regarded holding of and expression of political opinion by the individual refugee applicant as a human right the violation of which by state or non-state agents, in either of or in both its above forms, may trigger persecution and lead to granting of territorial asylum. Moreover, in all three states it has been established that political opinion may act as a ground for persecution not only if it is genuinely held by an individual, but also in case it is actually imputed to the latter by the persecuting agent, in a reflective, indirect manner, on the basis of the objective, societal background related to the individual refugee applicant.

The final point upon which all the domestic courts examined here have adopted a harmonised interpretational stance is that conscientious objection to state, as a rule, military service on the ground of a political opinion is to be regarded, in principle, as a legitimate ground for a well-founded fear of persecution. Domestic courts in all such cases have rightly emphasised that due regard should always be had to the genuineness of the refugee applicant's political character, as well as to the nature and degree of gravity that persecutory measures, reacting to and punishing such a deviating stance,

may take on. Indeed, objection to serving a particular state or quasi-state's military force represents one of the most striking, and perhaps most violent, examples of conflict between an individual's political credo and a potential persecutor. It constitutes a serious and direct clash that has the inherent potential to cause an individual's persecution because of the particular significance usually attached by dominant political forces to a military service obligation, in favour of the latter's political 'security'. As a consequence, what is dictated by the significant complex and sensitive substantive nature of the questions that arise in this context, is that domestic courts should always tackle such cases with the utmost attention and thoughtfulness.

CHAPTER XI

INTERPRETATION OF 'MEMBERSHIP OF A PARTICULAR SOCIAL GROUP' AS
A GROUND FOR PERSECUTIONSECTION 1. PERSECUTION BY REASON OF 'MEMBERSHIP OF A
PARTICULAR SOCIAL GROUP' IN THE CONTEXT OF ITS INTERNATIONAL
LAW ORIGIN AND DEVELOPMENT

The refugee's 'membership of a particular social group' has been established in international refugee law by Article 1 A.(2) of the 1951/1967 Refugee Convention, where it found its place rather as a complementary ground for persecution¹ at a late stage of the Convention's preparatory history. It originates in the proposal of an amendment concerning the first Article of the Convention, made by the Swedish delegate to the July 1951 Geneva Conference of Plenipotentiaries which resulted in the adoption of the UN Refugee Convention. That ground for refugee persecution was indeed not included either in the 1950 'definition of the term "refugee"' prepared by the UN Ad Hoc Committee on Refugees and Statelessness Persons², or

¹See Grahl-Madsen, A., The Status of Refugees in International Law, vol.I, Leyden, A.W. Sijthoff, 1966, at 219: 'The reason 'membership of a particular social group' was added by the Conference of Plenipotentiaries as an after-thought. Many cases falling under this term are also covered by the terms discussed above [race, religion, nationality]...'. Accord, Köfner, G., Nicolaus, P., Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Band 2, Mainz, München, Grünewald/Kaiser, 1986, at 458 where, on the basis of the preparatory history of the 1951/1967 Refugee Convention and on case law, they commented that since 'membership of a particular social group' 'demonstrates a catch-all element, [and as a consequence] one is always to prove primarily whether there exist no other general grounds for persecution like race, religion, nationality or political opinion.'

²See Report of the Ad Hoc Committee on Refugees and Stateless Persons, UN Doc. E/1850, E/AC.32/8, 25 August 1950, at 8, in Takkenberg, A., Tahbaz, C.C. (eds.), The Collected

in the homonymous definition of the Draft Convention which was presented to the above-mentioned Conference of Plenipotentiaries in 1951, following the approval of the UN General Assembly and of the UN Economic and Social Council³. Sweden had not participated in the pre-1951 preparatory work for the drafting of the Convention⁴. Her delegate made officially public a refugee definitional amendment on the second day of the Geneva Conference (3 July 1951), stressing that 'experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included'⁵. At a later meeting the same delegate, when referring to the above proposal concerning 'persons who might be persecuted owing to their membership of a particular social group', pointed out that 'Such cases existed, and it would be as well to mention them explicitly.'⁶. This comment made clear that the parti-

Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees, Amsterdam, Dutch Refugee Council, 1990 (hereinafter, Travaux), Vol.II, 206, at 209.

³See Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Texts of the Draft Convention and the Draft Protocol to be Considered by the Conference, UN Doc. A/CONF.2/1, 12 March 1951, at 4, in Travaux vol.III, 157, at 158.

⁴See comment by Mr Petré (Sweden), UN Doc. A/CONF.2/SR.2, 20 July 1951, at 21, in Travaux vol.III, 199, at 209: '...although his Government had not taken part in the preparatory work for the drafting of the Convention, it was disposed to accept the draft text in its main outlines.'

⁵UN Doc. A/CONF.2/SR.3, 19 November 1951, at 14, in Travaux vol. III, 213, at 219.

⁶UN Doc. A/CONF.2/SR.19, 26 November 1951, at 14, in Travaux vol. III, 371, at 377.

cular social group-ground for persecution, as envisaged, at least, by the Swedish delegation, was to correspond to cases of persecution with whose morphology states had already been familiar in the past⁷, having, nonetheless, the potential to reappear in the present and in the future. The fact that, on the basis of the available travaux, there ensued no further elaboration on that ground for persecution in the course of the 1951 UN Conference⁸, as in the case of the notion of 'persecution' itself, neither by Sweden nor by any other participating state, has contributed to a kind of notional mystification of the above provision in the field of refugee law⁹. Thus, the "'social group" category' has been regarded by A. Helton, among other authors opting for an expansionist

⁷Accord, Hathaway, J.C., The Law of Refugee Status, Toronto, Vancouver, Butterworths, 1991, at 159: 'It is clear from the comments of the Swedish proponent of the social group category and others that the Convention was designed simply as a means of identifying and protecting refugees from known forms of harm, not of anticipating future, distinct types of state abuse.'

⁸The Swedish amendment was adopted by 14 votes to none, with 8 abstentions, UN Doc. A/CONF.2/SR.23, 26 November 1951, at 8, in Travaux vol.III, 414, at 417; see also Aleinikoff, T.A., 'The meaning of 'persecution' in United States asylum law', 3 IJRL (1991) 5, at 11, Botelho, A., 'Membership in a social group: Salvadoran refugees and the 1980 Act', 8 Hastings International and Comparative Law Review (1985) 305, at 331-2.

⁹See Parish, T.D., 'Membership in a particular social group under the Refugee Act of 1980: Social identity and the legal concept of the refugee', 92 Columbia Law Review (1992) 923, at 926-8, Pratz, M.I., 'The notion of "membership of a particular social group": A European perspective', in Bhabha, J., Coll, G. (eds.), Asylum Law & Practice in Europe and North America: A Comparative Analysis, Washington, DC, Federal Publications Inc., 1992, 71, at 73; see also Fullerton, M., 'Persecution due to membership in a particular social group: Jurisprudence in the Federal Republic of Germany', 4 Georgetown Immigration Law Journal (1990) 381, at 382.

interpretation of the above term, as meaning 'to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up'¹⁰.

R. Plender has provided some aid to the provision's demystification attempt, commenting, following a restrictive interpretational vein, that although 'membership of a particular social group' was actually 'intended to ensure that the Convention would embrace those-particularly in Eastern Europe during the Cold War-who were persecuted because of their social origins', the 'language in the Convention is...more expansive than would have been necessary to achieve that objective'¹¹. The above line of interpretation is in fact in

¹⁰Helton, A.C., 'Persecution on account of membership in a social group as a basis for refugee status', 15 Columbia Human Rights Law Review (1983) 39, at 45; accord, Kälin, W., Grundriss des Asylverfahrens, Basel, Frankfurt a.M., Helbing & Lichtenhahn, 1990, at 95, where it is commented that the 'criterion of membership of a particular social group was constructed in a sufficiently loose manner, so that justice be done to later developments.'. Accord, Graves, M., 'From definition to exploration: Social groups and political asylum eligibility', 26 San Diego Law Review (1989) 740, at 749, and at 799 et seq., Neal, D.L., 'Women as a social group: Recognizing sex-based persecution as grounds for asylum', 20 Columbia Human Rights Law Review (1988) 203, at 228-9. See also Helton, A.C., ibid. at 46: 'Until otherwise shown...the presumption must be that it was intended that all victims of capricious persecution (as opposed to justifiable prosecution or differentiation) be included in the "social group" category. This is the implication of the Swedish representative's reference...to the lessons of "experience."'

¹¹Plender, R., 'Admission of refugees: Draft Convention on Territorial Asylum', 15 San Diego Law Review (1977) 45, at 52, emphasis added; see also ibid. at 53 where, stressing the danger that courts may overstretch the 'membership of a particular social group' clause in the course of asylum adjudication, it was commented: '...the imprecision with which the Convention defines the word refugee has, at least potentially, the merit of broadening its significance.'

tune with post-World War II international human rights law. All the major international and regional human rights instruments have included in their non-discrimination clauses 'social origin', along with 'property [or 'economic status'], birth or other status [or 'any other social condition']', as one of the bases on which no distinction should be made with regard to the entitlement to the rights and freedoms enshrined in their provisions¹². However, a further significant clue to the question under consideration was provided by the German Federal Administrative Court in its well-known judgment of 15 March 1988, concerning an Iranian homosexual refugee applicant¹³. The Court, although it declined to apply directly the definitional provision of the 1951/1967 Refugee Convention, placed emphasis upon the close relationship between the German constitutional provision on asylum, and the above Convention, a relationship founded on the fact that the former 'reflects the firsthand experience of innumerable cases of persecution and expulsion especially during the era of national socialism and following 1945', while the latter similarly 'relies upon historical persecutions and relevant

¹²See Article 2 of the 1948 Universal Declaration of Human Rights UN GA Res. 217 A (III), UN Doc. A/810, at 71 (1948), Article 2.2 of the 1966 International Covenant on Economic, Social, and Cultural Rights, 993 UNTS 3, Article 26 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Article 14 of the European Convention on Human Rights, 213 UNTS 221; see also Article 1 of the American Convention on Human Rights, 1144 UNTS 123, where 'economic status' and 'any other social condition' have been utilised as prescriptive non-discrimination grounds, unlike the rest of the above human rights instruments which have referred to 'property' and 'other status'.

¹³BVerwG 9 C 278.86, 79 BVerwGE 143. On this judgment see also Section 2 infra.

experiences.¹⁴ Thus, the Bundesverwaltungsgericht in a later phase of its judicial reasoning included expressis verbis in the history of persecution, on which both the above legal instruments coincide de facto and to which, consequently, should correspond de iure, the "special treatment" of homosexuals in the Third Reich', which was 'carried out in concentration camps'¹⁵. As a consequence, the Court accepted that homosexuals should be provided, in principle, with protection through granting of territorial asylum. Homosexuals should, accordingly, be considered to constitute a 'social group', even though the German Court declined to use directly this notion, whose inclusion in the protective area of the 1951/1967 Refugee Convention's 'membership of a particular social group' is to be accepted as sound from a historical and, consequently, from a legal point of view as well.

The difficulty of delimitation of the scope of the above ground for persecution has been evident also in the case of the UNHCR Handbook¹⁶, where UNHCR has attempted to provide a relevant clarification commenting, in a schematic manner, that 'A "particular social group" normally comprises persons of similar background, habits or social status. A claim to fear

¹⁴Ibid. at 145.

¹⁵Ibid. at 147. See also Marx, R., Eine menschenrechtliche Begründung des Asylrechts, Baden-Baden, Nomos, 1984, at 198: '...especially in asylum law, historical and teleological interpretations are closely tied to each other.'

¹⁶UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979 (hereinafter UNHCR, Handbook).

of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality'¹⁷. As examples of this kind of persecution UNHCR has propounded cases where the ground under consideration 'may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.'¹⁸ This clarification has been concordant with the view of A. Grahl-Madsen who, emphasising that 'the notion of 'social group' is of broader application than the combined notions of racial, ethnic, and religious groups', has offered as examples of 'social groups of various kinds' the following: 'Nobility, capitalists, landowners, civil servants, businessmen, professional people, farmers, workers, members of a linguistic or other minority, even members of certain associations, clubs, or societies'¹⁹.

In a similar vein, another leading author, G.S. Goodwin-Gill, has commented that 'A fully comprehensive definition is impracticable, if not impossible, but the essential element in any description would be the factor of shared interests, values, or background—a combination of matters of choice with other matters over which members of the group have no

¹⁷Ibid. at 19, para. 77.

¹⁸Ibid. at 19, para. 78.

¹⁹See Grahl-Madsen, A., op. cit. supra n. 1 at 219.

control.' The above author has gone on to stress that in the interpretation of the notion of 'particular social group' 'attention should...be given to the presence of unifying factors such as ethnic, cultural, and linguistic origin; education; family background; economic activity; shared values, outlook, and aspirations. Also relevant are the attitude to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by state authorities.'²⁰ It is submitted that the above explanatory comment by G.S. Goodwin-Gill, although it may be regarded as being partially overstretched, especially through its reference to the above last three 'unifying factors', has been the sole one, provided by contemporary leading refugee law authors, in harmony with the group concept which has been employed in contemporary international law regarding minority protection, as well as with the concept of social group established in the field of sociology. The discussion in international law referring to protection of 'ethnic, religious or linguistic minorities', in the context of Article 27 of the 1966 International Covenant on Civil and Political

²⁰Goodwin-Gill, G.S., The Refugee in International Law, Oxford, Clarendon Press, 1983, at 30; ibid. at 30-31: 'The notion of social group...possesses an element of open-endedness which states, in their discretion, could expand in favour of a variety of different classes susceptible to persecution. Whether they would be prepared to do so is another matter, but in arguing for expansion appropriate reference could be made to the unifying factors of the group in question and to the elements of distinction which make it the object of persecution.'

Rights²¹, is particularly pertinent. Even though minority rights have been established in international law as belonging to individual members of any of the above minority types, it is irrefragable that the factual basis of every minority is a group participating directly or indirectly in the life of a state's society²². In this vein, F. Capotorti has distinguished two major criteria employable in an attempt to define 'minorities'. First, objective criteria such as 'the existence, within a State's population, of distinct groups possessing stable ethnic, religious or linguistic characteristics that differ sharply from those of the rest of the population', 'the numerical size of such groups: they must in principle be numerically inferior to the rest of the population', and, finally, 'the non-dominant position of the groups in question in relation to the rest of the population'. The second major criterion has been of a subjective nature

²¹See Article 27 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171. According to the above provision 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

²²See Deschênes, J., Proposal concerning a definition of the term "minority", UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1985/31, 14 May 1985, at 9 para. 56: 'Every minority undoubtedly constitutes a group, but where it is a question of determining its rights, it is on the individual as a member that the emphasis should be placed.'; see also Thornberry, P., International Law and the Rights of Minorities, Oxford, Clarendon Press, 1991, at 173 et seq.; see also Ramaga, V.P., 'The group concept in minority protection', 15 HRQ (1993) 575 infra, where (ibid. at 588) it is emphatically claimed that 'minority rights should be considered collective'.

`defined as a will on the part of the members of the groups in question to preserve their own characteristics'. Accordingly, F. Capotorti has laid down the following definition of the term `minority': `A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.'²³ A very similar identification of a social group, employing both subjective and objective elements of a group distinction, has emerged also in the field of sociology, where a social group has been defined `as two or more individuals who share a common social identification of themselves or, which is nearly the same thing, perceive themselves to be members of the same social category'²⁴. In an attempt to define in a more detailed sociological manner the concept of group, M. Deutsch has laid down the following relevant basic `distinguishing criteria': `two or more persons who (1) have one or more characteristics in common, (2) perceive themselves as forming a distinguishable entity, (3) are aware of the interdependence of some of their goals or interests, and (4) interact with one another in

²³Capotorti, F., Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, New York, United Nations, 1979, at 96, paras.: 565-8.

²⁴Turner, J.C., `Towards a cognitive redefinition of the social group', in Tajfel, H. (ed.), Social Identity and Intergroup Relations, Cambridge, Cambridge University Press, 1982, at 15.

pursuit of their interdependent goals'. The same author has propounded the following three secondary criteria, which actually bring the sociological definition of a group much closer to the above-mentioned minority definition proposed by F. Capotorti: '(5) groups endure over a period of time and as a result develop (6) a set of social norms that regulate and guide member interaction and (7) a set of roles, each of which has specific activities, obligations, and rights associated with it'²⁵. It may not be contended that the above definitional attempts in the fields of international law and sociology may be directly transplanted into the concept of a 'particular social group' of the 1951/1967 Refugee Convention, given the different historical and functional context of this treaty. The fact, nonetheless, that the former definitions, like the latter one, refer de facto to social groups in the framework of a certain state, allows one to utilise the above definitional attempts in an elucidating manner, in the course of an interpretational attempt to clarify the concept of 'membership of a particular social group'.

In international refugee status jurisprudence In re: Gilberto ACOSTA-Solorzano²⁶ has been the case rightly regarded as a locus classicus, since it was the first contemporary judicial attempt that actually provided a reasoned theoretical interpretational background to 'particular social group'. In

²⁵Deutsch, M., 'Group behavior', in International Encyclopedia of the Social Sciences, vol.6, 1968, at 265.

²⁶US Board of Immigration Appeals, Interim Decision: 2986, File: A24 159 781, March 1, 1985 (transcript copy).

this case, the US Board of Immigration Appeals (BIA) made use of the interpretational canon of 'eiusdem generis' ('of the same kind'), according to which 'general words used in an enumeration with specific words should be construed in a manner consistent with the specific words'²⁷. The Board held that each of the other grounds for persecution enumerated in the 1951/1967 Refugee Convention, that is, race, religion, nationality and political opinion, 'describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed'²⁸. On the basis of this reasoning, the US Board of Immigration Appeals interpreted 'the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined

²⁷Ibid. at 24. See criticism of the judicial reasoning in Acosta by Bagambiire, D.B.N., 'Terrorism and Convention refugee status in Canadian immigration law: The social group category according to Ward v. Canada', 5 IJRL (1993) 183, at 192: '...it seems clear that denial of asylum to the applicant was a paramount consideration of the BIA in the Acosta decision and that the eiusdem generis rule was just a means to achieve this end.'

²⁸Idem.

on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.²⁹ Accordingly, the above asylum-adjudicating organ did not accept that 'being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages' constituted immutable characteristics that were in a position to qualify the appellant for refugee status, since, in the words of BIA, 'the members of the group [a taxi cooperative] could avoid the threats of the guerrillas either by changing jobs or by cooperating in work-stoppages'³⁰. A similar reasoning was utilised by the US Court of Appeals in Sanchez-Trujillo³¹. In this case, the court argued here that the 'words "particular" and "social" which modify "group"...indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a

²⁹Idem.

³⁰Ibid. at 25; idem: 'It may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.'

³¹Sanchez-Trujillo v. INS, US Court of Appeals, Ninth Circuit, October 15, 1986, 801 F.2d 1571.

voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.'³² As a consequence, the Court of Appeals stressed that 'a prototypical example of a "particular social group" would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people.' By contrast, 'the class of young, working class, urban males of military age' were not, according to the same court, to be regarded as such, since 'Individuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings.'³³

³²Ibid. at 1576.

³³Ibid. at 1576-7. On this and other relevant N. American cases see Blum, C.P., 'Refugee status based on membership in a particular social group: A North American perspective', in Bhabha, J., Coll G. (eds.), op. cit. supra n. 9 at 81 infra; Compton, D., 'Asylum for persecuted social groups: A closed door left slightly ajar', 62 Washington Law Review (1987) 913 infra. Family was accepted as a particular social group also in Chan Yee Kin et al. v. Minister for Immigration and Ethnic Affairs, High Court of Australia, 6 April, 12 September 1989, 87 Australian Law Reports 412, at 423 (per Dawson J.). Accord, Cheung et al. v. Minister of Employment and Immigration, Canadian Federal Court of Appeal, April 1, 1993, 153 National Reporter 145, at 149-150, where, in a part of the decision the reasoning basis of which is very similar to that in Acosta, it was stated: 'It is clear that women in China who have one child are faced with forced sterilization...comprise a group sharing similar social status and hold a similar interest which is not held by their government. They have certain basic characteristics in common. All of the people coming within this group are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis that interference with a women's reproductive liberty is a basic right "ranking high in our scale of values"...'. Contra: Estrada-Posadas v. U.S. I.N.S., US Court of Appeals, Ninth Circuit, April 24, 1991,

Similar to the above line of interpretation, but much more integrated, has been the thesis adopted by the Canadian Supreme Court in Ward³⁴, arguably the most complete and theoretically sound, so far, judicial clarification attempt regarding 'membership of a particular social group'. In this case, the Court did not employ the eiusdem generis canon of construction which was proposed by the US Board of Immigration Appeals in Re: Acosta, but stressed that 'The meaning assigned to "particular social group"...should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.'³⁵ The Supreme Court of Canada, employing the aforementioned US case of Acosta, as well as case law of the Canadian Court of Appeal, laid down 'three possible categories' which may be identified under the rubric of 'particular social group': '(1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.'³⁶ As examples, the Court suggested with reference to the first

924 F.2d 916, at 919 where the court stated that the appellant 'cites to no case that extends the concept of persecution of a social group to the persecution of a family, and we hold it does not.'

³⁴Canada (Attorney General) v. Ward, Supreme Court of Canada, June 30, 1993, 153 National Reporter 321.

³⁵Ibid. at 377 para. [70].

³⁶Idem.

category 'individuals fearing persecution on such bases as gender, linguistic background and sexual orientation', for the second one 'human rights activists', while with regard to the third social group category it commented that this 'branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.'³⁷ Accordingly, the Canadian Supreme Court, applying this three-pronged interpretational basis, did not accept that the group of INLA members (a terrorist Republican organisation in N. Ireland) constituted a particular social group, fulfilling the prerequisites of none of the three aforementioned social group categories³⁸.

The theoretical basis of legal contextualisation employed by the Canadian Supreme Court for the interpretation of the Refugee Convention's clause of 'membership of a particular social group' has been undoubtedly correct from a substantive viewpoint. The significance of the above judgment additionally lies in the fact that the above Court pointed to the right methodological direction of interpretation propounded earlier in the present thesis (Chapter II), on the basis of the general rule of interpretation established by Article 31.1 of the 1969 Vienna Convention on the Law of Treaties³⁹, and for this reason Ward should be used in refugee status

³⁷ Idem.

³⁸ Ibid. at 383-5, paras. [76]-[79].

³⁹ 1155 UNTS 331.

jurisprudence as a prototype. According to that provision, a treaty should be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. However, in the case of the 1951/1967 Refugee Convention, particular significance acquires, as already pointed out, apart from its context, the teleology of the treaty, to which corresponds the last part of the above rule. This is an especially significant interpretational element, as demonstrated in Chapter II, in the case of the category of human rights protection treaties, in which the above Convention may also be included lato sensu, albeit not identified with. Indeed, the raison d'être of the Convention refugee definitional provision has not been the protection of every characteristic of the refugee's personality or actual life. The historical specificity and the ad hoc character of the Convention have made clear that the human rights which were intended to and should be covered by this refugee protection (and not human rights protection) instrument should be fundamental human rights upon which the core of dignity of the human person is contingent⁴⁰. As a consequence, the interpretation of the Canadian Supreme Court in Ward is to be regarded as sound and correct when it rejected a panoptic view of the protective potential of the 'membership of a particular social group' opting, instead, for its limitation to the protection of a social group members' innate/unchangeable, or

⁴⁰The role and nature of refugee protection is exemplified by the notion of persecution in refugee status law, see supra Chapter V.

fundamental, characteristics which are in a position to act as unifying factors among the individual members of a social group.

SECTION 2. INTERPRETATION OF 'MEMBERSHIP OF A PARTICULAR SOCIAL GROUP' BY BRITISH, FRENCH AND GERMAN COURTS

Even though courts and tribunals in the UK have been reluctant to provide a generally applicable definition of 'a particular social group', they have employed without hesitation the aforementioned relevant definitional recommendation provided by the UNHCR Handbook. Thus, having regard to the Handbook's recommendation contained in para. 77, the Immigration Appeal Tribunal, in Secretary of State for the Home Department v. Patrick Kwame Otchere⁴¹, accepted that former members of the Ghanaian military intelligence who had been victimised and persecuted by a new government constituted a social group of the kind provided for by the UNHCR Handbook. A similar case was that of Sophia Aduamah and another v. The Secretary of State for the Home Department⁴², a case concerning the wife of a former director of the military intelligence in Ghana, who had suffered persecution by the new regime in her country. The Tribunal accepted that 'wives of high ranking military intelligence officers' could constitute a particular social group and, thus, qualify for refugee status.

⁴¹[1988] Imm AR 21.

⁴²Immigration Appeal Tribunal, Appeal No. TH/7003/85 (5963), 15 June 1988 (transcript copy).

Journalists critical of their own countries' regime and proving to have a well-founded fear of persecution have also been recognised as able to constitute and belong to a particular social group⁴³. The same has occurred in cases involving individuals related (e.g. as grandsons, nephews, or brothers) to members of families who have held a high administrative position or were even just members of a societal circle identified with a former political regime and who subsequently face persecution by the new executive⁴⁴.

An issue arisen before the Immigration Appeal Tribunal in Masood Cheragh Zadeh v. The Secretary of State for the Home Department⁴⁵ was whether a particular social group may be formed by 'westernised Iranians', that is, individuals 'who had lived in the West for a number of years, were predominantly male, almost invariably students, generally middle class and had left a country very different from that to which

⁴³See Akua Appiah-Kubi v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/1885/85 (6041), 15 July 1988; see also Adjoa Owusu v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/8804/85 (5678), 20 January 1988 (transcript copies).

⁴⁴See David Nyaruhuma Omutwanga v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/117669/83 (3740), 7 February 1985, Mohammad Reza Sara-bandi v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/6630/85 (4313), 26 November 1985, Dina Djahanara Tadayon and others v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/15675/86 (5379), 21 August 1987, R. v. Secretary of State for the Home Department ex parte Rahi, Queen's Bench Division, CO/1415/86, 21 June 1988 (transcript copies).

⁴⁵Immigration Appeal Tribunal, Appeal No. TH/19404/86 (5424), 22 September 1987 (transcript copy).

they would return'. The Tribunal rejected that proposition, on the ground that a particular social group is 'likely to have a degree of cohesiveness that makes it readily identifiable', an element which was deemed to be lacking in Zadeh, since the group which was proposed there was too large and consisted in fact of individuals of 'diverse religions', 'varied ethnic [or professional] backgrounds'. Faced with the similar question of whether 'women in general or Westernised middle-class Islamic women' may constitute a particular social group in Iran, the Tribunal in Gilani⁴⁶ rejected the relevant appeal, having defined a social group by saying that '"Social group" clearly indicates the principle that...it is persecution because of a membership of a group capable of being identified and having some common practice or common belief.'⁴⁷ This was not considered to be the case in Gilani, since, in the words of the Tribunal, 'the evidence is that the opposition to the dress and other aspects of the Islamic approach adopted in Iran remains individually based and there is no evidence that there is any recognition that those opposing look upon themselves as a group distinguished from other women or that they are so viewed because of the opposition to various practices. This lack of identifiability seems to us to be underlined by the additional qualification floated before us that the group is of "Westernised middle-class women". Such a qualification, itself uncertain, simply renders any "group"

⁴⁶Mahshid Mahmoudi Gilani v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/9515/85 (5216), 25 February 1987 (transcript copy).

⁴⁷Ibid. at 12.

even less identifiable than that suggested of "Westernised women".⁴⁸ However, the Immigration Appeal Tribunal demonstrated an unjustifiable inconsistency in its reasoning in the case of Ghile⁴⁹, where it accepted without any actual elaboration that 'people deemed to have fled their country', and who were subsequently 'liable to life imprisonment or even the death penalty' constituted a particular social group in the context of asylum adjudication. What is the characteristic element of cohesiveness or identifiability of these persons was left by the Tribunal as a pending question with no actual answer⁵⁰. Moreover, 'wealthy landowners' or 'wealthy traders' who have faced persecution by newly established regimes in their country of origin have been recognised in British refugee case law, again without any express theoretical foundation, as particular social groups and thus worthy of protection under the 1951/1967 Refugee Convention⁵¹.

⁴⁸ Idem.

⁴⁹ Asfaha Saba Ghile v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/18701/86 (5641), 22 January 1988 (transcript copy).

⁵⁰ See also Adjoa Owusuaa v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/8804/85 (5678), 20 January 1988 (transcript copy) where the Tribunal upheld the appeal of a Ghanaian member of an illegal political organisation in her country, and whose father was also an active member of an oppositional party. The Tribunal accepted -without any jurisprudential elaboration of the standard of social group-cohesiveness/identifiability (required earlier in Zadeh and Gilani) emanating from the concept of 'membership of a particular social group'- that the appellant belonged 'to a particular social group, namely those who are opposed to the Rawlings' regime.'

⁵¹ See F.R. v. The Secretary of State for the Home Department, Court of Appeal (Civil Division), CO/153/84, 3 June 1987, Cecilia Bamfoe v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No.

A controversial issue in British case law has been the question of whether homosexuals claiming persecution in their country of origin could be considered to constitute a particular social group. From the very first recent relevant case of an Iraqi refugee applicant, Shuuri Mohamad Ali Shewaish v. The Secretary of State for the Home Department⁵², the Immigration Appeal Tribunal was totally negative to any such claim, pointing out with a characteristic terseness that they did not 'think that such proclivities bring a person within a 'social group' as the term is used in the Convention'⁵³. In R. v. Secretary of State ex parte Zia Mehmet Binbasi⁵⁴, the High Court dealt with another homosexual refugee applicant from the northern part of Cyprus who claimed that he would face persecution if returned there where 'homosexual acts, even when committed consensually between adults in private, are still contrary to the criminal law'. The Tribunal avoided once again tackling the question of the potential of homosexuals to constitute a 'particular social

TH/12007/86 (5109), 11 February 1987 (transcript copies). See also Afil Hovsepian Ali Bolaghi and others v. The Secretary of State for the Home Department, Immigration Appeal Tribunal, Appeal No. TH/115/88 (6384), 20 February 1989 (transcript copy), a successful case concerning an Iranian woman and her two children who feared persecution on the ground, inter alia, of the fact that the appellants' husband/father who worked for the National Iranian Oil Corporation was a victim of mob violence, while the Tribunal diagnosed also that 'there is a particular risk' for one of the two children 'who has studied and spent considerable time living in the United Kingdom.'

⁵²Immigration Appeal Tribunal, Appeal No. TH/3147/88 (6091), 19 August 1988 (transcript copy).

⁵³Ibid. at 5.

⁵⁴Queen's Bench Division, 25 July 1989, [1989] Imm AR 595.

group'. In the above case, the Queen's Bench Division actually adopted the restrictive, with elements of absurdity, reasoning which had been applied in earlier refugee cases the claims of which were based on fear of persecution on the ground of political opinion. The Court of Appeal in Mendis, a case concerning persecution on the ground of 'political opinion', had commented that 'a man cannot claim to be a refugee on the basis of a fear of persecution arising from some future activity in which he can refrain from taking part'⁵⁵. The court, however, went on to qualify this overrestrictive principle, stressing that it would be 'quite unrealistic' to apply it to cases concerning individuals 'of settled political conviction'⁵⁶. Nonetheless, the High Court in Binbasi applied the above-mentioned Court of Appeal principle-like comment in a completely unqualified, absurd manner. It dismissed the appeal, having accepted, in effect, one of the Secretary of State's claims, according to which it was not inevitable that the appellant, even if homosexual, would suffer persecution or prosecution in his country of origin, since that could be 'avoided by self-restraint'⁵⁷. The same issue was considered

⁵⁵Viraj Jerome Mendis v. Immigration Appeal Tribunal and Secretary of State for the Home Department, Court of Appeal, 17 June 1988, [1989] Imm AR 6, at 18; see also supra Chapter X, note 44 and accompanying text.

⁵⁶Idem.

⁵⁷See [1989] Imm AR 595, at 600-2. The case was later brought before the European Commission of Human Rights, see Application No 16106/90, B. v/ the United Kingdom, decision of 10 February 1990, European Commission of Human Rights, Decisions and Reports 64, 278. The Commission rejected the application, having found, inter alia, that 'while the evidence indicates that the applicant might at some stage in the future be subject to the risk of prosecution for

later by the Immigration Appeal Tribunal in Farhad Golchin v. The Secretary of State for the Home Department⁵⁸, a case concerning an Iranian refugee applicant who feared persecution if returned to Iran, since homosexuals there were subject to harsh penalties which included execution⁵⁹. The Tribunal, using as basis for its reasoning a definition of 'minority groups', held that 'there should be some historical element in a 'social group' which predetermines membership of it "capable of affiliating succeeding generations": it is not enough, in our view, for association to arise by way of inclination'⁶⁰. Thus, the British Tribunal adopted the overrestrictive view of Shewaish, regarding homosexuality as a mere 'inclination' or

homosexual acts it does not indicate that the risk is high. Furthermore, the evidence adduced in the course of the proceedings for judicial review does not show that homosexuals in the northern part of Cyprus are persecuted by the authorities.', ibid. at 283.

⁵⁸Immigration Appeal Tribunal, Appeal No. TH/17184/89 (7623), 17 January 1991 (transcript copy).

⁵⁹On persecution of homosexuals in Iran see Amnesty International, Violations of the Human Rights of Homosexuals, January 1994, AI Index: POL 30/01/94, at 11; see also Arman, 'Sexual exiles', New Internationalist, March 1992, at 10. On protection of human rights of homosexuals in the framework of the European Convention on Human Rights see, inter alia, Van Dijk, P., 'The treatment of homosexuals under the European Convention on Human Rights', in Waaldijk, K., Clapham, A. (eds.), Homosexuality: A European Community Issue, Dordrecht etc., Martinus Nijhoff Publishers, 1993, 179, esp. at 202-3 where it is stressed that the current European Human Rights Court's interpretation 'of the scope of responsibility under Article 3 raises the possibility that a contracting State violates Article 3, if it decides to expel an alien to a country where he or she faces degrading treatment on the basis of homosexuality.'; see also Millns, S., 'Homosexual rights and wrongs under the European Convention on Human Rights: A question of privacy or equality?', in Jackson, B.S., McGoldrick, D. (eds.), Legal Visions of the New Europe, London etc., Graham & Trotman/Martinus Nijhoff, 1993, at 225 infra.

⁶⁰See supra n. 58, at 8.

'proclivity' not able to identify homosexuals as a particular social group. Moreover, it went on to repeat the view propounded in Binbasi, that it would not be unreasonable to demand of homosexual asylum seekers 'self-restraint' in order to avoid persecution.

The above interpretation of refugeehood in cases involving persecution of homosexuals is, firstly, substantively erroneous, since, as shown in the first section, persecution of homosexuals has been part and parcel of the historical period to which the 1951/1967 Refugee Convention corresponds. Secondly, the British interpretation is extremely restrictive and anachronistic, especially following the above-mentioned 1988 jurisprudence of the German Supreme Administrative Court, and the Canadian Supreme Court case of Ward where sexual orientation was expressly recognised as 'an innate or unchangeable characteristic' which should be protected in the context of territorial asylum⁶¹. By contrast, British case law has been characterised by a lack of willingness on the part of the courts to regard homosexuality as representing a common crucial background of the human personality of those asylum seekers, with the potential to trigger persecution. Additionally, the British Immigration Appeal Tribunal have declined not only to apply the cohesiveness theory referred to earlier in Zadeh, or the prerequisite of identifiability propounded in Gilani, but have surprisingly and erroneously taken recourse to and applied (probably as a camouflage to their a priori

⁶¹See supra n. 34.

taken negative relative decision) a definition of 'minority groups' as an absolute notional standard. This is a definition that, as already mentioned above, may indeed provide some useful insights into the 'group' notion as employed in international law regarding minority protection, but may in no case whatsoever be regarded as directly transplantable into and applicable in refugee law, since the natures and goals of these two legal fields, albeit similar, are not at all identical.

In French refugee case law, it has been striking that even though the Commission des Recours des Réfugiés has dealt with 'particular social group' cases, has never elaborated on, and in the majority of the examined cases not even employed, this term. However, the non-use of any of the other four Convention grounds for persecution, and the context of the cases under consideration have left no doubt that the only relevant appropriate rubric of persecution-related ground would be that of a particular social group. Thus, the Commission des Recours has accepted, indirectly but quite clearly, that membership of a family of merchants and industrialists may be equated with membership in a particular social group. Mme Thai⁶² concerned such a Vietnamese national, persecuted by the authorities in her country. The fact that such specific social groups like merchants have been defined by economic, financial terms and have, consequently, claimed, in a number of cases, to have been subjected to persecution of an economic nature has added

⁶²CRR No. 44.062, 25 June 1987 (transcript copy).

a special difficulty to the identification and acceptance of a claim to refugee status. The Commission des Recours has not accepted general economic measures of a government which had affected particularly such social categories as a valid ground for persecution. Accordingly, in Mme Thai, where persecution consisted not only of property confiscation but also of the arrest of the applicant's husband, the Commission des Recours pointed out that claims regarding persecution should always comply with the prerequisites of the notion of 'persecution' as established in refugee law, and especially with the individualistic character and gravity that surpass the effects of a general governmental policy which may well affect the whole population of a specific country⁶³.

Similar to the aforementioned social group is that of individuals categorised as of 'bourgeois origins' by state authorities, particularly following a change of the political scene in countries like China, Laos or Albania⁶⁴. Moreover, past professional life of a refugee applicant which linked her/him with political forces that have been viewed unfavourably by the government of the state of origin has been regarded as a potential constitutive element of a particular

⁶³See also M. Diep, CRR No. 30.211, 19 November 1984, M. Ba, CRR No. 30.851, 22 April 1985, M. Ha, CRR No. 20.503, 12 July 1985, M. Manir, CRR No. 19.688, 16 October 1986, M. Le, CRR No. 37.156, 22 April 1988 (transcript copies).

⁶⁴See Mle Seng Luang, CRR No. 20.255, 20 October 1987, M. Zhong, CRR No. 70.034, 19 September 1988, M. Zhong, CRR No. 70.033, 19 September 1988, Mme Zeng, CRR No. 51.052, 15 June 1989, Mme Duri, CRR No. 140.229, 22 October 1990 (transcript copies).

social group. As such has been regarded by the Commission des Recours des Réfugiés former employment in the diplomatic service of Vietnam⁶⁵, employment in a company in Vietnam which supplied equipment to the US army⁶⁶, the post of a communal collector under the Duvalier regime in Haiti⁶⁷, employment as an interpreter for Khmer Rouge in Cambodia⁶⁸, or the post of Dean of the Faculty of Arts in Teheran under the Shah regime⁶⁹, or employment in the police force of a past regime⁷⁰. In a very similar position have been regarded by French jurisprudence to be refugee applicants claiming persecution due to their personal or family political connections with and/or position in the context of a former political regime⁷¹.

As a particular social group may also be categorised women who

⁶⁵See M. Doan, CRR No. 31.986, 10 October 1985 (transcript copy).

⁶⁶See M. Nguyen, CRR No. 18.860, 18.923, 30 July 1984; see also M. Thai, CRR No. 20.708, 30 June 1986, M. Mohamach, CRR No. 29.155, 23 February 1987, Mme Mohamed, CRR No. 32.475, 6 October 1987 (transcript copies).

⁶⁷See M. Elpenord, CRR No. 175.006, 11 July 1991 (transcript copy).

⁶⁸See Mle Srey, CRR No. 30.028, 28 February 1986 (transcript copy).

⁶⁹See M. Pirzadeh, CRR No. 19.746, 3 October 1985 (transcript copy).

⁷⁰See Mle Banno, CRR No. 30.814, 23 January 1986 (transcript copy).

⁷¹See Mme Rachidi, CRR No. 47.836, 1 October 1987, Mle Bisereko, CRR No. 43.803, 26 February 1987, M. Amiri Nasserabadi Hassan, CRR No. 38.457, 15 April 1988, Mme Kupi, CRR No. 140.223, 22 October 1990, M. Miluka, CRR No. 140.232, 22 October 1990 (transcript copies).

claim persecution on the ground of their subjection to forced circumcision in their country. The Commission des Recours has dealt with this issue in Mlle Diop⁷², a case concerning a Malian female refugee applicant. Although this particular appeal was dismissed on evidential grounds, the Commission des Recours accepted in principle that forced female circumcision as applied in Mali might constitute persecution, since it was forcibly practised in state hospitals, and thus deliberately tolerated by the authorities. Accordingly, the Commission concluded that 'a woman of Malian nationality who requests to be recognised as a refugee on the ground that she would be threatened with circumcision in her country of origin may be justified to do so only if she has been personally exposed to such a mutilation and if, since she is not any more legally under parental authority, she may be regarded as being refused by the authorities any protection from the above-mentioned mutilation'⁷³. The decision has not explicitly referred to persecution by reason of membership in a social group. However, the above decision's wording demonstrates that such a categorisation would be reasonable and legitimate.

The Commission des Recours expressly employed the term

⁷²CRR No. 164.078, 18 September 1991 (transcript copy).

⁷³Idem. See also 'Mémoire de l'OFPPRA devant la Commission des Recours', Documentation-Réfugiés, Supplément au No 187, 20/29 Juin 1992, at 2, Tiberghien, F., 'Observations', ibid. at 5-6. See also Oosterveld, V., 'Refugee status for female circumcision fugitives: Building a Canadian precedent', 51 University of Toronto Faculty of Law Review (1993) 277, at 288-93.

'particular social group' in the case of Mlle Nadia El Kebir⁷⁴, a case concerning an Algerian female refugee applicant, brought up in France and persecuted by 'Islamic elements' in her country of origin, basically because of her life style. The Commission in its second 'Considérant' pointed out that 'the Algerian legislative provisions that regulate the life of women in Algeria are applied indiscriminately to the whole of this country's female population;...the fact that some of them [women] wish to challenge [the above provisions] does not allow one to regard the former as belonging, solely for this reason, to a particular social group in the sense of the...Geneva Convention'⁷⁵. The Commission des Recours did not specify, in their (typically) cursory syllogism, on what specific conditions they would consider such women as forming a particular social group. They did, however, upheld that appeal on the ground that the particular appellant had indeed suffered persecution (consisting of repeated violent, aggressive acts against her) by Islamic elements, with the deliberate tolerance of the local authorities. Thus, it was, indirectly but clearly, accepted that Algerian women challenging established norms regulating female behaviour in such an Islamic country may legitimately constitute a particular social group of refugees, on condition that their persecution fulfils the relevant substantive requirements.

⁷⁴CRR No. 237.939, 22 July 1994, reported (in French) in 13 Refugee Quarterly Survey (1994), Nos. 2 and 3, at 198.

⁷⁵Ibid. at 199.

A special social category with which the Commission des Recours has dealt is also that of transsexuals harassed by organised political or non-political groups of individuals originating in the population of the refugee's country of origin. The Commission, although it rejected the relevant appeals on the ground that the alleged ill-treatment bore no signs of any kind of direct or indirect state implication, has not actually dismissed the possibility that those persons may constitute a particular group of a society and potentially be subjected to persecution⁷⁶. A similar stance has been adopted by the Commission des Recours in cases of homosexual individuals claiming official state, or simply public, persecution on the ground of their sexual orientation. The Commission des Recours des Réfugiés has avoided, so far, to address directly and substantively the theoretical question whether homosexuals may constitute a persecuted social group under the Geneva Refugee Convention. No such case has to date been successful, having failed to attain the degree of gravity necessary for persecution or to provide substantial evidence. However, the Commission, unlike British courts, has never rejected in principle the claim that members of such a social group may suffer persecution and qualify, consequently, for refugee status⁷⁷.

⁷⁶See Mme Gambini, CRR No. 93.031, 24 July 1990, M. Teldjoune, CRR No. 173.117, 28 November 1991 (transcript copies).

⁷⁷See M. Gungor, CRR No. 74.537, 23 May 1988, M. Sirlincan, CRR No. 172.541, 27 May 1992 (transcript copies). See also M. Koloskov, CRR No. 229.428, 17 December 1993, reported in Documentation-Réfugiés, Supplément au No 245, 21 Juin/4 Juillet 1994, at 4. See also Tiberghien, F., 'Observations',

In the Federal Republic of Germany, refugee status case law, as in France, has not actually expressly employed the notion 'membership of a particular social group' as a ground for refugee persecution⁷⁸. This has been so due to the fact that the contemporary legal foundation of asylum in Germany basically is, as already noted⁷⁹, the asylum provision of the Bonn Basic Law, and not solely the 1951/1967 Refugee Convention in which the above persecution ground originates. Accordingly, the Bundesverwaltungsgericht, in the already mentioned case concerning a refugee applicant from Iran who claimed that he feared persecution on the ground of expression of his homosexual orientation, punishable by death in Iran, objected to applying directly the refugee definitional provision of the above Convention. It refused to interpret that provision in a manner, as the German Appeal Court had done, that would accept with no reservation the view that 'homosexuals could be regarded as members of a particular social group'⁸⁰. As a consequence, the above German Federal Court, in a rather anxious attempt to establish that the German constitutional provision has the inherent legal potential to transcend the ambit of personal characteristics-persecution grounds of the Refugee Convention, relying,

ibid. at 5.

⁷⁸See also Fullerton, M., loc. cit. supra n. 9 at 396 et seq. where relevant case law (until 1985) of German administrative and administrative appeal courts is analysed.

⁷⁹See supra Chapter II, Section 3.

⁸⁰Judgment of 15 March 1988, BVerwG 9 C 278.86, 79 BVerwGE 143, at 144-5.

nonetheless, on the four of the five Convention grounds of persecution (excluding 'membership of a particular social group'), reconfirmed, in line with its established jurisprudence, that 'asylum is to be enjoyed by an individual who should fear persecutory measures by reason of the fact that he is different, on the ground of his unalterable personal characteristics, from what he is to be according to the view of the persecutor.'⁸¹ Accordingly, the Court stressed that the fundamental principle of asylum law according to which 'no state has the right to harm the life, limb or freedom of a person because of his unalterable characteristics attached to him' and subsequently concluded that 'On the basis of these considerations, the expression of a homosexual orientation is to be...also regarded...as one of the asylum-related unalterable personal characteristics'⁸². Thus, the Federal Administrative Court, on the basis of the practice and legal situation in Iran, as laid down by the lower court, accepted that the appellant's homosexual orientation would be 'affected [in Iran] as a personal characteristic of significance to the law of asylum, through the imposition and execution of the death penalty, [since he would not] abide by the existing prohibitions, as a result of his homosexual character which is determined by fate'⁸³. The Court recognised the refugee status of the appellant, also emphasising the overtly disproportionate character of the death penalty, as

⁸¹Ibid. at 146.

⁸²Ibid. at 146-7.

⁸³Ibid. at 152-3.

well as the fact that homosexuals in Iran were in practice equated by the theocratic Iranian authorities with 'counter-revolutionary criminals'⁸⁴. The Court reiterated later its above-mentioned thesis regarding the protection of an individual's homosexuality through territorial asylum in another case concerning an Iranian homosexual asylum seeker⁸⁵. It is worth noting that in this case the Bundesverwaltungsgericht, in contrast to British courts, rejected the view of the lower court which had readily accepted, with the support of no relevant scientific advice, that the applicant under consideration could avoid persecution in his home country, on the assumption that he was able to abstain from homosexual contacts and 'switch to heterosexual contacts'⁸⁶.

In a different context, and again despite the lack of express reference to the concept of 'membership of a particular social group', the Federal Constitutional Court has also established that persons who belong to a particular 'age and sex' may be considered as parts of a 'circle of persons' worthy of asylum protection. The case before the above Court concerned 'young male Tamils' who had been subjected to violent attacks by the Sri Lankan security forces, in the context of the latter's

⁸⁴Ibid. at 153-4. On this judgment see Kimminich, O., 'Anmerkung', 43 Juristen Zeitung (1988) 713.

⁸⁵Judgment of 17 October 1989, BVerwG 9 C 25.89 (transcript copy) at 9 et seq.

⁸⁶Ibid. at 11.

struggle against militant Tamil organisations⁸⁷. The German Federal Administrative Court also dealt with similar cases of young male Tamil refugee applicants but seemed to have adopted a very reserved attitude towards any kind of recognition of persecution on the basis of their social status in the state of Sri Lanka. This Court actually rejected a claim regarding persecution of young male Tamils of the ages of 17-35 by Sri Lankan security forces. The Court's reasoning was based on the fact that the majority of the members of Sri Lankan terrorist organisations consisted of young Tamils of the above ages and, consequently, the state authorities had a legitimate right to hinder by force those men's participation in such organisations⁸⁸. Regrettably, the relevant German Supreme Court case law has not offered any elaborate judicial reasoning with regard to the above potential social group. However, the rejection of the relevant claim by the Bundesverwaltungsgericht was not based on an actual substantive reasoning vis-à-vis the notion of 'young male Tamils'. It founded its judgment on a pragmatic, pro-state policy-oriented argument linked with the fact that such Tamils

⁸⁷See judgment of 13 February 1990, 2 BvR 1088, 1157,1342/86, 400,1159/87 (transcript copy) at 3-4, judgment of 6 March 1990, 2 BvR 937,1289 etc./89 (transcript copy) at 5.

⁸⁸See judgment of 16 July 1986, BVerwG 9 C 155.86, 8 InfAuslR (1986) 294, at 298. See also judgment of 21 January 1991, BVerwG 9 C 92.90 (transcript copy) at 11: 'It may not be concluded solely from the fact established by the Appeal Court, according to which it is mainly young Tamils who have been affected by the provisions of the PTA [Sri Lanka's Provisions of Terrorism Act], that there is any [persecutory] direction of the application of these provisions, which would be of significance to [the application of the constitutional provision on] asylum'.

were de facto members of Tamil militant organisations and, consequently, would inevitably constitute 'legitimate' targets of the Sri Lankan authorities acting for the defence of the state itself⁸⁹.

Another kind of 'membership of a group' which has been considered as worthy of protection through territorial asylum by a German lower court, the Administrative Court of Minden, is membership in 'the group of former members of the intelligence service'⁹⁰. The above court accepted, similarly to the relevant British case law, the well-foundedness of the claim regarding persecution of a Ghanaian former member of the intelligence service, on the ground of evidence concerning actual persecution of other individuals who had worked in this service under an old government, and who had suffered persecution by the new executive.

In contrast to British and French jurisprudence, but in accordance with German jurisprudential practice, German Supreme Court case law has not categorised families as 'particular social groups'. The Bundesverwaltungsgericht has, instead, established in German refugee law a legal presumption ('Regelvermutung') operating, in the course of the prognostic assessment of a claim regarding fear of persecution, in favour solely of the spouse or of the minor children of an individual

⁸⁹ Idem.

⁹⁰ Verwaltungsgericht Minden, judgment of 4 June 1986, 9 K 10.357/85, reproduced in Marx, R., Asylrecht, Band 2, 5. Auflage, Baden-Baden, Nomos Verl.-Ges., 1991, at 822.

'persecuted on political grounds'⁹¹. According to this rebuttable presumption, in cases where it has been established that a particular state 'has carried out reprisals against the wife or the (minor) children, in connection with the 'political persecution' of the husband or father', it is to be presumed that 'also the wife or the children, whose asylum claim is to be decided upon on a case-by-case basis, are similarly threatened with a considerable probability'⁹². The . . . above Supreme Court has justified this thesis by recognising the 'special potential endangerment position' of the aforementioned close relatives of a persecuted individual: a dangerous position which, in the words of the Court, 'stems... from the inclination of intolerable states, in the course of the struggle against oppositional forces, to take hold of persons who are particularly close to the persecuted individual, instead of the political foe whom they would not be able to apprehend, so that they just achieve in one or another way their goal, that is, the suppression of deviating views...'⁹³. However, the above German Supreme Court has not excluded from the protective zone of territorial asylum further relatives of an individual whose persecution has been already established. Thus, it has laid down that cases concerning substantiated persecution of relatives, other than spouses and minor children, may also be 'recognised as a fact

⁹¹See judgment of 26 April 1988, BVerwG 9 C 28.86, 79 BVerwGE 244, at 245. On the operation of this legal presumption in German law see also Marx, R., ibid., at 505-7.

⁹²79 BVerwGE 244, at 245.

⁹³Ibid. at 246.

acting in favour of [establishing the existence of a] danger of individual persecution [of other not 'particularly close' relatives]'⁹⁴.

CONCLUSION

Regrettably, the above-analysed case law of the three European states under consideration in the present thesis has demonstrated a domestic jurisprudential practice regarding the . . . interpretation of 'membership of a particular social group', . . . which does not really seem to have attempted either to develop fully, so far, its potentials, or to act in a consistent and/or theoretically sound manner, in contrast to the relevant North American, especially Canadian, judicial practice. If one makes the attempt to classify the European domestic case law examined above on the basis of jurisprudential inconsistency, then the first place should, no doubt, be awarded to the British case law. British courts and tribunals have demonstrated in a number of cases regarding the interpretation of the concept of 'membership of a particular social group' an ability to ground their syllogism upon an, at least partially, sound theoretical framework. The emphasis placed on the prerequisites of cohesiveness and identifiability of the social groups in the context of asylum law has undoubtedly pointed in the right direction, although this has not proved enough for British courts and tribunals to reach conclusions able to convince one about their reasonableness, as shown

⁹⁴Ibid. at 248. See also judgment of 13 January 1987, BVerwG 9 C 53.86, 75 BVerwGE 304 infra.

especially in Gilani and in Zadeh. However, the overt inconsistency of the relevant British jurisprudence has become evident through the non-application of the same theoretical syllogisms, based on the aforementioned prerequisites, to all the cases where the question of membership in a particular social group has been involved. The result has been a demonstration of a case law using, in effect, double standards with regard to cases of the same nature. This pathological phenomenon of British jurisprudence has been exacerbated in the cases concerning homosexual refugee applicants. Indeed, these cases have represented the apotheosis of judicial absurdity, parochialism and anachronism. Here we have, arguably, some of the clearest examples of judicial practice, where courts, in order to express an a priori taken negative decision, have deliberately employed various unsound interpretational techniques with the aim to justify that decision. The British Immigration Appeal Tribunal had clarified from the early relevant cases that they would not consider persecution on the ground of homosexual orientation as an issue which should be covered by territorial asylum, an erroneous thesis unable to find any support even from the post-World War II historical development of the institution of territorial asylum. Nevertheless, in later cases they shifted from this outright negative attitude, and commenced to justify their negative decisions, first, by employment of the, over-restrictive and basically absurd, self-restraint ground, and at a later stage, using the definitional standard of 'minority groups', the direct (strict standard-setting) application of

which to asylum cases, is, as already noted, totally inept.

French case law has not shown this kind of inconsistency or parochialism. The French Commission des Recours des Réfugiés, although it has rarely employed the 'membership of a particular social group' in an express manner, has placed, in effect, no rigid limits to the social groups that may be considered to be worthy of protection through territorial asylum. The problem, however, with relevant French jurisprudence lies in the absolute lack of any theoretical framework which would be in a position to provide a guideline as to the judicial methodology employed in such refugee status cases, a common problem, as already mentioned before, with French case law in this field.

Finally, German jurisprudence has let us have no actual qualm about commenting that it is the only one of the three herein examined European case law sets which has demonstrated a consistent and sound theoretical interpretational methodology. The drawback, however, of the German case law lies in the actual reluctance of the German Supreme Courts to employ directly the definitional article of the 1951/1967 Refugee Convention. This has consequently led to an interpretation of the 'social group' category which, as shown in the Iranian homosexual case, albeit consistent with German jurisprudence and theoretically sound, has not covered, as yet, all the characteristics of the human personality which may rightly be protected by territorial asylum. German case law has

prescribed the protection of homosexual refugee applicants on the ground of the 'unalterable personal characteristic' of their sexual orientation, but, as shown by the Canadian Supreme Court in Ward, this notional delimitation may not be regarded as the ultimate one. German case law has established, as shown in earlier chapters, that asylum may provide protection not only to unalterable human characteristics like ethnic origin, but also, theoretically at least, changeable ones, like religion, or political opinion. However, German Supreme Court jurisprudence has already shown signs, in the cases of young Tamil applicants, of a potential relevant interpretational expansion. There may be no doubt that any such expansion of protection on the ground of the refugee applicants' social group membership, if carried out with prudence and theoretical consistency, would be in line not only with the internationally established teleological principles of asylum law but, moreover, with the substantial, substantive principles established in German asylum law.

GENERAL CONCLUSION

Refugee movements throughout the globe have always constituted one of the thorniest geopolitical questions that states have to cope with. Refugee exoduses and inflows will regrettably continue to be high on the political, and consequently legal, agendas in the future as well, given that the main perennial cause of such movements, that is, serious human rights violations by utterly intolerant, state or quasi-state forces acting, in principle, on a national territory, seems to be here to stay.

The present thesis has dealt with arguably the most significant substantive question that individual refugees present to a potential state of asylum: who should be recognised as a refugee by a state, and consequently be provided with the full range of rights that contemporary international law provides for. The recognition of refugeehood, in a legal sense, constitutes indeed a privilege¹ which should be granted by a state, on humanitarian in principle grounds, to disfranchised, lato sensu, foreign individuals in need of vital and effective protection. The

¹See Zolberg, A.R., Suhrke, A., Aguayo, S., Escape from Violence Conflict and the Refugee Crisis in the Developing World, New York, Oxford, Oxford University Press, 1989, at 3: 'Refugee status is a privilege or entitlement, giving those who qualify access to certain scarce resources or services outside their own country, such as admission into another country ahead of a long line of claimants, legal protection abroad, and often some material assistance from private or public agencies.'; see also Martin, D.A., 'The refugee concept: On definitions, politics, and the careful use of a scarce resource', in Adelman, H. (ed.), Refugee Policy - Canada and the United States, Toronto, York Lanes Press, 1991, 30, at 31-7.

irrefragable post-1970 trend of asylum applications' increase in economically developed states, and especially in 'affluent' member states of the European Union, has accordingly transformed the issue of refugeehood into one of the most delicate and controversial questions dominating contemporary politico-legal arenas, having been directly liaised with state security issues². European Union states have been actually striving for the formulation and application of a common substantive legal policy towards refugees, which should transcend procedural asylum questions already tackled by treaties concluded among European states, as part of the EU 'exogenous integration' process³. However, no such policy may eventually materialise if it is not based on an in-depth comparative knowledge of the already rich experience of substantive asylum adjudication accumulated on a national level.

It has been our thesis that a common European legal management

²See, inter alia, Rogers, R., 'The future of refugee flows and policies', 26 IMR (1992) 1112, at 1113; Marx, R., Eine menschenrechtliche Begründung des Asylrechts, Baden-Baden, Nomos, 1984, at 153.

³See Evans, A., 'Third country nationals and the Treaty on European Union', 5 European Journal of International Law (1994) 199, at 201: 'Exogenous integration [in contradistinction to endogenous integration based on the practice of the EU institutions] proceeds on the basis of bargains between Member States and becomes most visible in agreements or 'conventions' concluded between the Member States themselves, in amendments to the EC Treaty and in new treaties, such as the Treaty on European Union.', see also ibid. at 211 et seq.; see also Europäisches Parlament, 'Grundprinzipien einer europäischen Flüchtlingspolitik', EntschlieÙung vom 19. Januar 1994, Dok.: A3-0402/93, reproduced in 21 Europäische Grundrechte Zeitschrift (1994) at 141-3.

of the question of substantive asylum law is not only wishful thinking but may moreover be practically possible. Indeed, the foregoing comparative jurisprudential analysis of the three major EU states, the UK, France and the FRG, demonstrates that a common interpretational framework regarding the majority of the fundamentals of substantive refugee law is already in place. The almost identical application of the rule of the external (and to a lesser degree internal) asylum subsidiarity, based on a common acceptance of the principle of causation between persecution and refugee exodus, by the majority of the above states' (except for France) domestic courts⁴ has been one of the clearest examples of the existing potentials for the creation of a common judicial framework of substantive asylum interpretation on the European continent. The same conclusion may be reached, on the basis of the examined European case law, with reference to other refugee law questions like the substantive aspects of the notion of persecution (established basically as a serious, grave violation of the individual refugee's human rights) and its individualistic, in principle, nature⁵, the objective character of persecution prognosis⁶ and the interpretation of ethnic origin and political opinion as aetiological frameworks of refugee persecution⁷.

⁴See supra Chapter IV.

⁵See supra Chapter V.

⁶See supra Chapter VII.

⁷See supra Chapters VIII and IX respectively.

However, our research has additionally demonstrated a serious pathological aspect prevalent in the course of European judicial interpretation of the legal refugee concept: the actual lack of an interpretational process in domestic fora, methodologically principled and, concurrently, concordant with the fundamental requisites of a contemporary and dynamic refugee law. The negative effects of the real lack of any interpretational methodology in refugee status cases before domestic fora is evident especially when domestic courts are called upon to apply overtly vague constitutive notions of the legal concept of refugeehood, like 'membership of a particular social group'. British case law has constituted in such cases concerning refugee applicants persecuted on the ground of their homosexual orientation a clear example of the apotheosis of jurisprudential arbitrariness and irrationality⁸ with serious negative effects on individual refugees. French courts have presented a rather sui generis case law set. Although they have hardly ever employed a verifiable legal reasoning, let alone an interpretational methodology, they have managed to produce a liberal and above all remarkably effective refugee status jurisprudence⁹. Finally, German courts have shown a considerable ability to employ an interpretational methodology, even though, in a number of cases, they have seriously contravened contemporary international law rules.

⁸See supra Chapter XI Section 2.

⁹See e.g. French judicial interpretation of the agents of persecution, supra Chapter VI, Section 2, and of 'membership of a particular social group', supra Chapter XI, Section 2.

The need for the establishment of a common, principled interpretational stance of the European courts in substantive refugee status law derives, in fact, from the highly idiosyncratic nature of the legal refugee concept, as established in international and domestic law. Domestic courts are obliged to utilise and thus interpret, directly or indirectly, a refugee definition laid down by a more than forty years old treaty, designed by a number of states representing the minority of the world's nations, in order to deal with the 'normalisation' of the refugee's status, based on the morphology of refugeehood as emerged mainly following the end of World War II. The roots of the 1951/1967 legal conceptualisation of refugeehood are found in the concerted attempts of the international society to deal with and 'regularise' the refugee exoduses of the first half of the twentieth century, natural, in a certain way, by-products of the extremely violent establishment of nation-states on the European continent¹⁰. Consequently, the legal concept of refugeehood which is currently employed by domestic courts is, from a historical viewpoint as shown in the main corpus of the present thesis, mainly connected with refugees produced by serious violations of their, first and foremost, civil and political rights, in principle by autocratic, utterly repressive state mechanisms. This was the kind of refugee morphology viewed by states as worthy of protection in 1951, and which was consequently attempted to be reflected in the

¹⁰See analysis of development of the refugee concept in contemporary international law supra Chapter I.

1951/1967 international refugee definition. However, modern refugee production is not any more associated solely with the above internal, nation state-centred structural background. Indeed, there has been a transition from the classic refugee-hood represented by refugee 'activists' and refugee 'targets', that is, 'dissenters and rebels whose actions contribute to the conflict that eventually forces them to flee' and 'individuals who, through membership in a particular group, are singled out for violent action' respectively¹¹. This transition has been identified with the creation of another type of refugeeism: the 'refugee victims', i.e. individuals fleeing their countries by reason of 'violence resulting from conflict between state and civil society, between opposing armies, or conflict among ethnic groups or class formations that the state is unable or unwilling to control.'¹² This violence-based refugee morphology has been expressly tackled, as we saw, on a regional level by states members of the Organization of American States and of the Organisation of African Unity¹³. However, that morphology is not what was in principle envisaged by the 1951/1967 refugee definition referring to a well-founded fear of persecution on the grounds of race, nationality, political opinion, or membership in a particular social group, and which has been applied by domestic European, inter alia, courts. Is this principal legal conceptualisation

¹¹See Zolberg, A.R., Suhrke, A., Aguayo, S., op. cit. supra n. 1, at 269.

¹²Idem; see also ibid. at 29-33.

¹³See supra Chapter I, Section 4.3 et seq.

(still factually valid to a great extent) then to be considered practically defunct in the modern global refugee-related factual framework?

The answer to the above question-dilemma is negative, based on a two-tiered argument. First, the contracting states of the 1951 Refugee Convention emphasised, by Recommendation E. of the 1951 Final Act¹⁴, that it was their wish that the application of the Refugee Convention by states should exceed the Convention's 'contractual scope'. Accordingly, protection should be provided not only to persons expressly foreseen by the UN states members in 1951 but to every other disfranchised alien whom a state may objectively regard as worthy of protection. The importance of the above Recommendation lies in demonstrating in the clearest possible manner that the UN Refugee Convention, and consequently its definitional provision, was actually created in order to provide effective protection (as happened with the UN and regional post-World War II treaties on human rights protection as well) to refugee applicants, surpassing thus narrow legal technical boundaries. Recommendation E., however, may not be of great practical value to a domestic forum called upon to apply and thus interpret the 1951/1967 refugee definitional provision. The actual vitality and dynamic character of this legal definition lies, in fact, in its own substantive nature. Here is exactly where the second basis of our answer to the above-posed question lies. The internationally established refugee

¹⁴189 UNTS 137, at 148.

definition has been a stipulative synthetic-semantic one, since it has actually recognised and laid down a partially new meaning of the legal concept of refugeehood, as this had been viewed by the mid-1940s. Moreover, it has been of an instrumentalist nature, given that the states through this definition actually wished to further their main objective: the management of refugee exoduses and inflows into their sovereign, in principle, territories. However, what is the main characteristic of the above definition is its porousness. The characteristic vagueness of the international refugee definition is the latter's invaluable property that, apart from the inherent interpretational difficulties, has provided the judicial interpreting organs with a great advantage: the potential to employ the above definition in a dynamic and evolutionary manner. Regrettably, this potential has not often been applied in domestic fora. From our own research and the foregoing European domestic case law analysis, we may safely conclude that the reason for this lies above all in an actual lack of a principled judicial interpretational methodology concordant with the humanitarian requirements of contemporary refugee protection.

The refugee definition basically employed by European domestic courts, indirectly or directly, is that contained in the 1951/1967 Refugee Convention. This is a law-making treaty of a humanitarian/human rights law nature which has expressly imposed on state parties a general obligation of effective

protection¹⁵ vis-à-vis disfranchised, forcibly displaced individuals on some specific political, lato sensu, grounds. There may be no better normative setting employable by domestic fora for the interpretation of the Refugee Convention than that provided by Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. There, the main three legal interpretational approaches (objective, subjective and teleological methods of interpretation) have been actually combined and formed the general and fundamental rule of interpretation of the aforementioned Article 31. As shown in the main corpus of the present thesis, the teleological method has been established in the interpretation of international human rights law, since it is particularly apt in the case of interpretation of normative treaties where state obligations have been enshrined in favour of an effective protection of individual rights. Unlike the objective school that prioritises the text of the treaty, and the subjective one which relies basically on state parties' intentions, the teleological method rests upon the 'object and purpose' of the treaty. Thus, the teleological approach has been widely recognised as the only one that may really serve the purposes of a humanitarian or human rights convention, in accordance with the principle of maximum effectiveness ('ut res magit valeat quam pereat'), a principle consistently applied in the context of human rights treaties where fundamental interests of individuals, such as their life and/or liberty (as in

¹⁵See Kälin, W., 'Refugees and civil wars: Only a matter of interpretation?', 3 IJRL (1991) 435, at 444 et seq.

asylum cases), are actually at stake¹⁶. Moreover, the teleological interpretational approach constitutes the only one that, transcending the static treaty text, as well as the (usually hardly definable) contracting states' original or subsequent intentions, is able to provide an old treaty provision, like that containing the refugee definition, with the much-needed vitality and cautious elasticity in order to effectively respond to modern factual frameworks which should be regulated by it.

The European domestic courts examined in the present thesis regrettably have shown in general, with the exception of a number of German cases, an almost complete indifference to, or ignorance of, the internationally established general rules and supplementary means of interpretation. Indeed, British, and especially French (whose legal interpretational reasoning has been an extremely scarce asset in asylum case law), courts have shown a serious chronic lack of any substantial interpretational methodology in refugee status cases. By contrast, German jurisprudence has shown a significant deference to rules of interpretation in asylum law. In German case law there may actually be discerned two quite different interpretational approaches. According to the first one, dominant until now and backing a 'wide interpretation' of the constitutional asylum provision, substantive asylum law should be guided by a teleological method of interpretation, corresponding to the spirit of the framework in which the

¹⁶See supra Chapter II, Section 2 et seq.

right to asylum was drafted. This has been aptly demonstrated in the context of interpretation of the notion of refugee sur place¹⁷. By contrast, recent interpretation of both the constitutional asylum provision, and especially the UN refugee definition, carried out by the Federal Administrative Court, has demonstrated a substantial restrictive interpretational shift of German jurisprudence. This is a shift that supports, in effect, a static interpretation of refugeehood, limited to legal textualism and indefinable (or clearly definable according to the above Court) subjective intentions of the original states parties¹⁸. It is not accidental that such a substantial restrictive shift was demonstrated in 1994, and in a case involving the issue of agents of persecution in a civil war context. These two facts actually combine to form the most appropriate setting for a restrictive European judicial interpretation of refugee status. The above jurisprudential shift occurred in a period when restriction of migration in general has been the keyword in all EU states. At the same time, persecution in civil war situations represents the typical example of modern refugeehood ('refugee victims') that were indeed unforeseen by states forty years ago. No doubt, the challenge in front of a domestic court is daunting. The

¹⁷See supra Chapter III, and Chapter II at n. 178 and accompanying text.

¹⁸See judgment of 18 January 1994, BVerwG 9 C 48.92, 47 Die Öffentliche Verwaltung (1994) 479, and supra Chapter II at n. 170 and accompanying text, and Chapter VI at n. 78 and accompanying text. Such jurisprudential precedents constitute moreover evidence of the fact that a mere constitutional establishment of an individual right to asylum may not be in and of itself enough for the creation of a liberal/effective legal refugee protection on a national level.

domestic judicial reply, as seen in the main corpus of the thesis¹⁹, to this challenge negative. The real setback generated by the above-mentioned judgment has been actually the Federal Administrative Court's express but cursory reference to the general interpretation rule of the 1969 Vienna Convention, obviously employed in a pre-determined static manner²⁰. That setback was compounded by the wrong cursory and express dependance of the 'object and purpose' (teleology) of the UN refugee definition on the date of its creation. The fundamental theoretical erroneousness of this 'reasoning' is the incompatibility of a treaty's own teleology with a static interpretation (a contradiction in terms), something holding true a fortiori in a case of a treaty of a humanitarian character. Such a treaty may never function properly, in favour of its individual beneficiaries, if it is not distanced from substantive, chronology-biased limitations referring to the date of its creation. The indirect but clear principal rejection by such a major European domestic court as the German Federal Administrative Court of an effective teleological interpretation in asylum law has thus been overtly contrary to the object and purpose of the humanitarian institution of territorial asylum and to the demands of an effective refugee protection. Nonetheless, what this

¹⁹ Idem.

²⁰ The lack of elaboration on such an important jurisprudential tool of interpretation as the Vienna Treaty has not been typical of a German Federal Court. This is a fact that may reasonably lead one to the conclusion that the reasoning of the above-mentioned 1994 judgment has not been motivated by pure legal considerations.

jurisprudential precedent has made crystal clear is that the mere judicial employment of the internationally established rules of interpretation, although highly recommended, does not suffice in itself. Additionally, these invaluable rules should always be placed in the right legal framework prescribed by the nature of the legal text under consideration and, consequently, be applied according to the principles regulating the creation and application of the interpreted text. Interpretational rules applied in a narrow manner, that is, out of the substantive normative context of the legal text-target may only lead, especially in cases of humanitarian/human rights law treaties, to overrestrictive and thus erroneous results.

The rejection by German case law, in principle, of the validity of refugee status claims originating in factual situations involving civil wars (unlike British and French jurisprudence) on the fundamental basis of lack of any state responsibility, in principle, in such frameworks, has demonstrated one more serious drawback of domestic refugee jurisprudence: the lack of deference to, or even knowledge of, on the part of domestic courts, of binding principles of contemporary international human rights and humanitarian law applicable in asylum cases. Courts in the UK and in France have accepted civil war refugees, in principle, opting for an effective protection solution, although they have not actually employed any relevant ruled interpretation. By contrast, German jurisprudence has opted for a different reply

utilising, as we saw, either a narrow static legal interpretation based on historical considerations, or a pro-state political theory justifying, in principle, persecutory state actions in internal armed conflicts carried out in favour of an effective continuation of the legitimate 'state monopoly of power'²¹. However, German courts would have reached different conclusions if they were willing, or, possibly, if they had the knowledge, to employ modern international human rights/humanitarian law standards which have established the principle of an actual potential existence of state responsibility in the context of states of emergency, as those presented by civil wars, as well. The non-use or ignorance on the part of domestic courts of binding international law rules or principles has not been an uncommon phenomenon. Nevertheless, it is completely unjustifiable, especially in refugee status cases where human lives are literally at stake, and for this reason is to be eclipsed²².

²¹See supra Chapter VI.

²²See Institute of International Law, Resolution: 'The activities of national judges and the international relations of their State', in 65 (II) Institute of International Law Yearbook 1993, at 319-23, where it is stressed, inter alia, the importance of promotion by states of better knowledge of international law on the part of domestic courts when international law is to be applied and interpreted by the latter; see also relevant preliminary report by B. Conforti, ibid., Part I, 327, at 354-7. See also Schermers, H.G., 'The role of domestic courts in effectuating international law', in Brus, M. et al. (eds.), The United Nations Decade of International Law, Dordrecht etc., Martinus Nijhoff Publishers, 1991, 77, at 82-3; see also Falk, R., 'Implementing international law - The role of domestic courts: Some reflections on the United States experience', ibid., 67, at 75: 'It is claimed...that courts lack the knowledge of international law and the ability to ascertain the facts in foreign policy settings. Of course, such problems might arise in particular circumstances with respect to facts, and could form one basis for presuming the

The direct clash of German jurisprudence with contemporary international human rights law has been, moreover and particularly, evident in cases involving persecution on the basis of religious beliefs. The rejection by German, unlike British and French, case law, in principle, of asylum claims of refugees whose fundamental right to public expression of their religious beliefs has been violated presents an overt contravention of the different principle established in contemporary international human rights law²³. Refugee law is not identical with human rights protection law. However, both belong to the same universal (UN) regime relating to human rights protection²⁴. Indeed, the origins and fundamental character of the former derive from and are inextricably linked with the latter. All European courts examined herein have recognised that refugee law exists and functions on a national level in order to prevent only serious infringements of human rights related to the refugee's political, lato sensu, status in the country of origin, and producing grave detrimental effects upon that individual. As a consequence, fundamental principles of contemporary international human rights law constitute the ultimate legally binding parameters

legality of contesting government action. But to claim that international law standards are too obscure or too vague is unacceptable. It is the role of a court to apply applicable law...'. See also Benvenuti, E., 'Judicial misgivings regarding the application of international law: An analysis of attitudes of national courts', 4 European Journal of International Law (1993) at 159 infra.

²³See supra Chapter IX infra.

²⁴See Donnelly, J., 'International human rights: a regime analysis', 40 International Organization (1986) 599, at 605 et seq.

of the judicial evaluation of persecution and its established aetiological framework in refugee status case law²⁵. Accordingly, violations of such principles should always be regarded and interpreted, in an appropriate, i.e. effective, manner, by asylum-adjudicating organs as factual elements able, in principle, to qualify individual asylum seekers for refugee status.

Domestic courts constitute a factor the role of which is unduly neglected and underestimated as far as the development of refugee law is concerned. Refugee law constitutes a field praised, on the one hand, for its potentials to provide refugees with effective and lasting protection, and condemned, on the other, for contributing to a static and unproductive, in many cases, 'legalisation of complex societal relations and social conflicts'²⁶. Domestic fora are certainly to bear a

²⁵See, inter alia, Hathaway, J.C., 'Reconceiving refugee law as human rights protection', 4 Journal of Refugee Studies (1991) at 113 infra, Schmid, W., 'Migrationen und Rechtsordnung', in Kälin, W., Moser, R. (Hrsg.), Migrationen aus der Dritten Welt, Bern, Stuttgart, P. Haupt, 1989, 193, at 197-200, Shacknove, A., 'From asylum to containment', 5 IJRL (1993) 516, at 531; see also Dummett, A., Nicol, A., Subjects, Citizens, Aliens and Others, London, Weidenfeld and Nicolson, 1990, at 260-81.

²⁶See Stanek, H., 'Justizialisierung des Asylproblems und verwaltungsgerichtliches IuD-System', in ZDWF (Hrsg.), Festschrift anlässlich des 10jährigen Bestehens der ZDWF, Bonn, ZDWF, 1990, at 139; see also Coles, G.J.L., 'The human rights approach to the solution of the refugee problem: A theoretical and practical enquiry', in Nash, A.E. (ed.), Human Rights and the Protection of Refugees under International Law, Halifax, Canadian Human Rights Foundation, The Institute for Research on Public Policy, 1988, 195, at 216; Goodwin-Gill, G.S., 'The refugee regime: A perspective on the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', in Baehr, P.R., Tessenyi, G. (eds.), The New Refugee Hosting Countries: Call for Experience-Space for Innovation, Utrecht, Netherlands

great part of responsibility for the above well-founded, to a certain extent, accusation, given that, albeit far from the political/legislative decision-making process, they have always had, in fact, a great potential to play a primary and ultimate role in a national context regarding effective protection of fundamental rights of aliens²⁷. However, this is a fact that concurrently has made legalisation of refugee protection an inexorable, to a large extent, phenomenon. It is true that legal responses to social phenomena have always had the nature of an ex post facto reaction to developments which have already shaped domestic or international societies. Law is inherently static, since one of its basic aims is the normalisation of social questions, or 'problems', that disturb a domestic or international status quo. Accordingly, the application of law by courts has a certain tendency to confirm such inherently static attempts of legal normalisation. Thus, the reply of law and concomitantly of domestic courts to refugeehood has been, by necessity, ex post facto and the nature of such a reply has been, in effect, palliative, since neither of them has ever been de facto able to shape or to have a direct effect upon the causes, and not merely the symptoms²⁸, of the extremely complex question of national

Institute of Human Rights, 1991, 24, at 36-7.

²⁷See Legomsky, S.H., 'Political asylum and the theory of judicial review', 73 Minnesota Law Review (1989) 1205, at 1208.

²⁸See Köfner, G., 'Politik und Asylrecht', in Köfner, G., Nicolaus, P. (Hrsg.), Probleme des Asylrechts in der Bundesrepublik Deutschland, München, Mainz, Kaiser/Grünwald, 1983, 52, at 53-4.

refugee genesis and intra-national refugee movements. This, however, may detract nothing at all from the second inherent side of the Janus-faced institution of law: the protean ability to evolve, adapt and, consequently, effectively deal with novel social phenomena. This legal metabolism may occur either directly by a legislator, acting directly upon and altering an outdated corpus of law, or indirectly by a judicial interpreter acting in a creative but ruled manner upon the unaltered existing law. In the case of the established legal concept of refugeehood, the judicial interpreter has before her/himself a legal text that is not only subject to a potential evolutionary judicial action, but is moreover, as mentioned earlier in the thesis²⁹, by nature open to new factual challenges and subsequent interpretations. As a consequence, the dilemma posed before all domestic courts-interpreters is a hard one. It is a question on whose reply does not depend merely the potential acquisition by a refugee of a new kind of societal membership³⁰, but also, and especially, the latter's life and/or personal liberty.

However, this is a dilemma whose management has, moreover, long term and wide-ranged implications for the development of a nation or a unified group of nations, called upon to

²⁹See supra Chapter II, Section 1.

³⁰On the notion of membership in and alienage vis-à-vis a political community see Walzer, M., Spheres of Justice, Oxford, Blackwell, 1983, at 31-63. See also Brugger, W., 'Menschenrechte von Flüchtlingen in universalistischer und kommunitaristischer Sicht', 80 Archiv für Rechts- und Sozialphilosophie (1994) 318, at 326-334.

effectively act on such cases of human emergency. Indeed, which alien, in other words on what conditions, an alien, this 'frightening symbol of the fact of difference as such, of individuality as such'³¹, ultimately enters or stays dehors a society's boundaries does not affect solely the entry applicant. The answer to such urgent, in effect, 'membership applications' greatly influences and defines the fundamental principles on which the future structure of the society, or societal leagues, recipient of such applications will be based.

In consequence, the onerous burden borne particularly by European courts in the context of contemporary refugee status claims, has an especially significant and challenging character. Domestic judicial fora in Europe are to urgently become conscious of the fact that the answers provided by them to refugees' urgent, permanent or temporary, 'membership applications' do not affect solely the latter. Concurrently, they bear a great significance for the long term nature of the structural, societal-ideological parameters which will delimit the future unified citizens' Europe³² that is currently

³¹See Arendt, H., The Origins of Totalitarianism, New York, Harcourt, Brace & World, Inc., 1966, at 301: 'The "alien" is a frightening symbol of the fact of difference as such, of individuality as such, and indicates those realms in which man cannot change and cannot act and in which, therefore, he has a distinct tendency to destroy.'

³²On the emerging concept of 'European citizen' in the EU context see, inter alia, Giannoulis, Ch., Die Idee des "Europa der Bürger" und ihre Bedeutung für den Grundrechtsschutz, Europa-Institut, Universität des Saarlandes, 1992, at 145-158; see also Capotorti, F. et al., The European Union Treaty, Oxford, Clarendon Press, 1986, at 36-8.

planned by European Union states. Accordingly, the judicial answers to the above questions-claims should be based on sound legal and political, lato sensu, principles, but not on narrow, short term political policies³³. They should be founded on the objective of an effective protection of the individual asylum seekers' lawful interests, always in accordance with the internationally established human rights principles. These are answers that will actually determine, in the final analysis, the democratic values and sensitivity of the 'community pillars'³⁴ in which the future, complex and inherently pluralistic³⁵ Union of European nations ultimately is to be grounded.

³³See Dworkin, R., Political Judges and the Rule of Law, Maccabaeen Lecture in Jurisprudence 1978, British Academy, London, Oxford University Press, 1980, at 261 et seq. where it is argued that judges should rest their judgments on controversial cases on arguments of political principle 'that appeal to the political rights of individual citizens', and not in arguments of political policy 'that claim that a particular decision will work to promote some conception of the general welfare or public interest'.

³⁴See Hurd, D., 'Pillars of the Community', The Independent, 4 October 1994, at 16; see also Twomey, P.M., 'The European Union: three Pillars without a Human Rights Foundation', in O'Keefe, D., Twomey, P.M. (eds.), Legal Issues of the Maastricht Treaty, London etc., Chancery Law Publishing, 1994, at 121-132.

³⁵See Arnaud, A-J, Pour une Pensée Juridique Européenne, Paris, Presses Universitaires de France, 1991, at 147 et seq.; 'Elaboration d'une Europe juridique et post-modernisme vont de pair. La rationalité de l'une coïncide avec les principes de rationalité de l'autre. L'Europe juridique ne sera que si elle fait siens pluralisme et complexité qui, dès l'origine, furent inscrits dans son histoire.', ibid. at 300.

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