

# WORKING PARTY ON NON-STATE AGENTS OF PERSECUTION: 2002 REPORT

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This short paper is a brief update of the subject of our working party. There has, to my knowledge, in most countries not been very much development in the approach of our subject.

There seems to be a large mainstream approach worldwide with a more extensive interpretation. But there still is a minority of countries, where a more narrow explanation is in use of the relevant part of the refugee definition in the 1951/1967 Geneva Convention relating to the Status of Refugees (Refugee Convention). Maybe the minority of European countries that follow this interpretation, will be changing their approach. The Immigration Ministers of the European Union seem committed to an agreement on a uniform interpretation of this matter. In a meeting in Copenhagen on 13 September 2002 they have sought further to agree on new European rules of interpretation on this part of the refugee definition.

The Rapporteur thanks the members of the Working Party who sent in their comments for this brief update.

## ***I OUTLINE OF SUBJECT***

According to the definition in Article 1 of the Geneva Convention, refugee status is granted when one cannot get protection of the State of origin. A central question of interpretation is which source of persecution is included in the definition. Of course, persecution carried out by or instigated by authorities of the State of origin is included in the definition. But under which circumstances can

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threats of persecution by non-State agents<sup>1</sup> be included or excluded from the definition? Explicit limitation of the definition seems to be limited especially to parts of Western Europe practice.

Two situations give rise to discussion:

- (1) Persecution is carried out by non-state agents of persecution, against which the state is willing but unable to provide protection. In general there are two main streams of interpretation:
  - (a) accountability view: only when persecution emanates from the state someone can be seen as refugee;
  - (b) protection view: this extends the definition to cover situations where the state of origin is incapable to provide necessary protection for persecutory acts by non-state agents.
- (2) Persecution is carried out by non-state agents of persecution in situations of total collapse of governmental power where there are no (State) authorities left that could provide protection against persecution: some countries argue that there cannot be persecution without a functioning State, whereas in other countries refugee status can be granted also in these situations.

## **II EXAMPLES OF DIFFERENT APPROACHES**

### **A Australia**

The State need not itself be the agent of harm. Also persecution by private individuals or groups is taken into account. It is enough that the State of origin is unable or unwilling to provide effective protection. But persecution must have an official quality, in the sense that it is official or is officially tolerated or uncontrollable by the authorities of the country of origin/nationality. On the other hand protection does not need entirely to be provided by government forces. Also in the situation where a combination of government forces and other – eg foreign or UN or even private – forces, can provide protection, there is not a wellfounded fear within the scope of the definition.

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1 Non-State agents is commonly used, but maybe "non-State actors" is more accurate.

***B Canada***

In June 2002 a new law was implemented: The Immigration and Refugee Protection Act. The jurisdiction of the Immigration and Refugee Board is expanded by this law. Although the Minister has residual discretion to confer humanitarian and compassionate grounds, under this law the IRB can grant protection on three different bases: 1. as Convention refugee; 2. in case of danger of torture; 3. when the asylum seeker seeks protection because of a risk to life or a risk of cruel and unusual treatment or punishment. Under the Refugee Convention only must the refugee's fear relate to one of the grounds political opinion, race, etc. Under the first and third bases the risk need not to be at the hands of a State agent. But under the second basis, it must.

***C United Kingdom***

In the interpretation of the Refugee Convention the definition of refugee includes persons who fear persecution of non-State agents where the State is unwilling or unable to provide a sufficiency of protection. No State can, however, be required to be able to offer absolute protection to its citizens.

***D Germany***

Under current German law within the definition there is only political persecution where it is a matter of deliberate State measures, or when such measures are to be imputed to the state. Acts of persecution perpetrated by non-state agents are to be imputed to the state if the state encourages the perpetration of such acts, supports them, approves of, or acquiesces in them without taking any action, thus omitting to afford the necessary protection. Asylum law offers no protection against a general criminal threat to legal interests and personal attributes protected under asylum law or against the consequences of anarchic conditions or of the dissolution of State power. On the contrary, in such cases the necessary humanitarian protection is afforded by the provisions of the general law relating to aliens. From January 2003 this legal practice will change as a result of a new Residence Act. In application the Refugee Convention this legislation makes provision to the effect that it will no longer depend on whether persecution is imputable to the country of origin.

***E France***

Refugee status will not be recognized where the State authorities are willing, but simply are unable to offer protection against persecution by non-State agents. This must be seen in relation to the concept of de facto authority. When a power

with a minimum of organization and stability can be found in a certain territory, persecution that this power exercises or tolerates will be taken into account. But when no de facto authority exists no refugee status can be granted.

#### ***F The Netherlands***

In the Netherlands in 2001 a completely new immigration law has been implemented. Part of this law consists of new rules about shorter asylum procedures and different asylum grounds. One of these grounds is granting Convention refugee status. This law in principle does not change interpretation of the Refugee Convention, but a new appeal body is established. There is no jurisprudence of the new appeal court on this subject. According to standard jurisprudence of the District Court of the Hague, discriminatory or violent acts not committed by or on behalf of State authorities are considered as persecution, if these acts are supported or tolerated by the authorities and also if the authorities cannot offer sufficient protection against these acts. When State authorities are not capable or prepared to offer effective protection, there is a state of persecution. Whether there is or is not protection will also be investigated. A state of dissolution of State power does not mean that refugee status cannot be granted. On the other hand, subsidiary protection is in principle possible under domestic Dutch law and is especially at hand in cases of total civil war or very oppressive regimes like the Taliban in Afghanistan, but its scope has been reduced by the new Dutch Immigration Minister. He proposed not to grant anymore – or hardly ever grant – subsidiary protection to persons that flee from such countries, who cannot prove personally that they face persecution.

#### ***G Belgium***

Not only victims of State persecution, but also persecution by non-state agents can result in refugee status according to the definition. Also in case of civil war, where central government no longer exists, refugee status can be granted, although a state of civil war is not enough. The asylum seeker must be singled out. Prosecution must be related to this individual.

#### ***H European Union***

The EU aims to establish a common approach to asylum cases. For that purpose a so-called new EU Directive is proposed. In this Directive the following rule on this matter is proposed.

#### Article 9 - Sources of harm and protection

Member States shall consider that the fear of being persecuted or of otherwise suffering unjustified harm is well-founded whether the threat of persecution or other serious unjustified harm emanates from:

- a) the State;
- b) parties or organisations controlling the State;
- c) non-State actors where the State is unable or unwilling to provide effective protection.

In evaluating the effectiveness of State protection where the threat of persecution or other serious unjustified harm emanates from non-State actors, Member States shall consider whether the State takes reasonable steps to prevent the persecution or inflicting harm, and whether the applicant has reasonable access to such protection. There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actions which constitute persecution or other serious and unjustified harm. Where effective State protection is available, fear of being persecuted or otherwise suffering serious unjustified harm shall not be considered to be well founded, in which case Member States shall not recognise the need for protection.

For the purpose of this Directive, "State" protection may also be provided by international organisations and stable quasi-State authorities who control a clearly defined territory of significant size and stability, and who are able and willing to give effect to rights and to protect an individual from harm in a manner similar to an internationally recognised State.

If this approach is followed in the European Union, it seems the traditional gap between the two different approaches in Europe will mostly be abated. The recent meeting of Ministers of Immigration in Copenhagen indicated that there is unity in the EU on this matter.

### ***III FURTHER DISCUSSION?***

The recent development in the EU seems to resolve a great deal of the divergence in our subject. The majority approach, shortly defined as the protection view, seems to be the widely accepted explanation of the relevant part of the definition. But still minor differences can be seen in State practice. Our working party will be studying these differences in more detail. Maybe part of the divergence can be explained by subsidiary protection measures in different

countries that might result in less need for granting refugee status in cases where asylum seekers fearing aggression by non-state actors without proper protection of the State, are given rights to stay on subsidiary or human rights grounds (eg Convention Against Torture).

Some recent literature/research papers

Research paper on non-state agents of persecution, European Legal Network on Asylum/ELENA; European Council on Refugees and Exiles/ECRE, updated version Autumn 2000

"The new EU Directive – An Evaluation", paper by Hugo Storey for Dublin IARLJ Conference, May 2002

Papers to the informal meeting of CIREA representatives from courts and other review bodies dealing with asylum, Madrid, 9 May 2002.